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IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

Study on ways and means of insuring the implementation of International instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention

1. At its thirty-sixth session, on 26 February 1980, the Commission on Human Rights adopted resolution 12 (XXXVI) entitled "Implementation of the International Convention on the Suppression and Punishment of the Crime of Apartheid". By paragraph 7 of that resolution, the Commission requested the Ad Hoc Working Group of Experts, in co-operation with the Special Committee against Apartheid and in accordance with paragraph 20 of the annex to General Assembly resolution 34/24 of 15 November 1979, to undertake a study on ways and means of insuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention.

2. At the request of the Ad Hoc Working Group of Experts a Consultant was commissioned to prepare a study and a draft Statute of the proposed International Criminal Court.

3. The Working Group considered the study and the draft Statute at its meetings in Geneva in August 1980 and January 1981.

4. The attached interim Report is referred to the Commission on Human Rights with a recommendation that the Commission invites States Parties to the Convention on the Suppression and Punishment of the Crime of Apartheid to submit their comments and/or views to the study to enable the Working Group to give further consideration to it.

STUDY ON WAYS AND MEANS OF INSURING THE IMPLEMENTATION OF INTERNATIONAL INSTRUMENTS SUCH AS THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, INCLUDING THE ESTABLISHMENT OF THE INTERNATIONAL JURISDICTION ENVISAGED BY THE CONVENTION

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INTRODUCTION

1. This study is submitted in response to the request made by the Commission on Human Rights in its resolution 12 (XXXVI) that the Ad Hoc Working Group of Experts, in co-operation with the Special Committee against Apartheid and in accordance with paragraph 20 of the annex to General Assembly resolution 34/24 of 15 November 1979, should undertake a study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention. The study was prepared with implementation as its central consideration, and begins with an inquiry into the significance of the term "implementation" in view of the nature of the Apartheid Convention.

2. The report concludes that, in the present context, "implementation" signifies creation of an international criminal court. From this it proceeds to consider the state of international criminal law in terms of theory and practicality of operations of such a court, and with special attention to the particular nature of the crime of apartheid.

3. It is upon this foundation of relevant concerns that adoption of any instrument creating such a court, must be considered.

4. An assessment is included of the possible usefulness of such a court in combating the crime of apartheid.

5. Finally, a summary of issues requiring attention and means of addressing such issues is provided.

6. Throughout, an effort has been made to present a range of options and to describe modalities for achieving the widest possible acceptance of implementation steps. In keeping with this goal of flexibility, particular approaches are not strongly advocated for outright adoption. Rather, it is left to the Working Group and other concerned organs to identify especially promising alternatives based on their competence. In particular, the possibility of formalizing the quest for consensus in formulating an appropriate implementation scheme is outlined in the concluding portion of the report.

7. Although southern Africa is the chief concern of the Convention and of the Working Group, the discussion of implementation is general. This is not out of a spirit of neutrality; on the contrary, it is out of concern that apartheid be recognized and dealt with for what it is, regardless of where it occurs. Accordingly, general discussion ensures that implementation measures would be suitable for application in every context. That the official government policy labelled "apartheid" is not the sole concern of those combating the crime of the same name is readily apparent from such works as the progress report of the Ad Hoc Working Group of Experts (E/CN.4/1365) prepared in accordance with Commission on Human Rights resolution 12 (XXXV) and Economic and Social Council decision 1979/34.

8. Two major reports preceeding the present report have been prepared by distinguished members of the Ad Hoc Working Group, one by Professor Felix Ermacora entitled "Study concerning the question of apartheid, from the point of view of international penal law" (E/CN.4/1075), and the other by Professor Brarimir Jankovic entitled "Aide-Memoire" (E/CN.4/AC.22/1980/WP.2).

9. The study contains two models. The first is the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, which is based on article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, and permits States parties to add, by Supplemental Agreement, other international crimes which are the subject of multilateral conventions. The draft convention contemplates the creation of a new international legal entity, an International Penal Tribunal, through a multilateral convention open to States parties to the Apartheid Convention and to other States. The second model is the Draft Additional Protocol for the Penal Enforcement of the International Convention on the Suppression and Punishment of the Crime of Apartheid, which is based on article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid. It does not contemplate the potential addition of other international crimes than those listed in article II of the Convention. This model does not contemplate the creation of a new international legal entity but the use of existing United Nations structures, with the addition of one new structure, namely an international panel of judges to adjudicate violations of article II of the Convention. It requires an Additional Protocol to the Convention and is open to States parties to the said Convention.

10. The idea of establishing an international criminal court is not new, as is shown by the reference to foot-note 14. Particular care and attention has been given to the reports of Professors Ermacora and Jankovic referred to in paragraph 8, to the texts of a draft Statute for an international Criminal court prepared by the Committee on International Criminal Jurisdiction in 1953 and to the texts of a draft statute for an international criminal inquiry and a draft statute for the establishment of an international criminal court prepared by the International Law Association in 1979. Other studies relevant to this subject have also been considered.

11. Parts A and B establish the basis for the two alternative models, proposed in parts C and D, for an international penal enforcement system. Parts A and B describe the relationship between international criminal law and internationally protected human rights and lay the foundation for resort to international criminal law as a means to enforce internationally protected human rights. Furthermore, they establish the legal basis and arguments for an international penal enforcement mechanism under the Convention on the Suppression and Punishment of the Crime of Apartheid. The proposal in part C is for a multilateral convention, with the creation of new institutions pertaining thereto, which would deal not only with the crime of apartheid but with other international crimes. The proposal in part D is for an additional protocol to the Apartheid Convention limiting the jurisdiction of the enforcement organs to the crime of apartheid and maximizing the use of existing institutions and instruments to implement the draft protocol.

I. THE MANDATE FOR IMPLEMENTATION: ITS MEANING INTERPRETED IN VIEW OF THE NATURE OF THE CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

12. The conduct proscribed under the Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter referred to as the Apartheid Convention) is also proscribed under other, more basic instruments, some of which embody their own measures and mechanisms of implementation. For this reason, implementation of the Apartheid Convention requires consideration of the relationship of it to these other instruments in order to appreciate its distinctive motivations and objectives.

13. This consideration may begin with the duplicativeness of the Apartheid Convention as to the substantive norm enunciated. Apartheid is defined in article II of the Apartheid Convention as acts for the purpose of dominating a racial group including murder, infliction of harm, infringement of freedom or dignity, torture, imposing harmful living conditions, segregation, preventing development, depriving of freedoms, creating reserves and ghettoes, exploitation and persecutions of those who would resist such acts. In this respect the Apartheid Convention merely describes a norm narrower than but contained within the norms previously enunciated in more basic instruments.

14. For example, the Universal Declaration of Human Rights provides in article 2 that "Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour...national or social origin..." and among the rights set forth are: freedom from servitude (article 4); freedom from discrimination and a guarantee of equal protection of the laws (article 7); freedom of movement and residence (article 13); freedom of interracial marriage (article 16(1)); equal access to public service (article 21(2); choice of employment, equal pay and the right to form and join unions (article 23) and the right to an opportunity for higher education based on merit (article 26). Likewise, the International Covenant on Civil and Political Rights forbids discrimination on the basis of race, colour or origin (article 2), and provides rights to: means of subsistance for peoples (article 1); freedom of movement and residence (article 12); equality before the courts (article 14); freedom to associate and form or join unions (article 22 (1)); freedom of citizens to vote and be elected (article 25); equal protection of the laws (article 26); and for minority groups, cultural and developmental opportunities (article 27). In addition, the International Convention on the Elimination of All Forms of Racial Discrimination defines and condemns racial discrimination in terms that are comprehensive (article 1), condemns apartheid without defining it (article 3) and particularly condemns discrimination regarding listed civil, political, economic and social rights (article 5).

15. The obvious duplicativeness of the Apartheid Convention as to its proscription must find explanation in terms of other aspects of the instrument. Obligations of States parties with respect to the norms enunciated may be considered first, and may be divided for that purpose into obligations of a domestic orientation and those of an international orientation.

16. The Universal Declaration contains no express provision for domestic measures to be taken, but both the International Covenant and the Convention on the Elimination of All Forms of Racial Discrimination do so. The former obligates States parties to ensure that all rights under it are protected within their territory (article 2). The latter imposes general duties to see that its norms are respected as to discrimination (article 2) and apartheid (article 3), and a more emphatic duty to

eliminate discrimination regarding listed rights (article 5), plus more specific duties to oppose racist propaganda (article 4), assure remedies for deprivations of rights under it (article 6) and to promote racial tolerance (article 3). In contrast, the duties under the Apartheid Convention are highly specific: States Parties are to declare apartheid and those engaging in it as criminal (article I), and to take steps to prevent, prosecute, try and punish in accordance with their jurisdiction crimes of apartheid (article IV).

17. As to internationally-oriented obligations, a similar pattern may be observed. The Universal Declaration lacks specific provisions. The International Covenant requires submission of reports on compliance (article 40), and for States parties to inform other States parties should they derogate from that instrument's provisions (article 4(3)), and to respond to complaints by other States parties regarding compliance (article 41). In addition, the Optional Protocol to the Covenant provides for responses to certain complaints by individuals (article 4(2)). The Discrimination Convention also calls for reports (article 9(1)), responses to complaints (article 11(1)) and article 14(6) (b)), plus informing other States parties whether an acceptable solution to a dispute regarding compliance has been found (article 13(2)). Under the Apartheid Convention, the obligations are rather dissimilar. Parties undertake to accept and carry out anti-apartheid decisions of certain international organs (article VI), but this appears to be redundant in that such duties are already imposed in more general terms by the instruments relating to those organs. A reporting requirement is imposed (article VII(1)), and States parties are to settle their disputes regarding the Convention by means of the International Court of Justice or as they may otherwise agree (article XII). Also, in matters of extradition the States parties are not to regard crimes of apartheid as political offenses (article XI).

18. Related to these internationally-oriented obligations are provisions for implementation machinery, which merit consideration before assessing the patterns of obligations of the various instruments. No such machinery is created under the Universal Declaration, but the International Covenant establishes a Human Rights Committee (article 28), and assigns it the tasks of receiving, studying and transmitting reports of States parties (article 40), considering and reporting on disputes (article 41), and, when appropriate, referring such disputes to a conciliation commission (article 42(1)). The Optional Protocol to the Covenenant confers similar competence upon the Human Rights Committee with respect to individuals' complaints (article 4), and provides for possible reporting of the views of the Committee (article 5). Comparable functions are assigned to a Committee on Elimination of Racial Discrimination under the Racial Discrimination Convention (articles 8, 9, 11, 12(1) and 14). Under the Apartheid Convention, however, the function of considering reports is assigned to three members of the Commission of Human Rights designated by its chairman (article IX), and, as already mentioned, dispute settlement is otherwise provided for. A monitoring function is provided for the Commission on Human Rights (article X). Finally, it is provided that an accused may be tried by an international penal tribunal (article V).

19. The above pattern of obligations and implementation mechanisms does not present a clear spectrum in terms of effectiveness. Reporting is the chief vehicle for implementation under all of the instruments having express provisions for duties of States parties. Obviously the Optional Protocol, which has relevance not only to the Covenant but also to the Racial Discrimination Convention, represents an enhancement of potential effectiveness in that individual complaints are capable of bringing to light problems unlikely to be dealt with by complaints of States. Notably, no

provision is included in the Apartheid Convention for individuals' complaints. Dispute resolution is treated differently under the Apartheid Convention than under the other instruments, yet all of them make it possible for disputes to be settled without compulsory process if the complainant so agrees.

20. Instead of constituting a pattern of increasing or decreasing effectiveness, the above pattern may be understood as a function of the perceived purpose of each instrument. The Universal Declaration, as an embodiment of the widest possible consensus on human rights deserving international attention, contains no express provisions regarding duties of States or creating implementation machinery. As discussed elsewhere, it amplifies terms of the Charter, which has its own effectiveness, and certain of its principles are given heightened effectiveness through more narrow instruments, such as the International Covenant on Civil and Political Rights. The Covenant is itself an instrument of wide consensus and its provisions reflect this by shaping implementation-related measures to deal only with States parties, it being apparently contemplated that the Covenant should act as a vehicle for enhancing implementation of the rights provided under it within States that have already manifested acceptance of the validity of such rights. No express provision attempts to deal with States that have not manifested such acceptance, and the Optional Protocol is also limited to States manifesting acceptance. A similar treatment is provided under the Racial Discrimination Convention, although the duties under it are more detailed.

21. It is against this background that the distinctiveness of the Apartheid Convention may be appreciated. Its name is derived from the term given by South Africa to its racial policies [for reviews of such policies, see United Nations, Dag Hammarskjhold Library, Apartheid: A Selective Bibliography on the Racial Policies of the Government of the Republic of South Africa, 1970-1978 (1979)], and its purpose is to oppose such policies. Accordingly, although it may be viewed as aiming in part at preventing the spread of such practices to States parties, its primary thrust is against the practices of a non-State party. Moreover, to the extent that the term apartheid is given a generic definition applicable to practices of States other than South Africa, it must be presumed that no State indulging in such practices would also be a State party to the Apartheid Convention. Accordingly, the distinctive essence of the Apartheid Convention is that it addresses the consequences for States generally of conduct occurring within another State.

22. This distinctiveness is of central importance to the question of implementation, for unlike other related instruments the Apartheid Convention cannot and does not rely on co-operation of the State wherein the reported human rights violation has occurred. On the contrary, it concerns itself with co-operation of States within which no such violations have occurred. Such an orientation requires explanation in view of the general concept of non-intervention by States in the domestic affairs of other States.

23. Such an explanation may be found in the use by the Apartheid Convention of the terms "crime against humanity" (article I), and "international criminal responsibility" (article III), together with the general concept of international human rights. As described within a general obligation to respect human rights attaches to all members of the United Nations by virtue of the Charter and the Universal Declaration. The precise dimensions of such an obligation, however, are not explicitly stated in those instruments and the specificity with which the rights that must be respected are defined varies. The International Covenant and its Optional Protocol provide further elaboration of these rights and, for States parties, of the obligations regarding them. To the extent that such elaboration amounts to a statement of a general principle of

international law, it is binding upon non-States parties as well, and clearly this is more likely to be true with respect to elaboration of a norm than of institutional duties as reporting and dispute resolution. With respect to racial discrimination, even more detailed elaboration is contained in the Racial Discrimination Convention, with comparable effect.

24. As a result, the human rights instruments leading up to the Racial Discrimination Convention may be viewed on the one hand as progressively elaborating upon general principles of international law respecting treatment of races, and on the other as providing appropriate means for States parties to assure and enhance their compliance with these principles. The former is not dependent on express consent of particular States whereas the latter is largely dependent on such consent.

25. The Apartheid Convention has a similar duality in its nature but what must be recognized is that two such dualities are involved. In defining apartheid and indicating that persons ought not be subjected to a general treatment, there is an elaboration of a general principle comparable in purpose to the definitional portions of related human rights instruments, but highly specific. In assigning certain obligations to States respecting such conduct, such as reporting and dispute resolution requirements, there is an elaboration of a consent-dependent regime not greatly different from those of other, related human rights instruments.

26. However, there is a significant departure from prior instruments of similar vein in the pronouncements of criminality and the provisions dealing with consequences of this criminalization. Not all violations of rights enunciated in other human rights instruments have been described as criminal. Even racial discrimination is not described within the Racial Discrimination Convention as necessarily amounting to a crime. This terminology is applied exclusively to apartheid. Accordingly, the specific conduct elaborated in the Apartheid Convention's proscription is not merely a more detailed treatment of a human rights violation but also a seminal description of a class of international crime. As to the impact of this on non-States parties, consonance of the conventional language with general principles of international law is crucial, and to the extent such consonance exists, that language is applicable notwithstanding the consent of States.

27. Moreover, the same is true with respect to the duties of States to criminalize, prosecute and punish such conduct. This is in stark contrast to the consequences of reporting and dispute-resolution measures. The difference lies in the fact that particular consequences attach to international crimes under general principles of international law, including duties of action against such crimes.

28. Thus, just as the mere describing of certain conduct as violating international law does not make it so, yet it may be so as a general principle of international law, so also describing certain conduct as criminal under international law does not ipso facto make it an international crime. Likewise, stating that certain action ought to be taken by States with respect to certain conduct does not ipso facto establish a general rule of international law, but if the conduct in question is actually an international crime, then certain obligations of States flow from that.

29. In sum, if the various human rights instruments touching upon racial matters are viewed simply as consensual arrangements among States parties, the Apartheid Convention appears duplicative though some of its provisions are not themselves repetitious. However, when these instruments are considered as declarations regarding general rules of international law, the distinctive role of the Apartheid Convention becomes clearer.

It strives to define the international crime of apartheid and to express the consequences for States of that crime, while at the same time extending particular attention and protective measures to that matter in a manner similar to that done under other human rights instruments.

30. As a human rights instrument, the Apartheid Convention is as well implemented and as well founded and drafted as kindred human rights instruments. It is as a declaration of international criminal law that the Apartheid Convention merits special attention.

31. The particular legal questions relating to mode of implementation are addressed and assessed below. It is useful, however, to first consider very general matters.

32. First, it must be noted that the Apartheid Convention does not by its terms attempt to class apartheid as a mere crime of extraterritorial effect, suitable for independent action by individual States or concerted action by groups of States. Rather, it treats apartheid as a "crime against humanity," and one entailing "international criminal responsibility." Accordingly, although various states may feel the harmful effects of the crime, it is to be punished in the name of or on behalf of the world community. This suggests in itself that a uniform standard should be applied.

33. Second, although the Apartheid Convention is designed to be declaratory as to the acts constituting the international crime of apartheid, it may in that respect be either over-inclusive or under-inclusive or both, in that the actual crime's existence and character are dependent not on that Convention but on general principles of international law. As a result, the definition given in article II of the Apartheid Convention may be viewed as conventionally binding upon States parties, but as to States that are not parties its binding quality depends on its correspondence to the general rule of international law. Accordingly, actions by States parties under the Apartheid Convention, even when fully in keeping with the terms of that Convention, are justifiable as exercises of general international criminal law only to the extent that the terms of the Convention correspond with such general international criminal law. This is not to say that actions under the Convention would not be otherwise justifiable. Rather, it is to say that in so far as the Apartheid Convention purports to be a declaration of general rules of international law, actions taken pursuant to that convention seek justification in terms of that body of law.

34. Third, the search for appropriate means of implementation for this aspect of the Apartheid Convention is, if not easy, narrowly drawn. By its very nature implementation of criminal law is by criminal process, and although significant variations in such process exist in different legal systems, the general nature of such process may readily be recognized.

35. The distinctive character of criminal process may be appreciated not only by its particular form but also by its distinctive purposes. Criminal law does not merely specify proper or improper forms of behaviour, a function of other law generally. Rather, it identifies behaviour in response to which particular measures are to be imposed not in the name of or on behalf of someone disadvantaged by that conduct, but rather in the name of and on behalf of the community and its sense of justice. Such measures are commonly termed "penal" or "punitive" in order to indicate that they are not designed merely to remedy past harm of a remediable type. On the contrary, they are directed at the future in the sense of generally deterring future conduct of that kind, by incapacitating the offender or by affecting the offender's will or inclination

to engage in such conduct. Only in the sense of retribution do such measures have a remedial aspect, and this is aimed at vindicating the community's sense of justice, which was not in a tangible sense harmed and cannot in tangible form be repaired.

36. Because of this ultimate purpose of criminal process, initiation and direction of such process cannot be left merely to interested persons or organizations, but must rather be supervised by someone qualified to act on behalf of the relevant community. The appropriate motivation for initiation and direction of such process is concern for justice.

37. A second consequence of the purposes of criminal process is that an orderly and reliable method for establishing facts must be utilized. The broad outlines of such methods include both general investigation and consideration of allegations by the accused. In some systems the manner of receiving and considering evidence may be highly elaborate, but in every system an effort is made to gather evidence widely with particular care to utilize the most reliable sources. [It should be noted that, although instruments with an affirmative, human rights protection function, have involved some investigative activity, the procedures followed have not been as orderly and reliable as would be required for punitive purposes. See, e.g., Franck and Fairley "Procedural Due Process in Human Rights Fact-finding by International Agencies," A.J.I.L. 308 (1980)].

38. A third consequence is that criminal norms are specified in great detail. This is because of the special need to be right when acting in the name of the community's sense of justice. Conduct cannot be fairly punished when the community has not clearly expressed its intention that such conduct be avoided. The matter is given further attention in connection with the principle nulla poena sine lege.

39. The foregoing demonstrates that a mandate to implement the Apartheid Convention constitutes a mandate to create the mechanisms necessary to set in motion criminal process. Indeed, bringing international criminal law to bear on this wrongful conduct has been an enduring consideration of those involved in anti-apartheid activities. See, for example, the report of the Ad Hoc Working Group of Experts, entitled "Study concerning the question of apartheid from the point of view of the international penal law," (E/CN.4/1075). The central institution in such a process is a court, but related institutions may also be appropriate in order to assist the functioning of the court. The tasks that require treatment in order for such a court to operate merit separate attention.

40. The ultimate implementation goal of the Apartheid Convention may obviously be served by such an approach in that the goals of criminal process are prevention and suppression of specific conduct. The extent to which criminal process on an international scale can secure in practice such goals also merits separate consideration.

II. INTERNATIONAL CRIMINAL LAW CONSIDERATIONS

A. The application of international criminal law principles to internationally protected human rights

41. The International Convention on the Suppression and Punishment of the Crime of Apartheid is an harmonious part of the global scheme of international protection of human rights. As such it must be considered and interpreted in the light of other conventions in pari materia. To the extent that these other relevant conventions are specifically embodied in the language and spirit of the Apartheid Convention, in particular article II thereof, they are incorporated therein.

42. These relevant conventions fall into two categories: (1) conventions which are declaratory of certain specific human rights deemed protected by the international law of human rights; and (2) conventions which require signatories to criminalize certain violations of human rights in their national laws, to prosecute the violators or alternatively to extradite persons accused or found guilty thereof to a requesting State. Some of these conventions specifically declare the conduct in question to be a "crime under international law" while others do not state this specifically; the object and outcome remain however the same.

43. The conventions included in the first category, which contain declaratory principles on the protection of specific human rights, do not however deem their violations to be crimes under international law nor do they contemplate criminalization of the conduct in question under the national laws of the signatory States. However, they are none the less relevant in the historical process in that, as the embodiment of a worldwide consensus of certain minimum standards, these prescriptions may evolve into proscriptions which may become the object of enforcement measures including their criminalization under international law, or the imposition under international law of a duty to prosecute or extradite the violators of these protected rights. This has been the case with respect to many international instruments aimed at the protection of human rights which evolved from declaratory principles to specific international proscriptions having a penal character.

44. The principal conventions in this category which, because they refer to a prohibition or protection against "racial discrimination", are relevant to the interpretation and implementation of the Apartheid Convention are: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Reduction of Statelessness; and, the Convention on Refugees. 1/ Each of these instruments specifically refers to the protection of individuals against racial discrimination and is relevant in whole or in part to the Apartheid Convention, and more particularly to the meaning of Article II, of the said

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1/ For the texts of these and other international instruments on the protection of human rights see Human Rights: A compilation of international instruments (United Nations publication, Sales No. E.78.XIV.2). See also United Nations Action in the Field of Human Rights (United Nations publication, Sales No. E.74.XIV.2); L. Sohn and T. Buergenthal, International Protection of Human Rights (1973); J. Graven, Problèmes de protection internationale des droits de l'homme (Institut internationale des droits de l'homme, 1969).

Convention and the other provisions which implement it. (In addition other Conventions of the United Nations and its specialized agencies such as the ILO and UNESCO, which also include provisions against "racial discrimination" and its consequent practices could be deemed included in this category).

45. The significance of these Conventions lies first in that the Universal Declaration of Human Rights was deemed by the International Court of Justice in its 1970 "Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia" 2/ as incorporated in the meaning of Article 55 of the Charter of the United Nations. 3/ Thus, since the Universal Declaration of Human Rights is deemed to be the further expression of the words "Human Rights" of Article 55 of the Charter and since Article 56 of the Charter states that the protection of "human rights" under Article 55 is "self-executing", the protections afforded by the Universal Declaration of Human Rights are applicable to Member States of the United Nations and binding upon them.

46. To the extent that the conventions deemed relevant and listed in paragraph 4 above interpret the specific rights enunciated in the Universal Declaration of Human Rights they may, by incorporation, be considered binding on all Member States of the United Nations and not only on their signatory States. Such a binding effect would not derive from each convention qua, but from the fact that it gives specific meaning to specific rights embodied in the Universal Declaration of Human Rights which, under the decision of the International Court of Justice referred to in paragraph 45 above, is deemed as incorporated in the meaning of Article 55 of the Charter of the United Nations; and that Article 56 of the Charter requires the Member States to enforce the protection of these human rights.

47. In so far as the Apartheid Convention prohibits conduct predicated on "racial discrimination" which is specifically defined in the Conventions listed in paragraph 44 it can be said that the Apartheid Convention incorporates in its meaning of the prohibited conduct stated in article II thereof the provisions of these other conventions to the extent they are applicable.

48. Mutatis mutandi, to the extent that the Apartheid Convention criminalizes certain extreme forms of "racial discrimination" as defined and prohibited by the Convention on the Elimination of All Forms of Racial Discrimination, and that these two conventions give meaning to the protection against "racial discrimination" which is guaranteed by the Universal Declaration of Human Rights which Declaration is applicable to Member States of the United Nations through Articles 55 and 56 of the Charter as discussed in paragraphs 45 and 46 it could be argued that by incorporation of the relevant provisions of these Conventions in the Declaration that Member States of the United Nations are obligated under the Charter not to engage in the practices of apartheid as defined in article II of the Apartheid Convention.

49. The second category of relevant conventions, namely those which either declare given conduct to be "a crime under international law", or that the conduct in question should be criminalized under the national criminal law of the signatory States and thus embody the maxim aut dedere aut judicare, are:

2/ (1971) I.C.J., 16.

3/ Ibid., p. 57 et seq. See also Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter", 66 A.J.I.L. 337 (1972).

(i) The Nuremberg Principles 4/

(ii) Crimes Against Humanity 5/

(iii) The Genocide Convention 6/

(iv) The four Geneva Conventions of 12 August 1949 and the 1977 Additional Protocols thereto 7/

(v) The Slavery Conventions 8/

(vi) The Convention of the Non-applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity 9/

4/ In connection with the Nuremberg Principles, See General Assembly resolution 95 (I) of 11 December 1946 and the Report of the International Law Commission covering its second session (Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316), part III, pp. 11-14). See also M.C. Bassiouni and V.P. Nanda, A Treatise on International Criminal Law, vol. I, (1973) p. 587. See also Proceedings in the Trial of the Major War Criminals Before the International Military Tribunal, 42 vols. (1949), known as the "Blue Series". The ensuing trials were published under the title Trials of War Criminals before the Nuremberg Military Tribunal, 14 vols. (1949), known as the "Green Series". For an interesting account of the trial and the accused, see E. Davidson, The Trial of the Germans (1966). For a legal appraisal and description of the proceedings, see R. Woetzel, The Nuremberg Trials in International Law (1960); J. Keenan and B. Brown, Crimes against International Law (1950); S. Glueck, War Criminals, Their Prosecution and Punishment (1944), see also, P. Poltorak, The Nuremberg Epilogue (1977), translated from the Russian by D. Skvirsky.

5/ For "Crimes Against Humanity" see the Nuremberg Principles supra, note 4, principle VI (C). For a historical-legal analysis of "Crimes Against Humanity" see Bassiouni, "International Law and the Holocaust" 9 Calif. West. Int'l L.J. 201 (1979).

6/ Supra notes 1 and 5; and see also, E. Aronneau Le Crime Contre l'Humanité (1961) and P. Drost, The Crime of State (2 vol.) (1959).

7/ Geneva Conventions of 12 August 1949:

For the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, 75 United Nations, Treaty Series, 31; For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 United Nations, Treaty Series, 85; Relative to the Treatment of Prisoner of War, 75 United Nations, Treaty Series, 135; Relative to the Protection of Civilian Persons in Time of War, 75 United Nations, Treaty Series, 287.

Protocols Additional to the Geneva Convention of 12 August 1949, 19 June 1977, ICRC, (August-September 1977).

8/ See supra note 1, but also other conventions on the subject listed in M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (1980), at "A list of the Principal International Instruments" p. xiii, under "Slavery and Slave-Related Practices" that lists 25 international instruments. Appendix 2; see also B. DeSchutter, A Bibliography on International Criminal Law (1972) and Bibliography on International Criminal Law and International Criminal Courts prepared by the Secretariat of the United Nations (A/CN.4/28).

9/ Supra note 1; see also 37 Revue International de Droit Penal Vol. 3-4 devoted to that subject.

In addition a Convention which is currently at the drafting stage should be added:

The draft Convention on the Prevention and Suppression of Torture 10/

50. The relevance of these Conventions is first that article I of the Apartheid Convention declares the conduct defined in article II thereof as "a crime against humanity" and thus incorporates by reference Crimes Against Humanity which derive their meaning from the Nuremberg Principles. In addition the conduct prohibited by article II of the Apartheid Convention includes inter alia conduct deemed a "crime under international law" and conduct regarding which an international duty to prosecute or extradite exists under the provisions of the Convention listed in paragraph 49. Thus article II incorporated to the extent applicable some of the provisions stated in these conventions and is to be interpreted in light of the meaning of these other Conventions which prohibit the same conduct. The difference between the prohibition of article II and the prohibition stated in these other Conventions is that the Apartheid Convention prohibition refers to specific conduct done in furtherance of a policy of "racial discrimination" while the other Conventions with the exception of the Genocide Convention do not limit their prohibitions and violations to that particular purpose.

51. Article II of the Apartheid Convention includes a number of specific prohibitions and violations thereof deemed criminal under international law which, as discussed above, incorporate the meaning of other specific protections and prohibitions contained in some relevant conventions listed in paragraph 44 whose binding effect on Member States of the United Nations is discussed in paragraphs 45 and 46 and other specific prohibitions and violations contained in some relevant Conventions listed in paragraph 9.

52. In so far as article IV of the Apartheid Convention requires States parties to "prosecute" and "punish" the violators of article II of the Convention, and article V contemplates the enforcement of these violations by means of an "international penal tribunal", and, article IX requires States parties to "extradite" perpetrators of such violations, it is therefore necessary in order to satisfy the principle of legality in criminal law, nullum crimen sine lege, nulla poena sine lege, which is a "general principle of international law recognized by civilized nations", that article II be given more specificity in order to avoid vagueness, ambiguity and incorporation by reference or analogy of other relevant treaty provisions deemed incorporated within the meaning of article II of the Apartheid Convention.

10/ See the United Nations "Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment" (General Assembly resolution 3453 (XXX) of 9 December 1975), the "Draft Convention on the Prevention and Suppression of Torture" introduced by the Association Internationale de Droit Penal before the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (E/CN.4 NGO/213) and 48 Revue Internationale de Droit Penal No. 3-4 (1977) devoted to that subject. The Draft Articles before the Commission's Working Group are those contained in the official Swedish draft (E/CN.4/1285) which is quite similar to the AIDP Draft and Comments thereon (E/CN.4/1314).

B. Institutional setting: progress towards creation of an international criminal court

53. Article V of the Apartheid Convention contemplates the creation of an "international penal tribunal" to enforce the violations of Article II of the said Convention. Thus the legislative authority for the creation of an International Criminal Court is clearly established.

54. The only precedents save for an isolated historical instance 11/ are the Nuremberg and Tokyo war crimes tribunals which were ad hoc international criminal courts. 12/ There are no other examples of such tribunals in contemporary history.

55. In 1951, a draft statute of an international criminal jurisdiction (A/2136) prepared by a committee of experts was submitted to the United Nations and in 1953 a second draft (A/2645) was submitted based on the work of another committee of experts. Both drafts were tabled but no further action was taken by the United Nations on them. 13/

11/ Prof. A. Schwartzenberger reported that in 1474 one Peter Von Hagenbush was prosecuted by an international tribunal of the Holy Roman Empire for war crimes in Breisach, Germany, "The Breisach War Crime Trial of 1474" The Manchester Guardian 27 September 1946, see also de Barrante, Histoire des Ducs de Bourgogne, Vol. IX (1837). Another precedent could also be that of the trial in Naples of Couradin Von Hohenstofen for initiating an "unjust war" in 1268, though the composition of the tribunal was not international, see Bierzaneck, "The Prosecution of War Crimes" in Bassiouni and Nanda, supra note 4, p. 559, 560. Another possible precedent is the decision of the "Allies" at the Congress of Aix-La-Chapelle of 1810 to detain Napoleon Bonaparte on the Island of Elba for waging unjust wars. See Bellot, "The Detention of Napoleon Bonaparte" 39 Temple L. Rev. 170 (1923).

12/ See Wright, History of the United Nations War Crimes Commission (1948); Proceedings in the Trial of the Major War Criminals Before International Military Tribunals (1942) 42 vols; R. Woetzel, The Nuremberg Epilogue (1971); Roling, "The Nuremberg and Tokyo War Crimes Trials", in Bassiouni and Nanda, supra note 4, p. 590.

13/ See General Assembly resolution 1187 (XII) of 11 November 1957. See also the note by the Secretary- General entitled "International Criminal Jurisdiction" (Official Records of the General Assembly, Twelfth session, document A/3649) and the memorandum submitted by the Secretary-General of the United Nations entitled "Historical Survey of the Question of Criminal Jurisdiction" (United Nations publication, Sales No. 1949.V.8). For a documentary history of the various projects for the creation of an international criminal jurisdiction, see B. Ferencz, The International Criminal Court (1980) 2 Vols. See also, J. Stone and R. Woetzel, Toward a Feasible International Criminal Court (1970); 35 Revue Internationale de Droit Penal No. 1-2 (1964) devoted to that subject, and 45 Revue International de Droit Penal No. 3-4 (1974) containing the contributions of the AIDP to V United Nations Congress on Crime Prevention and Criminal Justice, Geneva, September 1975 devoted to the subject of "La Creation d'une Justice Penale Internationale". The Revue International de Droit Penal contained scholarly writings on this subject in its issues of 1928, 1935, 1945 and 1952 as well as others. The AIDP has traditionally supported the creation of an international criminal court as witnessed by the positions it has taken at its various International Congresses, and those of its distinguished members among them; Pella, Donnedieu de Vabres, Saldana, Graven, Jimenez de Asua, Cetille, Cornil, Bouzat, Jescheck, Romoshkiin, Herzog, Glaser, Dautricourt, Quaintano-Rippoles, Arroneau, Mueller, De Schutter, Triffterer, Lombois, Plawski, Ferencz, Oehler, Zubkowski. Because of the numerous writings on

56. The principal reasons for this action could be summarized as follows:

(i) There existed no codification of international crimes. In particular aggression 14/ had not been defined and those other customary and conventional crimes were insufficiently defined, with few exceptions;

(ii) The proposed international criminal jurisdiction contemplated the exercise of its jurisdiction over all international crimes, including those as of then deemed insufficiently defined;

(iii) A "General Part" dealing with principles of responsibility and other matters usually included in a "General Part" of the criminal codes or laws of most legal systems had not been elaborated and what was proposed by the two United Nations Committees of Experts who prepared the 1951 and 1953 drafts did not obtain sufficient consensus;

(iv) The absence of an international criminal code containing both a "General Part" and a "Special Part" (the crimes) violated the generally accepted principle nullum crimen sine lege, nulla poena sine lege; and

(v) The two drafts necessitated an amendment to the Charter of the United Nations which was impractical.

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the subject by the above-mentioned scholars and others it would be impossible to cite them all, but see Bassiouni supra note 8 "Bibliography" p. 175. For three more recent initiatives resulting in the submission of a draft statute, see the International Law Association, "Draft Statute for an International Commission of Criminal Injury" adopted by its International Criminal Law Committee in Paris, May 1979. Proceedings of the International Law Association (Belgrade Conference 1980) p. 4; and "Draft Statute for an International Criminal Court", World Peace through Law, Abidjan World Conference, August 1973 (edited by Robert K. Woetzel); and a "Draft Statute for an International Criminal Court" prepared by the Foundation for the Creation of an International Criminal Court, see also K. de Haan "The Procedural Problems of a Permanent International Criminal Jurisdiction" in De bestraffing van inbreuken tegen het oorlogs - en het humanitair recht (A. Beirlaen, S. Deckx, K. de Haan, C. Van den Wijngaert, eds., 1980) p. 191.

14/ General Assembly resolution 3314 (XXIX) of 14 December 1974. See also B. Ferencz, Defining International Aggression (1975).

57. In 1972, a Special Raport was prepared by the Ad Hoc Working Group of Experts of the Commission on Human Rights entitled "Study Concerning the Question of Apartheid from the Point of View of International Penal Law" (E/CN.4/1075) which sets forth the basis for the creation of an international criminal jurisdiction in accordance with article V of the Apartheid Convention. No action was taken on that report and no further implementation of article V of the Apartheid Convention has been proposed until recently.

C. Apartheid as an international crime: special issues on responsibility

58. Based on article III of the Apartheid Convention and in accordance with resolutions of the Commission on Human Rights and the Ad Hoc Group of Experts on Southern Africa, the basic principle of responsibility adopted is that of direct individual responsibility. However, this basis of responsibility is much too narrow under article III and under international criminal law. 15/

59. In so far as the Apartheid Convention declares that the conduct proscribed in article II constitutes a crime under international law, the principle of responsibility thereunder should conform to established norms which are: 16/

(i) Direct responsibility for individual conduct;

(ii) Command responsibility for acts of subordinates;

(iii) Individual responsibility for failure to act;

15/ See Bassiouni supra note 8.

16/ "For direct responsibility of individual conduct", "Command responsibility for acts of subordinates", "Individual responsibility for failure to act" and "Individual responsibility for participating in criminal organizations", see the "Nuremberg Principles" supra note 4. For some general works see Komarov, "Individual Responsibility Under International Law: The Nuremberg Principles in Domestic Legal Systems", 29 Int'l & Comp. L.Q. 21 (1980); Diritto Penale Internazionale (Consiglio Superiore della Magistratura, 1979); C. Lombois, Droit Penal International (1st ed. 1971, 2d ed. 1979); Green, "An International Criminal Code - Now?" 3 Dalhousie L.J. 560, 561 (1976); Dinstein, "International Criminal Law", 5 Israel Y.B. of Human Rights 55, 72 (1975); La Belgique et le Droit International Penal, B. DeSchutter ed. (1975); D. Oehler, Internationales Strafrecht (1974); Special issue 45 Revue Internationale de Droit Penal 3-4 (1974) on International Criminal Law; Triffterer in Bassiouni and Nanda, A Treatise on International Criminal Law vol. II (1974) pg. 86-96; M.C. Bassiouni and V.P. Nanda, A Treatise on International Criminal Law (1973) two volumes; Munch, in Bassiouni and Nanda, A Treatise on International Criminal Law vol. I (1973) pg. 143-55; B. DeSchutter, A Bibliography on International Criminal Law (1972); S. Plawski, Etude des Principes Fondamentaux du Droit International Penal (1972); S. Glaser, Droit Penal International Conventionnel (1970); O. Triffterer, Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nürnberg (1966); G.O.W. Mueller and E.M. Wise, International Criminal Law (1965); V. Pella, La Guerre-Crime et les Criminels de Guerre (1964); S. Glaser, Infraction Internationale (1957); A. Quintano-Rippoles, Tratado de Derecho Penal Internacional y Internacional Penal (1956) two volumes; H.-H. Jescheck, Die Vorantlichkeit der Staatsorgane Nach Völkerstrafrecht (1952); V. Pella, La Codification du Droit Penal International (1952); N. Lavi, Il Diritto Penale Internazionale (1949); Radin, "International Crimes", 32 Iowa L. Rev. 33, 46 (1946); H. Donnedieu de Vabres, Introduction a l'Etude du Droit Penal International (1928); M. Travers, Le Droit Penal Internationale et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre (1920-22) five volumes; Meili, Lehrbuch des Internationalen Strafrechts und Strafprocessrechts (1910); Hegler, Prinzipin des Internationaled Strafrechts (1906).

(iv) Responsibility of corporate entities;

(v) State responsibility;

(vi) The non-applicability of the defence of superior orders (if a moral choice existed). 17/

60. While international criminal law contemplates only the punishment of individuals, the responsibility of corporate entities and that of the State can be deemed to be a quasi-criminal responsibility for which fines and punitive damages are the appropriate remedies.

61. The principle of State responsibility for wrongful conduct should also apply, 18/ and the appropriate remedies would be remedial legislative and administrative action, reparations and damages.

D. Some considerations on the potential impact of creating an international penal system to prevent and punish the crime of apartheid

62. The prevention of apartheid can be accomplished through the processes of international criminal law only to the extent that the threat of punishment deters such conduct, the corollary of which is that actual imposition of punishment can be accomplished in order to achieve specific deterrence through retribution,

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17/ See the "Nuremberg Principles", supra note 4, Y. Dinstein The Defense of Obedience to Superior Orders in International Law (1965) and Vogler "The Defense of Obedience to Superior Orders in International Criminal Law" in Bassiouni and Nanda, supra note 4.

18/ See Yearbook of the International Law Commission, 1978, vol. II (Part Two) (United Nations publication, Sales No. E.79.V.6) pp. 74 et seq., document A/33/10, chap. III. See also "The internationally wrongful act of the State, source of international responsibility" (A/CN.4/246 and Add.1-3) reproduced in ibid., 1971, vol. II (Part One) (United Nations publication, Sales No. E.72.V.6) (Part I), pp. 199 et seq., citing landmark decisions of the P.C.I.J. and I.C.J. as well as arbitral decisions. See also M. Whiteman, A Digest of International Law, vols. 1 and 8 (1968); A. Verdross, Völkerrecht (5th ed. 1964); G. Balladore-Pallieri, Diritto Internazionale Publico (8th ed. 1962); C. Rousseau, Principes Generaux de Droit International Public (1953); P. Guggenheim, Traite de Droit International Public (1953); H. Kelsen, Principles of International Law (1952); L. Oppenheim, International Law, vol. 1 (Lauterpacht 8th ed. 1955); G. Schwarzenberg, International Law (3rd ed. 1957); J. Personnaz, La Reparation du Prejudice en Droit International Public (1939); C. Eagleton, The Responsibility of States in International Law (1928); C. de Visscher, La Responsabilite des Etats (1924); D. Anzilotti, Teoria Generale della Responsabilite della Stata nel Diritto Internazionale (1902), reprinted in D. Anzilotti, Corso di Diritto Internazionale (1928); K. Strupp, Handbuch des Völkerrechts - Das völkerrechtliche Delikt, vol. 3 (1920); G. Vattel, Le Droit des Gens (1887).

incapacitation, and finally rehabilitation. Accordingly, the effectiveness of any penal measures depends on the machinery implementing the system and its prompt and certain operation. In that respect, an international penal system is no different from a national penal system. 19/

1. Individuals in States with apartheid as policy

(a) Present threat of punishment

63. It may be assumed that no State with apartheid as an official policy would adhere to a draft convention and protocol as proposed in the present study (Parts III and IV), and therefore no such State would be bound by its express terms. As a result, the existence of such an instrument would in itself have no effect on the amenability of persons within such a State to an international criminal process. Such States would refuse to comply with requests and orders of an international enforcement system and such refusal would leave matters as they were before the instrument came into existence. However, any individual who had committed crimes of apartheid would find it necessary as a matter of prudence to refrain from going into the territory of any State who is a party to the draft convention (Part III) and the Protocol (Part IV). The same deterrence applies to other States with which States parties to the draft Convention and Protocol have extradition relations and could secure the surrender to them of such a person. 20/

64. Accordingly, the chief impact of the draft convention and protocol would be to limit offenders' freedom of travel, which is a small but perceptible punishment. The greater the number of States parties to the draft convention and protocol, and the stronger the expectation that that individual's acts were known to the machinery under the draft convention and protocol, the greater the impact of the restrictions and limitations.

19/ See A. Pagliaro, Principi di Diritto Penale (1980); The Criminal Justice System of the USSR (M.C. Bassiouni and V. Savitski eds.) (1979); E.R. Zaffaroni, Manuel de Derecho Penal (1979); M.C. Bassiouni, Substantive Criminal Law (1978); R. Carranca, Y Trujillo Derecho Penal Mexicano (1977); N. Hungria and H. Fragoso, Comentarios ao Condigo Penal (1977); A. Odah, Islamic Criminal Law Compared to Positive Law (in Arabic) two volumes (1977) 3rd ed.; F. Munoz Conde, Derecho Penal (1976); S. Renneberg, Strafrecht (1976); H.-H. Jescheck, Lehrbuch das Strafrecht (1975); M. Mostafa, Principes de Droit Penal des Pays Arabes (1973); R. Merle and G. Vitu, Droit Criminel (1967); and M. Ancel and Y. Marx, Les Code Penaux Europeens, three volumes (1958).

20/ See V.E.H. Booth, British Extradition Law and Procedures (1980); C. Van den Wijngaert, The Political Offence Exception to Extradition (1980); M.C. Bassiouni, International Extradition and World Public Order (1974); I. Shearer, Extradition in International Law (1971); T. Vogler, Auslieferingsrecht und Grundgesetz (1969); Bedi, International Extradition (1968); and A. Billot, Traite de l'Extradition (1874). See also M. Pisani and F. Mosconi, Codice della Convenzioni di Estradizione E Di Assistenza Giudiziaria in Materia Penale (1979).

65. Individuals may also be tried in absentia, as is theoretically possible under the draft convention and protocol and that would have the same if not a greater deterrent effect on the mobility of such persons beyond their State's boundaries. Another consideration which has negative implications on the preservation of world order is the possibility that such persons found guilty may become targets for violence or death by liberation movements or terrorist organizations or even by individuals. Such a result might serve as a deterrent, but no legal system would tolerate, much less advocate, enforcement of its judgements by lawless action, all authorities concurring that such conduct undermines the integrity of the legal system as an instrument of justice and the stability of world order.

66. Expectation of investigation and prosecution and actual commencement of an investigation for prosecution is also a deterrent, but it could also be relied upon by lawless persons or organizations as pretexts for violence.

67. Stigmatization resulting from investigation, prosecution or conviction would also be an effective remedy, particularly where world wide publicity attaches to the fact. But such factors are contrary to all theories of rehabilitation and resocialization.

(b) Future threat of punishment

68. The greatest threat to individuals residing in States with apartheid as policy would be in the future. Policies of States are subject to change, and in the case of apartheid the policy is most kindly described as a doomed anachronism. However, offenders may view their efforts as postponing the inevitable so that they may reap the benefits of the exploitation aspects of apartheid as long as possible before fleeing the State. The absence of a jurisdictional basis for other States to prosecute them may leave such offenders with the impression that they cannot be punished outside their State, and it should be noted that the Apartheid Convention itself merely requires States parties to punish offenders according to their own rules of jurisdiction. Thus, the absence of any mechanism for exercise of international jurisdiction is a serious problem.

69. Extradition limits the possibility of evading punishment, but offenders may be optimistic about finding themselves in a State that will not hold them for extradition. Unfortunately that optimism may not be without basis. Many States would regard apartheid as a political offence and would refuse to extradite an offender to the State wherein the crimes were committed if the government were changed. Moreover, even States parties to the Apartheid Convention, which are obligated not to regard apartheid as a political offence, might lack a legal basis to hold such an offender until a treaty of extradition was arranged with that offender's former State, so that during the period of government change many offenders would be able to pass through even such States.

70. Under the draft convention and protocol, however, the list of places for even the most temporary asylum would shrink in relationship to the number of States parties to that Statute and the multiplier effect of their extradition relations with other non States parties. Thus, the choice of an ultimate place of asylum might be severely limited.

71. States reluctant to enforce the provisions of the Apartheid Convention in their national system, may find it more politically convenient and acceptable to do so by recognizing an international penal jurisdiction.

2. Individuals in other States

72. In States not having an official policy of apartheid but which may be occasionally instituted may consider acts of apartheid either as individual perpetrators, illegal government activities, or as possible future government policy. If that State is a party to the draft convention and protocol, complaints to the Procuracy could result in their conduct's being brought to the attention of government officials, or other government officials, and that would be an effective deterrent to such activities.

73. With respect to non States parties, the draft convention and protocol permits the investigation, prosecution, adjudication and punishment of such acts irrespective of where they are committed. Thus a certain deterrent effect can be expected.

74. The independence and impartiality of the draft convention and protocol machinery, and particularly the court, are an inducement to States, whether parties or non-parties, to assist in the effective functioning of these organs, particularly where States can foresee, as in the case of the draft convention, the possible expansion of the jurisdictions of its organs to other international crimes, which is a prospect frequently hoped for by a number of responsible personalities in many States.

3. Threat of punishment to States

75. Historically, penalties for a State's wrongful conduct can be imposed only by virtue of military domination or the coerced consent of the affected State. However, the United Nations has angered a new era and such sanctions are now within the exclusive province of the Security Council.

76. At issue here is not the resort to the Security Council for sanctions whether economic or military because that is defined by the law of the Charter of the United Nations. What is at issue is the concept of fines or reparations as a measure of punitive damages against States who engage in internationally established wrongful conduct. 21/

77. The economic impact of such fines could have an impact on the international trade of such a State and be the most effective deterrent against what is basically a crime of State policy, even though it is carried out by individuals.

78. Finally, the effect of condemnation on world public opinion, and the potential diplomatic isolation of such a State would also have serious deterrent implications.

4. Transnational corporations

79. Surprisingly, perhaps, one of the most promising areas for deterring apartheid may be in connection with transnational corporations (TNCs). Because TNCs may have property in the territory of States parties to the draft convention and protocol, the threat of fines to be levied against such property may be a very real and effective

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21/ See supra note 18/.

deterrent. In the face of such a threat, TNCs could be forced to choose between dealing with States with a policy of apartheid and States parties to the draft convention and protocol.

80. One major qualification must be stated, however. Further elaboration is required before any process against TNCs could be attempted to distinguish between corporate policy that in fact aids apartheid and employees who may or may not be part of that decision-making process, and corporate policy that in fact defeats apartheid.

5. Other considerations

81. The creation of international penal systems as proposed in the draft convention and protocol while largely dependent for their effectiveness on the co-operation and support of States parties, will none the less create a momentum of its own. World public opinion would be affected by the very establishment of any of these two alternative systems, and it would certainly be shaped by its activities. Ultimately it is not international instruments or institutions which significantly alter State or individual conduct, though they contribute to it, but it is the change in individual and social values which produces the desired result. One has only to consider that slavery has now been almost eradicated not by the force of international enforcement machinery but by the cumulative impact of measures including international instruments which brought the change in social values that was the direct cause for its quasi-eradication. 22/

82. It should also be noted that States parties to the Apartheid Convention are bound to use their national legal system to investigate, prosecute and punish the crime of apartheid irrespective of whether there is an international penal enforcement machinery. That duty would still continue to exist even if an international penal system is established. 23/

22/ See the memorandum prepared by the Secretary-General of the United Nations on the suppression of slavery (ST/SOA/4). See, too, Nanda and Bassiouni, "Slavery and the slave trade: steps towards its eradication", 12 Santa Clara Law, 424 (1972).

23/ See the Report of the Group of Three established under the International Convention on the Suppression and Punishment of the Crime of Apartheid (E/CN.4/1328).

III. DRAFT CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL PENAL TRIBUNAL FOR THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID AND OTHER INTERNATIONAL CRIMES

PART I. NATURE OF THE TRIBUNAL AND ITS ORGANS AND POWERS

Article 1

PURPOSES

An International Penal Tribunal is hereby established for the specific purpose of enforcing the penal provisions of the International Convention for the Prevention and Suppression of the Crime of Apartheid, and any other international crime the States Parties may wish to include within the jurisdiction of the Tribunal by Supplemental Agreement.

Article 2

NATURE OF THE TRIBUNAL

The Tribunal shall be a permanent body, occupying facilities and performing its chief functions at the Palace of Justice in the Hague, and using as its official languages, those of the United Nations.

Article 3

ORGANS OF THE TRIBUNAL

1. The Tribunal shall consist of the following organs:

   (a) The Court;

   (b) The Procuracy;

   (c) The Secretariat; and

   (d) The Standing Committee of States Parties to the Statute of the International Penal Tribunal.

2. The functions and competence of the above organs shall be as described in Part III of this Convention.

Article 4

JURISDICTION

1. The Tribunal shall have jurisdiction over "grave breaches" of article II of the International Convention for the Prevention and Punishment of the Crime of Apartheid, namely: murder; torture; cruel, inhuman, or degrading treatment or punishment; arbitrary arrest and detention; and,

2. Any other act or conduct deemed an international crime by virtue of a multilateral convention in force which declares that act or conduct to be an international crime or which requires its contracting parties to criminalize it under their national laws and to prosecute or extradite its perpetrators, provided that any party hereto who wishes the Tribunal to exercise such jurisdiction does so by virtue of a Supplemental Agreement to this Convention.

3. The Tribunal shall have universal jurisdiction with respect to the investigation, prosecution, adjudication and punishment of persons and legal entities accused or found guilty of those crimes which are within its jurisdiction.

Article 5

COMPETENCE

1. The Tribunal shall be competent to investigate, prosecute adjudicate and punish any person or legal entity accused or guilty of:

(a) A "grave breach" of article II of the International Convention of the Suppression and Punishment of the Crime of Apartheid as defined in article 4, paragraph 1; and,

(b) Any other international crime as defined in article 4, paragraph 2, of this Convention and subject to any specific provisions of a Supplemental Agreement making a crime subject to the jurisdiction of this Tribunal.

2. The Tribunal shall, subject to the provisions of the present Convention, exercise its competence in accordance with international law whose sources are stated in article 38 of the Statute of the International Court of Justice.

3. The Competence of the Organs of the Tribunal shall be interpreted and exercised in light of the purposes of the Tribunal as set forth in this Convention.

Article 6

SUBJECTS UPON WHOM THE TRIBUNAL SHALL EXERCISE ITS JURISDICTION

The Tribunal shall exercise its jurisdiction over natural persons and legal entities as defined in article 20.

Article 7

SANCTIONS

1. The Court as an organ of the Tribunal shall upon entering a finding of guilty and in accordance with article 24 and standards set forth in this Convention have the power to impose the following sanctions:

(a) Deprivation of liberty or any lesser measures of control where the person found guilty is a natural person; and,

(b) Fines to be levied against a natural person or legal entity; and

(c) Injunctions against natural persons or legal entities restricting them from engaging in certain conduct or activities.

2. Sanctions shall be established by the rules of the Court and shall be published before their entry into effect. Such sanctions shall be equivalent to those penalties existing in the major criminal systems of the world for the same type of offence.

PART II. THE PENAL PROCESSES OF THE TRIBUNAL

Article 8

INITIATION OF PROCESS

1. No criminal process shall be initiated unless a complaint is communicated to the Procuracy or originated within the Procuracy.

2. The Investigative Division of the Procuracy shall determine whether such complaints are "manifestly unfounded" or not, and that determination shall be reported immediately to the source of the communication, if any.

3. No complaint by a State Party to the present Convention or an Organ of the United Nations shall be deemed "manifestly unfounded". Other States and intergovernmental organizations whose complaints are determined to be "manifestly unfounded" may appeal such determinations to the Court pursuant to article 12 of this Convention.

4. Unless otherwise directed by the Court, the Procuracy may either take no further action on "manifestly unfounded" complaints or may continue further investigation.

5. Communications determined "not manifestly unfounded" shall be transferred together with the record of investigation to the Prosecutorial Division of the Procuracy, which shall immediately inform the accused and assume responsibility for development of the case.

6. When a case is ready for prosecution, the Procurator shall submit it to an appropriate Chamber of the Court pursuant to article 9 of this Convention, or to the Standing Committee pursuant to Article XVII of this Convention, or to both, but if a case based on a complaint submitted by a State Party to this Convention or by an Organ of the United Nations has not been presented to the Court within one year of submission to the Standing Committee the source of the complaint may request the Court to examine the case and act pursuant to article 9 of this Convention.

Article 9

PRE-TRIAL PROCESS

1. The Prosecutorial Division of the Procuracy may request an appropriate Chamber of the Court pursuant to this Article of the Convention to issue orders in aid of development of a case, in particular, orders in the nature of:

(a) Arrest warrants;

(b) Subpoenas;

(c) Injunctions;

(d) Search warrants;

(e) Warrants for surrender of an accused so as to enable accused persons to be brought before the Court and to transit States without interference.

2. Requests for such orders may be granted with or without prior notice if opportunity to be heard would jeopardize the effectiveness of the requested order.

3. All such orders shall be executed pursuant to the relevant laws of the State in which they are to be executed.

4. The ultimate merits of a case shall not be considered pursuant to article 10 of this Convention until the case has been submitted to an appropriate Chamber of the Court, sitting in a preliminary hearing at which the accused is represented by Counsel and the Chamber, made the following determinations:

(a) The case is reasonably founded in fact and law;

(b) No prior proceedings before the Tribunal or elsewhere bar the process in accordance with the principle non bis in idem or fundamental notions of fairness; and

(c) No conditions exist that would render the adjudication unreliable or unfair.

5. The schedule of proceedings shall be established by the appropriate Chamber in consultation with the Procuracy and Counsel for the accused with due regard to the principle of fairness to the parties and the principle of "speedy trial".

Article 10

ADJUDICATION

1. Hearings on the ultimate merits of cases shall be conducted in public before a designated Chamber of the Court but deliberations of the Chamber shall be in camera.

2. A Chamber may at any time dismiss a case and enter appropriately motivated orders. In case of dismissal for any reason other than on the merits, the principle non bis in idem shall not apply.

3. In all proceedings a Chamber shall give equal weight to evidence and arguments presented by the Procurator and on behalf of the accused in accordance with the principle of "equality of arms" of the parties.

4. When all evidence respecting guilt or responsibility for wrongful acts has been presented, and argued by the parties, the Chamber shall close the Hearings and retire for deliberations.

5. The decisions of the Chambers shall be publicly announced orally, in summary or entirely, accompanied by written findings of fact and conclusions of law, or entered 30 days from date of pronouncement of the oral decision, and any judge of that Chamber may write a separate dissenting or concurring opinion.

6. A determination of guilt shall be deemed entered when recorded by the Secretariat, which shall communicate it forthwith to the Procuracy and the accused, but no such determination shall be regarded as effective until 30 days after the date of recording at which time the deciding Chamber may no longer modify its findings.

7. Each Chamber shall consist of three judges selected by lot, and cases shall be assigned to each Chamber by lot.

Article 11

SANCTIONING

1. Upon a determination of guilt or responsibility, a separate hearing shall be held regarding sanctions to be imposed at which hearing evidence of mitigation and aggravation shall be introduced and argued by the parties.

2. At the conclusion of this hearing the Chamber shall retire for deliberation and shall issue its determination in the same manner and subject to the same conditions as for a determination of guilt, as set forth in paragraphs 5 and 6 of Article X.

Article 12

APPEALS

1. Appeals to the Court en banc from determinations of Chambers as to guilt or responsibility or as to sanctions may be commenced by the accused upon written notice filed with the Secretariat and communicated to the other party within 30 days of the date of entry of judgement or order appealed.

2. Other appeals from actions of Chambers may be taken before a final judgement is entered only if such actions are conclusive as to independent matters.

3. The Procuracy may appeal questions of law in the same manner as an accused under paragraphs 1 and 2.

4. Decisions on appeals shall be delivered in the same manner as other decisions of the Court en banc as provided in article 10, paragraphs 5 and 6, of this Convention.

5. Decisions of the Court en banc and unappealed determinations or orders of Chambers shall be deemed final unless it is shown that:

(a) Evidence unknown at the time of the determination or order has been discovered, which would have had a material effect on the outcome of the said determination or order; or,

(b) The Court or Chamber was flagrantly misled as to the nature of matters affecting the outcome; or,

(c) On the face of the record the facts alleged have not been proved beyond a reasonable doubt; or,

(d) The facts proved do not constitute a crime within the jurisdiction of the Tribunal; or,

(e) Other grounds for which the Court may provide by its rules.

6. Appealed determinations may be revised or vacated or remanded for new determination, and when vacating a determination the Court shall specify what if any non bis in idem effect shall be given to the prior proceedings.

Article 13

SANCTIONS AND SUPERVISION

1. The Court may call upon any State Party to execute measures imposed in respect of guilt, in accordance with the laws of the said State Party.

2. With respect to each accused determined to be guilty, a judge of the Court shall be selected by lot as supervisor of the sanction imposed.

3. All requests to modify sanctions shall be directed in the first instance to the sanction supervising judge who may submit the request to the adjudicating chamber for modification provided such action in no way increases the sanction or conditions imposed upon the person or legal entity found guilty.

4. Decisions of the sanction supervising judges regarding modification requests may be appealed to the Chamber which imposed the sanction, but such appeals in the Chamber's discretion need not be the subject of full hearings and detailed written decisions.

5. Nothing herein precludes the Court in accordance with its rules to suspend its sanctions or place pre-conditions to their application in accordance with its rules.

PART III. ORGANS OF THE TRIBUNAL

Article 14

THE COURT

1. The Court shall consist of twelve judges, no more than two of whom shall be of the same nationality, who shall be elected by the Standing Committee of States Parties from nominations submitted thereto.

2. Nominees for positions as judges shall be of distinguished experts in the fields of international criminal law or human rights and other jurists qualified to serve on the highest courts of their respective States who may be of any nationality or have no nationality.

3. Judges shall be elected by secret ballot and the Standing Committee of States Parties shall strive to elect persons representing diverse backgrounds and experience with due regard to representation of the major legal and cultural systems of the world.

4. Elections shall be co-ordinated by the Secretariat under the supervision of the presiding officer of the Standing Committee of States Parties and shall be held whenever one or more vacancies exist on the Court.

5. Judges shall be elected for the following terms: four judges for four-year terms, four judges for six-year terms, and four judges for eight-year terms. Judges may be re-elected for any term at that time available.

6. No judge shall perform any public function in any State.

7. Judges shall have no other occupation or business than that of judge of this Court. However, judges may engage in scholarly activity for remuneration provided such activity in no way interferes with their impartiality and appearance of impartiality.

8. A judge shall perform no function in the Tribunal with respect to any matter in which he may have had any involvement prior to his election to this Court.

9. A judge may withdraw from any matter at his discretion, or be excused by a two-thirds majority of the judges of the Court for reasons of conflict of interest.

10. Any judge who is unable or unwilling to continue to perform functions under this statute may resign. A judge may be removed for incapacity to fulfill his functions by a unanimous vote of the other judges of the Court.

11. Except with respect to judges who have been removed, judges may continue in office beyond their term until their replacement are prepared to assume the office and shall continue in office to complete work on any pending matter in which they were involved even beyond their term.

12. The judges of the Court shall elect a president, vice-president and such other officers as they deem appropriate. The president shall serve for a term of two years.

13. Judges of the Court shall perform their judicial functions in three capacities:

(a) Sitting with other judges as the Court en banc;

(b) Sitting in panels of three on a rotational basis in Chambers; and

(c) Sitting individually as Supervisors of sanctions.

14. The salary of judges shall be equal to that of the judges of the International Court of Justice.

15. The Court en banc shall subject to the provisions of this Convention, adopt Rules governing procedures before its Chambers and the Court en banc, and provide for establishment and rotation of Chambers.

16. The Court en banc shallannounce its decisions orally in full or in summary, accompanied by written findings of fact and conclusions of law at the time of the oral decision or within thirty days thereafter, and any judge so desiring may issue a concurring or dissenting opinion.

17. Decisions and orders of the Court en banc are effective upon certification of the written opinion by the Secretariat, which is to communicate such certified opinion to parties forthwith.

18. The Court en banc may within thirty days of the certification of the judgement take its decisions without notice.

19. No actions taken by the Tribunal may be contested in any other forum than before the Court en banc, and in the event that any effort to do so is made, the Procurator shall be competent to appear on behalf of the Tribunal and in the name of all States Parties of this Convention to oppose such action.

20. States Parties agree to enforce the final judgements of the Court in accordance with the provisions of this Convention.

Article 15

THE PROCURACY

1. The Procuracy shall have as its chief officer the Procurator and shall consist of an administrative division, an investigative division and a prosecutorial division, each headed by a deputy procurator, and employing appropriate staff.

2. The Procurator shall be elected by the Standing Committee of States Parties from a list of at least three nominations submitted by members of the Standing Committee, and shall serve for a renewable term of six years, barring resignation or removal by two-thirds vote of the judges of the Court en banc for incompetence, conflict of interest, or manifest disregard of the provisions of this Convention or material Rules of the Tribunal.

3. The Procurator's salary shall be the same as that of the judges.

4. The deputy procurators and all other members of the Procurator's staff shall be named and removed by the Procurator at will.

Article 16

THE SECRETARIAT

1. The Secretariat shall have as its chief officer the Secretary, who shall be elected by a majority of the Court sitting en banc and serve for a renewable term of six years barring resignation or removal by a majority of the Court sitting en banc for incompetence, conflict of interest or manifest disregard of the Provisions of this Convention or material Rules of the Tribunal.

2. The Secretary's salary shall be equivalent to that of the judges.

3. The Secretariat shall employ such staff as appropriate to perform its chancery and administrative functions and such other functions as may be assigned to it by the Court that are consistent with the provisions of this Convention and the rules of the Tribunal.

4. In particular, the Secretary shall twice each year prepare:

(a) Budget requests for each of the organs of the Tribunal; and

(b) Make and publish an annual report on the activities of each organ of the Tribunal.

5. The Secretariat staff shall be appointed and removed by the Secretary at will.

6. An annual summary of investigations undertaken by the Procuracy shall be presented to the Secretariat for publication, but certain investigations may be omitted where secrecy is necessary, provided that a confidential report of the investigation is made to the Court and to the Standing Committee and filed separately with the Secretariat, but either the Court or the Standing Committee may order by majority vote that the report be made public.

Article 17

THE STANDING COMMITTEE

1. The Standing Committee shall consist of one representative appointed by each State Party.

2. The Standing Committee shall elect by majority vote a presiding officer and alternate presiding officer and such other officers as it deems appropriate.

3. The presiding officer shall convene meetings at least twice each year of at least one week duration each at the seat of the Tribunal, and call other meetings at the request of a majority vote of the Committee.

4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with this Convention, but in no way shall those functions impair the independence and integrity of the Court as a judicial body.

5. In particular, the Standing Committee may:

(a) Offer to mediate disputes between States Parties relating to the functions of the Tribunal; and

(b) Encourage States to accede to the Convention; and,

(c) Propose to States Parties international instruments to enhance the functions of the Tribunal.

6. The Standing Committee may exclude from participation representatives of States Parties that have failed to provide financial support for the Tribunal as required by this Convention or States Parties that failed to carry out their obligations under this Convention.

7. Upon request by the Procuracy, or by a party to a case presented for adjudication to a Chamber of the Court, the Standing Committee may be seized with a mediation and conciliation petition. In that case the Standing Committee shall within 60 days decide on granting or denying the petition from which there is no appeal. In the event that the Standing Committee grants the petition, Court proceedings shall be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the Parties and with the consent of the Court.

Article 18

GENERAL INSTITUTIONAL MATTERS

1. Each of the organs of the Tribunal shall formulate and publish its own rules in accordance with the standards set forth in Part IV to regulate its functions under this Convention, but the rules of the Procuracy and Secretariat shall be subject to approval by a majority of the Court en banc.

2. The Procurator shall participate without a vote in formulating the rules of the Court and of the Secretariat. The President of the Court shall participate without a vote in formulating the rules of the Procuracy and of the Secretariat.

3. Except to the extent of the adopted rules, procedures of the Court shall be those of the International Court of Justice and those of the Secretariat shall be as for the Registrar of the International Court of Justice.

4. Each of the Organs of the Tribunal shall co-operate with the Secretariat in formulating its budget request and such budget requests shall be presented to the Court en banc for modification or approval, subject to adoption or rejection in their entirety by the Standing Committee.

5. The Judges, the Procurator and Deputy Procurators and their assistants and the Secretary shall be deemed officers of the Court, as well as Counsels appearing in a given case, and they shall enjoy immunity from legal processes of States with respect to the performance of their official duties.

6. No officer of the Court other than Counsel in a given case shall perform any function under this Convention without having first made a public, solemn declaration of impartiality and adherence to this Convention and the rules of the Tribunal.

PART IV. TRIBUNAL STANDARDS

Article 19

STANDARDS FOR RULES AND PROCEDURES

1. In all proceedings of the Tribunal and in the formulation of any rules by any of its organs, the accused shall be entitled to those fundamental human rights enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which for these purposes are:

(a) The presumption of innocence

The presumption of innocence is a fundamental principle of criminal justice. It includes inter alia:

1. No one may be convicted or formally declared guilty unless he has been tried according to law in a fair trial;

2. No criminal punishment or any equivalent sanction may be imposed upon a person unless he has been proven guilty in accordance with the law;

3. No person shall be required to prove his innocence;

4. In case of doubt the decision must be in favour of the accused.

(b) Procedural rights ("equality of arms")

The accused shall have substantial parity in proceedings and procedures and shall be given effective ways to challenge any and all evidence produced by the prosecution and to present evidence in defence of the accusation.

(c) Speedy trial

Criminal proceedings shall be speedily conducted without, however, interfering with the right of the defence to adequately prepare for trial. To this effect:

1. Time limitations should be established for each stage of the proceedings and should not be extended without reason by the appropriate Chamber of the Court.

2. Complex cases involving multiple defendants or charges may be severed by the appropriate Chamber of the Court when it is deemed in the interest of fairness to the parties and justice to the case.

3. Administrative or disciplinary measures shall be taken against officials of the Tribunal who deliberately or by negligence violate the provisions of this Convention and the rules of this Tribunal.

(d) Evidentiary questions

1. All procedures and methods for securing evidence which interfere with internationally guaranteed human rights shall be in accordance with the standards of justice set forth in this Convention and in the rules of the Tribunal.

2. The admissibility of evidence in criminal proceedings must take into account the integrity of the judicial system, the rights of the defence, the interests of the victim and the interests of the world community.

3. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, violate the provisions of this Convention, and Rules of this Tribunal shall hold them inadmissible.

4. Evidence obtained by means of lesser violations shall be admissible only subject to the judicial discretion of the Court on the basis of the veracity of the evidence presented and the values and interests involved.

(e) The right to remain silent

Anyone accused of a criminal violation has the right to remain silent and must be informed of this right.

(f) Assistance of counsel

1. Anyone suspected of a criminal violation has the right to defend himself and to competent legal assistance of his own choosing at all stages of the proceedings.

2. Counsel shall be appointed ex officio whenever the accused by reason of personal conditions is unable to assume his own defence or to provide for such defence, and in those complex or grave cases where in the best interest of justice and in the interest of the defence such counsel is deemed necessary by the Court.

3. Appointed counsel shall receive reasonable compensation from the Tribunal whenever the accused is financially unable to do so.

4. Counsel for the accused shall be allowed to be present at all critical stages of the proceedings.

5. Counsel for the accused or the accused shall be provided with all incriminating evidence available to the prosecution as well as all exculpatory evidence as soon as possible but no later than at the conclusion of the investigation or before adjudication and in reasonable time to prepare the defence.

6. Anyone detained shall have the right to access and to communicate in private with his counsel personally and by correspondence, subject only to reasonable security measures decided by a judge of the Court.

(g) Arrest and detention

1. No one shall be subjected to arbitrary arrest or detention.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by this Convention and Rules of the Tribunal and only on the basis of a determination by the Court.

3. No one shall be arrested or detained without reasonable grounds to believe that he committed a criminal violation within the jurisdiction of the Tribunal.

4. Anyone arrested or detained shall be promptly brought before a judge of the Court and shall be informed of the charges against him; after appearance before such judicial authority he may be returned to the custody of the arresting authority but he shall be subject to the jurisdiction of the Court even when in the custody of a State Party.

5. Preliminary or provisional arrest and detention shall take place only whenever necessary and as much as possible should be reduced to a minimum of cases and to the minimum of time.

6. Preliminary or provisional detention shall not be compulsory but subject to the determination of the Court and in accordance with its rules.

7. Alternative measures to detention shall be used whenever possible and include inter alia:

Bail;

Limitations of freedom of movement;

Imposition of other restrictions.

8. No detainee shall be subject to rehabilitative measures prior to conviction unless he freely consents thereto.

9. No administrative preventive detention shall be permissible as part of any criminal proceedings.

10. Any period of detention prior to conviction shall be credited toward the fulfilment of the sanction imposed by the Court.

11. Anyone who has been the victim of illegal or unjustified detention shall have the right to compensation.

(h) Rights and interests of the victim

The rights and interests of the victim of a crime shall be protected and in particular:

1. The opportunity to participate in the criminal proceedings;

2. The right to protect his civil interests;

3. Due regard shall be given in formulation of Rules of the Organs of the Tribunal to the principle of non bis in idem, but a seemingly duplicative prosecution shall not be barred provided that the record in the prior proceeding is taken into account along with any prior measures in respect of guilt of the accused;

4. Arrest and detention shall be in conformity with the Standard Minimum Rules for the Treatment of Prisoners and the principles on freedom from arbitrary arrest and detention of the United Nations;

5. Maximum flexibility regarding restrictive measures should be encouraged, including use of such mechanisms as house arrest, work release and bail, and credit shall be given for any pre-conviction restrictions to an accused;

6. The Tribunal shall include all of the above in the formulation of its rules of practice and procedures which shall be effective upon promulgation.

7. No proceedings before the Tribunal shall commence prior to the promulgation of the Rules of practice and procedures of the Court, the Procuracy and the Secretariat.

PART V. PRINCIPLES OF ACCOUNTABILITY (PROVISIONS IN THE NATURE OF A GENERAL PART)

Article 20

DEFINITIONS

1. An international crime is any offence arising out of the provisions of this Statute and any supplemental agreement thereto as defined in Article 4.

2. A State is an international legal entity defined under international law.

(a) This term is used without prejudice to questions of recognition or membership in the United Nations.

(b) This term also includes a group of States acting collectively.

3. The words "person" or "individual" for the purposes of this Convention are used interchangeably and each one of them refers to a physical human being alive.

4. For the purposes of this Convention, the words "group" and "organization" are interchangeable. A group consists of more than one person, acting in concert with respect to the performance of a particular act.

5. The term "entity" is used herein to include groups, organs of State, States or groups of States.

6. Participation in group action is a person's conduct which directly contributes to the group's ability to perform a given act or which directly influences the decision of the group to perform a given act.

7. A person commits solicitation when, with the intent that an offence be committed, he instigates, commands, encourages or requests another to commit that offence.

8. A person commits conspiracy when, with intent to commit a specific offence, he agrees with another to the commission of that offence and one of the members of the conspiracy commits an overt act in furtherance of the agreement.

9. A person commits an attempt when, with the intent to commit a specific offence, he engages in unequivocal and direct conduct which constitutes a substantial step toward the commission of that offence and which if not for a fortuitous event or misapprehension of the actor, would result in the completion of the crime.

10. A person in authority is a person who has legal authority under domestic law or a person who by virtue of the power structure of a group is deemed to be in command or has the power to command others, and to whom obedience is generally expected.

11. Omission by a State, group or organization or failure to act occurs whenever a person in authority having power to act and having knowledge of the facts requiring action fails to take reasonable measures to prevent, or terminate the commission of a crime or to apprehend, or prosecute, or punish any person who has or may have committed a crime. Omission by an individual is conscious failure to act in accordance with a pre-existing legal obligation.

12. The masculine "he" used throughout this article refers equally to the feminine "she".

Article 21

RESPONSIBILITY

1. A person is criminally responsible under this article when he reaches the age of 18.

2. Direct personal responsibility

(a) A person who commits or attempts to commit a crime is responsible for it and criminally punishable under article 24.

(b) A person who conspires with another or solicits another to commit a crime as defined is criminally responsible for it and criminally punishable.

(c) A person who commits a crime is not relieved from responsibility by the sole fact that he was acting in the capacity of Head of State, responsible Government official, acting for or on behalf of a State, or pursuant to "superior orders" except where the provisions of article 24, paragraph 6 are applicable.

3. Responsibility for the conduct of others

(a) A person is responsible for the conduct of another if, before, during or after the commission of a crime, and with the intent to promote or facilitate the commission of a crime, he aids, abets, solicits, conspires or attempts to aid another person in the planning, perpetration or concealment of the crime, or facilitates the concealment or escape of a perpetrator.

(b) A person is not responsible for the acts of others if that individual is a victim of the crime, or when, before the commission of the crime, that person terminates his efforts of participation as described in paragraph 3(a) and such termination wholly deprives others of his efforts and of their effectiveness or if such a person gives timely warning and advice to appropriate government authorities.

(c) The vicarious responsibility for the conduct of another under this section is not dependent upon the conviction of a person accused as a principal.

(d) A person is responsible for the conduct of another with respect to any crime committed in furtherance of a solicitation, conspiracy and for those crimes which are reasonably foreseeable to be committed by others in furtherance of a common criminal scheme, design or plan.

4. Collective responsibility

(a) A group or organization other than a State or an organ of a State is collectively responsible for its acts, irrespective of the responsibility of its members.

(b) A person is responsible for crimes committed by a group or organization, if he knew of or could reasonably foresee the commission of such crime and remained a member thereof.

5. Responsibility of persons in authority

(a) A person in authority in a State, group or organization is personally responsible for the commission of a crime when such crime is committed at his instigation, suggestion, command or request, or if he fails to act.

6. State responsibility

(a) Conduct for which States are responsible

1. A State is responsible for any crime committed on its behalf, behest or benefit by a person in authority, regardless of whether such acts are deemed lawful under its municipal law.

2. Conduct is attributed to a State if it is performed by persons or groups acting in their official capacity, who under the domestic law of that State possess the authority to make decisions for the State or any political subdivision thereof or possess the status of organs, agencies or instrumentalities of that State or a political subdivision thereof.

3. Conduct outside the scope of authority of any of the entities listed in this article is attributed to the State.

(b) State responsibility for failure to act

1. Failure to act by a State in accordance with its obligation under this Code shall constitute an international offence.

2. Any revolutionary movement which establishes a State or overthrows a Government is responsible in the new State or new Government to prosecute or extradite any individual within such group or any individual who has been omitted from the group for any international crime. Failure to do so shall constitute a basis for State responsibility.

Article 22

ELEMENTS OF AN INTERNATIONAL CRIME

1. Definition

(a) An international crime shall contain four elements: a material element: a mental element: a causal element; and, harm, as defined in paragraphs 2 through 5 inclusive, except when in the definition of a given crime these requirements are altered.

2. Material element

(a) Any voluntary act or omission which constitutes part of a crime as defined in article 4 will constitute the material element.

3. Causal element

(a) Conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred, and that the result was a foreseeable consequence of such conduct.

4. Harm

(a) The element of harm shall depend upon the definition of the crime, except where no harm is needed in the definition of the crime.

5. Mental element

(a) The mental element of an offence at the time of the commission of the material element shall consist of either intent, knowledge, or recklessness, unless the definition of the crime specifies any of these three.

(b) A person "intends" to accomplish a result or engage in conduct described by the law defining the offence, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

(c) A person "knows" or acts "knowingly" when he is consciously aware of the attendant circumstances of his conduct or of the substantial probability of existing facts and circumstances likely to produce a given result.

(d) A person is reckless or acts recklessly when he consciously disregards a substantial and unreasonable risk that a likely result would be a foreseeable consequence of such conduct.

Article 23

IMMUNITIES

1. For purposes of this article, no person shall enjoy any international immunity except that Head of State, Head of Government, official representative of a State having diplomatic status, employees of international organizations and the members

of the families and staffs of the above-enumerated persons shall be exempt and immune from the criminal process of all States other than their own and this International Criminal Tribunal, provided that in the event of the commission of a crime as defined herein, the State party whose national is entitled to the immunity and exemption stated herein shall undertake to investigate, prosecute and punish the allegation or crime charged.

2. Any State may waive this immunity on behalf of its nationals without prejudice to its interests in favour of any other State.

3. Any person who falls into any of the categories of paragraph 1 of this article may specifically waive that immunity with the consent of the State of which he is a national or of the international organization by which he is employed without prejudice to that State or organization.

4. A person who no longer has the privileges of the positions covered by immunity in paragraph 1 of this article may no longer benefit from said immunity except with respect to those acts committed or alleged to have been committed while that person held the position that granted immunity.

Article 24

PENALTIES

1. Punishability

(a) All crimes defined in this article are punishable in proportion to the seriousness of the violation, to the harm threatened or caused, and to the degree of the responsibility of the individual actor in accordance with a schedule to be promulgated by rules of the Tribunal before it exercises its jurisdiction in a given case.

2. Penalties for individuals

(a) Penalties for persons who have been convicted of the commission of a crime shall consist of imprisonment or such alternatives to imprisonment or fines as promulgated by the International Criminal Court.

3. Penalties for a group or organization

(a) Penalties for crimes for which groups are collectively responsible under article 21, paragraph 4, shall consist of fines or other sanctions established in accordance with the principle of proportionality set forth in paragraph 1 of this article and as promulgated by the rules of the Court.

(b) Fines shall be collectively levied against the assets of group and individual participants and enforced by the States Parties wherein such assets may be found.

4. Penalties for States

(a) Penalties for States which are responsible for crimes shall consist of fines assessed on the basis of proportionality as set forth in section 1 of this article, without prejudice to the duties or reparations and civil damages.

(b) Such fines shall be due from a State, provided that they do not critically impair the economic viability of the State.

(c) The determination and assessment of fines against a State shall be made by the Court and the enforcement of such fines shall be by and through the United Nations.

(d) The provisions of this article are without prejudice to the rights and duties of the United Nations to impose sanctions against a State as provided for in the Charter of the United Nations.

(e) Special remedies

Nothing in this article shall prevent the International Criminal Court to rely on its inherent judicial power to order a State to cease and desist from a given activity which is an international crime or to order by injunctions the correction of previous violations and prevent their reoccurrence.

5. Multiple crimes and penalties

(a) The Court may with respect to a single criminal transaction involving the commission of more than one crime all of which are related and are based on substantially the same facts impose a single penalty with discretion concerning aggravating and mitigating circumstances as may be found by the Court.

6. Mitigation of punishment

(a) A person acting pursuant to superior orders may present such a claim in mitigation of punishment.

(b) Subject to the defence of double jeopardy a person who was sentenced in one State for substantially the same criminal conduct and resentenced by the Court shall receive credit for any part of a sentence already executed.

(c) The Court may take into account any mitigating fact such as imperfect or incomplete defences stated in article 25.

Article 25

EXONERATION

1. Definition

(a) A person shall be exonerated from responsibility arising under this Convention if in the commission of an act which constitutes a crime any of the defences stated in paragraphs 2 through 11 inclusive is applicable.

2. Self-Defence (Individual)

(a) Self-defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that he reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.

3. Necessity

(a) A person acts under necessity when by reason of circumstances beyond his control, likely to create a private or public harm, he engages in conduct which may otherwise constitute a crime which he reasonably believes to be necessary to avoid the imminent greater harm likely to be produced by such circumstances, but not likely to produce death.

4. Coercion

(a) A person acts under coercion when he is compelled by another under an imminent threat of force or use of force directed against him or another, to engage in conduct which may otherwise constitute a crime which he would not otherwise engage in, provided that such coerced conduct does not produce a greater harm than the one likely to be suffered and is not likely to produce death.

5. Obedience to superior orders

(a) A person acting in obedience to superior orders shall be exonerated from responsibility for his conduct which may otherwise constitute a crime or omission unless, under the circumstances, he knew that such act would constitute a crime.

6. Refusal to obey a superior order which constitutes a crime

(a) No person shall be punished for refusing to obey an order of his Government or his superior which, if carried out, would constitute a crime.

7. Mistake of law or fact

(a) A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements.

8. Double jeopardy

(a) The Court may not retry or resentence the same individual for the same conduct irrespective of what the crime or charge may be.

(b) In the event a person has been tried by the national courts of a State party he could be retried for the same conduct by the Court but he shall receive credit for a sentence rendered by a national criminal court and executed by that State or any other State.

(c) No individual who has been tried and convicted or acquitted on the merits by the Court shall be retried or resentenced by the domestic court of any State party.

(d) Amnesty or pardon by any State shall not constitute a bar to adjudication before the Court and shall not be deemed to fall within the defence of double jeopardy.

9. Insanity

(a) A person is legally insane when at the time of the conduct which constitutes a crime, he suffers from a mental disease or mental defect, resulting in his lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and such mental disease or mental defect caused the conduct constituting a crime.

10. Intoxication or drugged condition

(a) A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by the said crime.

(b) Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime.

(c) With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

11. Renunciation

(a) It shall be a defence to the crimes of attempt, conspiracy and solicitation if a person renounces or voluntarily withdraws from the commission of the said crimes before any harm occurs and if he has engaged in any individual activity by doing any of the following:

(i) Wholly deprives others from the use or benefit of his participation in the commission of the crime;

(ii) Notifies law enforcement officials in time in order to prevent the occurrence or the commission of the crime.

Article 26

STATUTE OF LIMITATION

1. Duration

(a) No prosecution or punishment by the Court of an international crime shall be barred by a period of limitations of lesser duration than the maximum penalty ascribed to the crime in question in the laws of the State where the crime was committed.

(b) The period of limitation shall commence at the time that legal proceedings under the provisions of this Convention may commence but shall not apply to any period during which a person is escaping or evading appearance before the appropriate authorities. It is interrupted by the arrest of the accused but shall recommence *ab initio* if the accused or convicted person escapes and in no case shall it run for a period which would be longer than twice the original period of limitation.

(c) In the case of State responsibility, the period of limitation for commencing any action before the Court shall be measured with reference to the acts of those State officials whose conduct has implicated the responsibility of the State in question.

PART VI. DUTIES OF STATES PARTIES

Article 27

GENERAL PRINCIPLES

1. States Parties shall surrender upon request of the Court any individual where it appears that there are reasonable grounds to believe that such a person has committed an international crime within the jurisdiction of the Tribunal.

2. States Parties shall provide the Court with all means of judicial assistance and co-operation, including but not limited to letters rogatory, service of writs, assistance in securing testimony and evidence, transmittal of records and transfer of proceedings.

3. States Parties shall recognize the judgements of the Court and execute provisions of such judgements in accordance with their national laws.

4. In the event the Court does not have detentional facilities under its direct control, States Parties will honour requests from the Court to execute its sentences in accordance with their own correctional systems, but subject to continuing jurisdiction of the Court over the transferred offender.

5. States Parties may receive requests for transfers of offenders.

6. States Parties to this Convention undertake to provide co-operation to organs of the Tribunal in accordance with the terms of this Convention and the purpose of the Tribunal, and in particular to:

(a) Provide financial support to the Tribunal in the proportion they would be assessed under contemporaneous General Assembly apportionments established in article 17 of the Charter of the United Nations, payments being due within six months of the adoption of a budget by the Standing Committee; and

(b) Budgetary needs of the Tribunal shall be computed after taking into account income from voluntary contributions and fines collected by the Tribunal.

Article 28

SURRENDER OF ACCUSED PERSONS

1. States Parties shall surrender upon a request of the Court any individual sought to appear before the Court for any proceeding arising out of the Court's jurisdiction provided that the Court's request shall be based on reasonable grounds to believe that the person sought has committed a violation of this Code.

2. The following acts shall not be a bar to surrender a person to the International Penal Tribunal for any acts constituting a crime:

(a) That the person sought to be surrendered claims or the State wherein he may be located claims that the act falls within the meaning of the "political offence exception";

(b) That the individual is a national of the requested State;

(c) That the requested State otherwise imposes certain conditions or restriction to the practice of extradition to and from other States.

3. Procedures regulating such transfers shall be determined by the rules of the Court subject to the laws of the requested State.

Article 29

JUDICIAL ASSISTANCE AND OTHER FORMS OF CO-OPERATION

1. The States Parties shall provide the International Penal Tribunal with all means of judicial assistance and co-operation including but not limited to letters rogatory, service of writs, assistance in securing testimony and evidence, transmittal of records, transfer of proceedings where applicable.

2. The procedures for such judicial assistance and other forms of co-operation shall be determined by the Court's rules of practice.

Article 30

RECOGNITION OF THE JUDGEMENTS OF THE INTERNATIONAL PENAL TRIBUNAL

1. The States Parties agree to recognise the judgements of the Court and to execute its provisions. For the purposes of double jeopardy and evidentiary matters the International Penal Tribunal shall recognize the sanctions of other States in accordance with the provisions of article 24.

2. The Court's rules of practice shall govern the recognition of the judgements of the Court by States Parties and those of the other States by the Court.

Article 31

TRANSFER OF OFFENDERS AND EXECUTION OF SENTENCES

1. In the event the International Penal Tribunal does not have detentional facilities under its direct control it may request a State Party to execute the sentence in accordance with that Party's correctional system and in that case the Court shall continue to exercise jurisdiction over the offender including his transfer to another State or facility.

2. In the event the International Penal Tribunal has placed an offender in its own detention facilities, this person may by agreement be transferred for detention to his country of origin subject to the Court's jurisdiction.

3. The Court's rule of practice shall determine the basis and condition of the transfer of offenders and the execution of sentences.

PART VII. TREATY PROVISIONS

Article 32

ENTRY INTO FORCE

1. This Convention is open for signature to all States, including after its entry into force.

2. This Convention is subject to ratification, instruments of ratification being deposited with the Secretary-General of the United Nations.

3. Accession to this Convention shall be effected by deposit of an instrument of accession with the Secretary-General of the United Nations.

4. This Convention shall enter into force on the thirtieth day after the deposit of the sixth instrument of ratification or accession, and for States thereafter ratifying or acceding to this Convention, on the thirtieth day after deposit of the applicable instrument.

5. The Secretary-General of the United Nations shall inform all signatory States of:

(a) All signatures, ratifications, accessions and reservations to this Convention; and

(b) The date of entry into force of this Convention.

6. This Convention, of which the Arabic, Chinese, English, French, Spanish and Russian texts are equally authentic, shall be deposited in the archives of the United Nations and copies thereof shall be transmitted to all signatories.

Article 33

RESERVATIONS

1. States may make any reservations to this Convention but shall not be deemed States Parties for the purposes of representation in the Standing Committee if the reservation is as to a material aspect of the Tribunal's jurisdiction, competence and the effects of its judgements.

2. The Secretary-General shall keep separate count of signatories making reservations not in conformity of paragraph 1 of this article.

Article 34

INITIAL IMPLEMENTAL STEPS

1. Upon entry into force of this Convention, the Secretary-General of the United Nations shall call the first meeting of the Standing Committee, and shall preside over that meeting until a presiding officer is chosen.

2. The Standing Committee shall undertake as its first order of business measures toward election of judges of the Court.

Article 35

AMENDMENTS

1. This Convention may at any time be amended by a vote of three-fourths of the members of the Standing Committee, subject to ratification of such amendments by the same number of States Parties represented in the Standing Committee.

2. Upon petition by a State Party to the Standing Committee the jurisdiction of the Court may be expanded to include additional crimes or classes of offenders and measures in respect of guilt when this is sought by a State capable of exercising compulsory process upon the accused; and this may be on either an ad hoc or permanent basis and shall be embodied in a supplemental agreement between the requesting State and the presiding officers of the Standing Committee acting for and on behalf of the said Standing Committee.

COMMENTARY

DRAFT CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL PENAL TRIBUNAL FOR THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID AND OTHER INTERNATIONAL CRIMES

General Observations

The International Convention on the Suppression and Punishment of the Crime of Apartheid (hereinafter referred to as Apartheid Convention) in article V is the only international convention which specifically contemplates an "international penal tribunal." No other international convention, which has as its objective to criminalize a certain conduct, contains a similar requirement. In fact only the Convention on the Protection and Punishment of Genocide incidentally recognizes the eventual jurisdiction of an International Criminal Court. The introductory notes to this study, seek to retrace the history of the creation of an International Criminal Court and cite appropriate authorities. It remains, however, that the only international legislative authority for an International Penal Tribunal is the Apartheid Convention. Consequently, this draft Convention relies on this legislative basis as its authoritative source. Thus, having secured an international legislative basis, nothing precludes the States parties to this draft Convention from enlarging upon its jurisdiction by a device referred to in this draft Convention as "Supplemental Agreement" in order to permit the International Penal Tribunal to investigate, prosecute, adjudicate and punish other conventional international crimes.

The approach, though characterizable as "direct enforcement model" [See M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (1980)] meaning the existence of an international system for the investigation, prosecution, adjudication and punishment of international crimes, is nevertheless dependant upon States parties for substantial aspects of its functioning. Thus there is in this approach still much of the "indirect enforcement model" which characterizes contemporary international criminal law in that States assume certain international duties which they enforce through their national systems. In that respect the enforcement mechanisms of the International Penal Tribunal rely on the "indirect enforcement model." Such an approach by necessity must not only rely on the voluntary compliance of States, but must also accept the inherent differences of national legal systems through which enforcement of the Tribunal's functions and orders are to be channelled.

The Court and the investigative and prosecutorial functions are internationally institutionalized, as is contemplated by the 1979 International Law Association Draft Statute of an International Criminal Court and its 1978 Draft Statute for An International Commission of Criminal Inquiry. Such institutional mechanisms solve some problems, but not others due to the absence of an international legislative apparatus.

To remedy this situation a quasi-legislative body is created in the form of the "Standing Committee of States Parties" which is given policy and administrative functions. Furthermore, a rule-making power is given to the organs of the Tribunal subject to certain "standards" of international fairness embodied in the draft Convention.

The administrative needs of the Court are met by a Secretariat, which also provides support to the other organs of the Tribunal and serves as a vehicle for assuring that record-keeping and registry functions as well as other requirements essential to fairness and effectiveness are met.

In view of the conceptual framework chosen and outlined above, an appropriate organizational approach was adopted in the formulation of the sequence of the provisions of the draft Convention:

Part I: Nature of the Tribunal and its organs and powers

Article 1	Purposes
Article 2	Nature of the Tribunal
Article 3	Organs of the Tribunal
Article 4	Jurisdiction
Article 5	Competence
Article 6	Subjects upon whom the Tribunal shall exercise its jurisdiction
Article 7	Sanctions

Part II: The Penal Processes of the Tribunal

Article 8	Initiation of process
Article 9	Pre-trial process
Article 10	Adjudication
Article 11	Sanctioning
Article 12	Appeals
Article 13	Sanctions and supervision

Part III: Organs of the Tribunal

Article 14	The Court
Article 15	The Procuracy
Article 16	The Secretariat
Article 17	The Standing Committee
Article 18	General institutional matters

Part IV: Tribunal Standards

Article 19	Standards for rules and procedures

Part V: Principles of Accountability (Provisions in the Nature of a General Part)

Article 20	Definitions
Article 21	Responsibility
Article 22	Elements of an international crime
Article 23	Immunities
Article 24	Penalties
Article 25	Exoneration
Article 26	Statute of limitation

Part VI: Duties of States Parties

Article 27	General principles
Article 28	Surrender of accused persons
Article 29	Judicial assistance and other forms of co-operation
Article 30	Recognition of the judgements of the International Penal Tribunal
Article 31	Transfer of offenders and execution of sentences

Part VII: Treaty provisions

Article 32	Entry into force
Article 33	Reservations
Article 34	Initial implementation steps
Article 35	Amendments

PART I: NATURE OF THE TRIBUNAL AND ITS ORGANS AND POWERS

This text relies in part on article I of the Revised draft statute for an international criminal court (A/2645), prepared by the United Nations 1953 Committee on International Criminal Jurisdiction (the Geneva Committee) hereinafter referred to as the 1953 Geneva Committee draft and the draft statute of an international criminal court of the International Law Association (ILA), of May 1979, in proceedings of the International Law Association's Belgrade Conference, 1980, p. 11, hereinafter referred to as 1979 ILA Draft.

Article 1 - Purposes. Establishes an International Penal Tribunal which is to be a new international legal institution consisting of several organs discussed in article 3 below. The legislative authority of the Tribunal and, of course, all of its organs is predicated on Article V of the Apartheid Convention. But this draft Convention provides States parties with the opportunity to include, by Supplemental Agreement, within the jurisdiction of the Court other international crimes which are defined in article 4, paragraph 2.

Article 2 - Nature of the Tribunal. Considers the Tribunal as a newly created institution and in order to minimize logistical problems the suggested location is the Palace of Justice in The Hague since it is already established and equipped as an international judicial body. The official languages are those of the United Nations which represent a recognized world consensus.

Article 3 - Organs of the Tribunal. Establishes four bodies with separate functions and purposes which are described throughout Part II in the allocation of their respective duties in connection with the penal processes but which are more adequately described in Part III though that Part deals more with the institutional and operational aspects of these organs. It is important at this juncture to conceptualize the inter-relationship of these organs which are, with respect to the Court, the Procuracy and the Secretariat, very similar to the traditional organs of the national penal systems of most countries of the world. Clearly an attempt has been made to integrate different institutional concepts which are represented by the major criminal justice systems of the world (see Bassiouni, "A Survey of Major Criminal Justice Systems of the World" in Handbook of Criminology ed. D. Glaser (1974)). In effect, the Court as an organ of the Tribunal and its functions does not differ from their traditional role in any legal system. The distinguishing characteristics pertaining to the role of the judges and the degree of their

discretion in the conduct of the proceedings are left to the formulation of the rules of the Court which are to be promulgated as specified in article 18 and subject to those minimum standards of fairness embodied in international instruments for the protection of human rights which are stated in Part IV.

The Procuracy is a combination of the Soviet Union and Eastern European Socialist systems (see M.C. Bassiouni and V. Savitski, The Criminal Justice System of the USSR (1979); the judge of instruction in the Romanist-Civilist system (M. Ancel and Y. Marx, Les Code Penaux Europeens, three volumes (1958)) and the Common Law system's prosecutor (Archbold Pleading, Evidence and Practice in Criminal Cases (39th ed.) S. Mitchell ed. (1976) and Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure (1980)). In balance, there is more emphasis toward the Romanist-Civilist tradition than to the Common Law tradition since it would be more consonant with the need for effective investigation and prosecution of international crimes subject to the guarantees enunciated in Part V which are adequate to secure individual human rights protection.

The Secretariat fulfills the traditional administrative support functions as well as the functions of court registrar.

The Standing Committee is a novelty in the structural approach to the creation of new international institutions. To a large extent the Standing Committee is to the organs of the Tribunal what the General Assembly is to the United Nations. It represents the States parties, assists in insuring compliance with the provisions of the Convention and oversees the administrative and financial affairs of the Tribunal.

Article 4 - Jurisdiction. The jurisdiction of the Tribunal is limited to what is defined in paragraph 1 as "grave breaches" of the Apartheid Convention. The analogy here is to the conception of grave breaches in the Four Geneva Conventions of 12 August 1949 (For the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, United Nations, Treaty Series, vol. 75, p. 31; For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, ibid., p. 85; Relative to the Treatment of Prisoners of War, ibid., p. 135; Relative to the Protection of Civilian Persons in Time of War, ibid., p. 287; and in the Protocols Additional to the Geneva Convention on 12 August 1949, 19 June 1977 (ICRC, August-September, 1977)). In addition, paragraph 2 defines those additional international crimes which may be part of the Court's jurisdiction by Supplemental Agreement and binding only upon the States parties entering into such an agreement with the Standing Committee. International Crimes, however, are limited to those so declared in a multilateral convention and which can be so construed by the institution of penal procedures or the obligation to prosecute or extradite. This embodies the maxim aut dedere aut judicare which characterizes international crimes.

Paragraph 3 establishes the Tribunal's jurisdiction over such crimes and, of course, over persons and entities charged with them as universal in terms of its scope and in terms of the power of the Court.

The 1953 Geneva Committee draft does not define the crimes to be dealt with beyond the phrase "crimes generally recognized under international law," whereas the 1979 ILA draft incorporates by reference definitions of crimes in 16 international conventions, but notably omitting the Apartheid Convention.

Article 5 - Competence. While penal theoreticians may argue the merits of a distinction between jurisdiction and competence, it is suggested that jurisdiction establishes the Tribunal's geographic and subject-matter authority, and in personam authority, while competence determines the specific powers of the Court with respect to its jurisdiction and provides the legal framework of reference for the Tribunal's exercise of its jurisdictional authority.

Article 6 - Subjects upon whom the Tribunal shall exercise its jurisdiction. Though Article 4 on jurisdiction refers to the Court's authority over natural persons and legal entities, it was deemed of importance to emphasize this authority under a separate article though it may appear duplicative.

Article 7 - Sanctions. Only the Court upon a finding of guilty, subject to the provisions of this Convention, the procedures and rules which would be developed by the different organs and the standards of fairness set forth in Part V, can impose a sanction against a natural person or legal entity. Clearly deprivation of liberty applies to natural persons and not to legal entities but fines and injunctions apply to natural persons and legal entities. It is to be noted that there is no schedule of penalties affixed to any specific crime and to some this may raise a question of nulla poena sine lege. To avoid this problem the Convention preconizes that the Court shall enact appropriate and specific Rules on sanctions to be promulgated prior to the Tribunal's commencement of activities which would satisfy the element of notice. There is, however, the objection that such penalty will apply to persons who have committed "grave breaches" of the Apartheid Convention or violations of other international conventions made subject to the Court's jurisdiction by supplemental agreement (as discussed in the Commentary to articles 1 and 4) before the promulgation of these sanctions. In effect this would be tantamount to applying a penalty which was not promulgated at the time of the commission of a given crime. In some ways this may be deemed a violation of the principle nulla poena sine lege though it could be argued that if the penalty is commensurate with or equivalent to the same penalty provided for in the State in which the crime was committed for equivalent crimes the objection would lose much of its substance. If, however, the sanction is to be the same as that for the equivalent crime in the national legal system of the State in which the international crime had been committed the principle nulla poena sine lege would be complied with.

Part II: The penal processes of the Tribunal

Article 8 - Initiation of process

The desirability of such a process has substantial support. See General Assembly resolution 1187 (XII) of 11 November 1957. See also the note by the Secretary-General entitled "International Criminal Jurisdiction" (Official Records of the General Assembly, Twelfth Session, document A/3649) and the memorandum submitted by the Secretary-General of the United Nations entitled "Historical Survey of the Question of Criminal Jurisdiction" (United Nations publication, Sales No. 1949.V.8).

For a documentary history of the various projects for the creation of an international criminal jurisdiction, see B. Ferencz, The International Criminal Court (1980) 2 Vols. See also J. Stone and R. Woetzel, Toward a Feasible International Criminal Court (1970); 35 Revue Internationale de Droit Penal No. 1-2 (1964) devoted to that subject, and 45 Revue Internationale de Droit Penal No. 3-4 (1974) containing the contributions of the AIDP to V United Nations Congress on Crime Prevention and Criminal Justice, Geneva, September 1975 devoted to the

subject of "Creation d'une Justice Penale Internationale." The Revue Internationale de Droit Penal contained scholarly writings on this subject in its issues of 1928, 1935, 1945 and 1952 as well as others. The AIDP has traditionally supported the creation of an international criminal court as witnessed by the positions it has taken at its various International Congresses, and those of its distinguished members among them; Pella, Donnedieu de Vabres, Saldana, Graven, Jimenez de Asua, Setille, Cornil, Bouzat, Jescheck, Romoshkiin, Herzog, Glaser, Dautricourt, Quaintano-Rippole Arroneau, Mueller, De Schutter, Triffterer, Lombois, Plawski, Ferencz, Oehler, Zubkowski. Because of the numerous writings on the subject by the above-mentioned scholars and others it would be impossible to cite them all. For three more recent initiatives resulting in the submission of a draft statute, see the International Law Association, "Draft Statute for an International Commission of Criminal Injury" adopted by its International Criminal Law Committee in Paris May 1978 Proceedings of the International Law Association (Belgrade Conference 1980) p. 4; and "Draft Statute for an International Criminal Court," World Peace through Law, Abidjan World Conference August 1973 (edited by Robert K. Woetzel); and a "Draft Statute for an International Criminal Court" prepared by the Foundation for the Creation of an International Criminal Court, see also, K. de Haan "The Procedural Problems of a Permanent International Criminal Jurisdiction" in De bestraffing van inbreuken tegen het oorlogs - en het humanitair recht (A. Beirlaen, S. Dockx, K. de Haan, C. Van den Wijngaert, eds., 1980) p. 191.

The 1953 Geneva Committee draft, in article 29, provides that the penal processes could commence only by action of a State party. The 1979 ILA Draft in Article 23 allows only States to approach the Commission which at its turn would present a case to the Court. The procedures presented herein differ from the 1953 Geneva Committee draft and 1979 ILA Draft in that it concentrates the investigation and prosecution of any case with the Procuracy, but a State party, organ of the United Nations, intergovernmental organization, non-governmental organization and individual may file a complaint with the Procuracy which shall accept such communications. The Procuracy then makes an initial determination as to whether the complaint is "not manifestly unfounded" or "manifestly unfounded". That determination is quite similar to the one made by the European Commission on Human Rights as to complaints concerning violations of the European Convention on Human Rights. However, the Procuracy is not without controls as to its discretion in that a State party and an organ of the United Nations are entitled to recognition of their complaints as being "not manifestly unfounded" while other States and intergovernmental organizations are entitled to an appeal to the Court of a determination by the Procuracy that the complaint has been found "manifestly unfounded". Communications and complaints by individuals and non-governmental organizations are not entitled to the same status. The Procuracy's decisions are thus reviewable in the case of certain complaints and communications and a decision holding a complaint "not manifestly unfounded" will then travel two alternate channels: (a) the possibility of mediation and conciliation through the Standing Committee;(b) adjudication before the Court. A period of one year is allowed for the conciliation process which is the same period allowed for the Procuracy's investigation and preparation of the case. Thereafter the case may be presented to the Court at the request of the complaining State party or organ of the United Nations if it is the initiator of the complaint. Otherwise that period of one year is extendable subject to the Court's review.

Article 9 - Pre-trial process. A non-exhaustive list of orders that may be issued by the Court in aid of the preparation of a case is specified. It is expected that the Rules of the Court will go into the details of the form, content, and other formalities pertaining to these orders. They are among the traditional powers of either a Court, or a judge of instruction respectively in the Common Law and Romanist-Civilist tradition. Similar provisions may be found in the 1953 Geneva Committee draft, articles 40, 41, and 42, and in the 1979 ILA Draft, Articles 36, 37. It must be noted here that the Tribunal in general and the Court in particular will in this and in other respects rely on the co-operation of the States parties to implement its orders. It must also be noted that where a State party has with a State which is not a party, treaties or relations on the subject of extradition and judicial assistance and co-operation, the Court's orders and determinations of any sort would have an impact beyond that State party and thus give this Convention a multiplier effect with respect to its impact. (See e.g., V.E.H. Booth, British Extradition Law and Procedure (1980); C. Van den Wijngaert, The Political Offence Exception to Extradition (1980); M.C. Bassiouni, International Extradition and World Public (1974); I. Shearer, Extradition in International Law (1971); T. Vogler, Auslieferingsrecht und Grundgesetz (1969); Bedi, International Extradition (1968); A. Billot, Traite de l'Extradition (1874) and, M. Pisani and F. Mosconi, Codice delle Convenzioni di Estradizione E Di Assistenza Giudiziaria in Materia Penale (1979)). The observations made herein are also relevant to Part VI on the duties of State parties since such duties will not only extend to the carrying out of the obligations of this Convention within their own territories but also whenever possible in their relations with other States. It is clear that the carrying out and execution of all such obligations to assist the Tribunal where required by this Convention, and in particular Part VII, but a State party is only requested to act pursuant to its relevant national laws. It must, however, be noted that a State party cannot enact national laws which will frustrate the carrying out of the obligations arising under this Convention.

Paragraph 4 establishes a procedure analogous to an indictment, such as was proposed in articles 33 to 35 and 31 of the 1953 Geneva Committee and the 1979 ILA drafts respectively, by means of a Committing Chamber in the former and Commission processes in the latter. Under the present draft, however, this process is but a step toward determination as to guilt, it being unnecessary to give it special consequences because prior procedures in the Procuracy have been given appropriate consequences and progress under the present draft after the initial Procuracy action is gradual rather than involving thresholds.

The subparagraph (a) determination is primarily for the sake of efficiency, as a means of detecting any errors by the Procuracy as to the suitability of the matter for further action. Subparagraph (b) provides an opportunity for early consideration of whether misconduct in preparation of the case may have impugned the Tribunal's integrity in such a way to impair credibility or acceptability of its determinations, as well as for early consideration of non bis in idem (double jeopardy) problems. (See M.C. Bassiouni, Substantive Criminal Law (1978), pp. 499-512).

Subparagraph (c) is particularly intended to deal with the need to consider the possibility that non-co-operation of States, particularly non-parties, may render evidence of either incriminatory or exculpatory character unavailable, so that a fair trial of the case may be impossible. Early detection of problems of this type would not only be more efficient but also would tend to avoid unnecessary and difficult non bis in idem questions regarding aborted proceedings.

Article 10 - Adjudication. Paragraph 1 parallels articles 39 of the 1953 Geneva Committee draft and 35 of the 1979 IFA draft, conforming more closely to the latter, which makes no express provision for secret sessions. This treatment appears appropriate in that any confidential evidence may be submitted in public in a form or manner that protects essential matters of confidentiality such as identity of a witness or a particular technique for obtaining evidence, and the details for such presentations may be treated in rules of the Court and Procuracy, which may be elaborated at a time when the actual needs in this regard are clearer.

Paragraph 2 describes the inherent power of courts to dismiss cases, particularly in respect of evidentiary problems. Article 38, paragraph 4, of the 1953 Geneva Committee draft has a similar dismissal provision. No express provision is made for withdrawal of a matter, as was done in articles 43 and 38 of the Geneva Committee and ILA drafts, respectively, it being implicit in the nature of the powers of the Procuracy to determine whether to take such action.

Paragraphs 4 and 5 are self-explanatory.

It is contemplated that rules of the Court will address non bis in idem issues. Paragraph 3, it should be noted, relates to the principle of equality of arms, which has been observed under the European Convention on Human Rights. (Applications No. 596/59 and 789/60, Franz Pataki and Johann Dunshirn vs. Austria, Report of the Commission of 28 March 1963, Yearbook of the European Convention on Human Rights pp. 730, 734 (1963)).

Paragraph 6 is in part motivated by the availability of appeal and also the fact that Chambers, being constituted on a rotational basis, may be unavailable in their prior form for subsequent arguments. Details of the rotational constitution of Chambers are left for elaboration in Court rules.

Article 11 - Sanctioning. These provisions are self-explanatory, but this article is to be read in pari materie with article VII and the Commentary thereto and articles XIII and XXIV.

Article 12 - Appeals. Appeals from Chambers determinations and orders, which may be entered only on behalf of an accused or the Procuracy on questions of law, are permitted including post-conviction orders. This is consonant with the provisions of the International Covenant on Civil and Political Rights concerning the dual level of judgement and review.

No appeal is permitted for the accused under articles 49 and 43 of the Geneva Committee and ILA drafts, respectively. Also interlocutory appeals are permitted as practical necessity may require them.

Paragraph 6 on revision of judgements parallels articles 52 and 45 of the Geneva Committee and ILA drafts respectively, but is broader in scope.

Article 13 - Sanctions and Supervision. Paragraph 1 corresponds to article 46 of the 1979 ILA draft, Article 51 of the 1953 Geneva Committee draft having left such matters to future conventions. The terminology "sanctions" is capable of including not only punishments of imprisonment or fines, but also levies of compensation or injunctive orders, thus maintaining the possibility for such broad ranges of action.

As noted previously, the supervisory mechanism of paragraph 2 replaces the clemency and parole boards provided for by the Geneva Committee and ILA drafts, and appeal is made possible under paragraph 3.

It should be noted that these provisions govern only the procedures relating to sanctions. Standards relating to sanctions may be elaborated further in Court rules but subject to article 24.

Part III: Organs of the Tribunal

Article 14 - The Court. Except for mechanical differences, the terms of this article as to selection, tenure and replacement of judges closely parallel those of articles 4 through 12 and 15 through 20 of the 1953 Geneva Committee draft and 3 through 9 and 12 through 15 of the 1979 ILA draft, although the latter makes no provision for removal of judges.

This article represents an innovation, in that the other drafts dealt with a single court organ and created a separate clemency and parole board. As discussed below, the provision for separate functions of Chambers and the Court en banc permits appeals, a right called for in article 14, paragraph 5, of the International Covenant on Civil and Political Rights. Rather than create a separate institution to deal with such matters as clemency and parole it was deemed more efficient to have such functions performed by individual judges, subject to possible appeals from their decisions, as discussed in connection with article 12.

Paragraph 5 contemplates that judges will be elected with reference to specific terms. Accordingly, when a given judge is considered for re-election, any of the terms that are vacant at that time may be regarded as available for that judge.

Paragraph 7 addresses the concern that any conduct by a judge may create an appearance of impropriety, and narrowly circumscribes permitted non-Court activity.

Paragraph 11 is intended to permit judges to remain in their official capacity for the sole purpose of completing work on Court action begun prior to expiration of their terms.

Paragraph 12, it should be noted, does not bar re-election of the Court president.

Article 15 - The Procuracy. The significance of the three-part division of the Procuracy is apparent in connection with budgets and reports and transfer of cases from investigative to prosecutorial divisions, as well as to the rights of the accused.

Paragraph 2, providing for joint action by the Court and Standing Committee for selection of a Procurator, appears appropriate because such an officer should be politically acceptable and States are in a superior position to become aware of suitable candidates, while the Court is in a superior position to judge legal competence and estimate probable devotion to impartiality. Removal power is vested in the Court in the belief that deficiencies of the kind the Court would be likely to note would be the appropriate bases for dismissal.

Deputies are placed under control of the Procurator in paragraph 4 in the interest of effective management.

Article 16 - The Secretariat. Although most of the functions of the Secretariat are ministerial in character, its duties to oversee communications and prepare reports serve an inspectorate function as well. Accordingly, control over the Secretariat is vested in the Court, as a neutral body.

Article 17 - The Standing Committee. The 1953 Geneva Committee draft assumed that the court created under it would be a part of the United Nations, and therefore any governing-body needs or political issues regarding its operations would be addressed by the political organs of the United Nations, especially the General Assembly. Under the 1979 ILA draft, a similar assumption appears to have been made in that no treaty-type provisions are included and, although references are made to "Contracting Parties," this term appears to mean only States that have consented to be subject to operation of the court. Nevertheless, the commission contemplated in the ILA drafts would have had a somewhat political character, in that only nationals of States consenting to be subject to operations of the commission could have been members and the commission's own statute is referred to as a "Convention" in its article 3.

The present Statute, in contrast, would be entirely conventional in character, although there are various express provisions for co-ordination of action with the United Nations. Accordingly, the need for an organ to deal with governance of the Tribunal and political issues relating to its activities promoted provision for a Standing Committee. It should be noted that the express functions of the Standing Committee are of a governing-body nature for the most part, and that its functions beyond these are largely unspecified. This would permit the representatives of States parties who constitute that organ to have wide flexibility in pursuing non-juridical matters helpful to international criminal justice. The requirement of meetings twice a year assures that the Standing Committee will be available for consultation on political questions.

One of the most significant functions of the Standing Committee may be in Articles 17, paragraph 6, with respect to proposing action to initiate and propose new norms of international criminal law or standards for its application by the Tribunal. In view of the vagueness of existing instruments purporting to define international crimes, such proposals and adoption may be essential in order that criminal responsibility may be dealt with without violating the principle of nulla peona sine lege.

It should be noted that this article does not contemplate deprivation of the status of State party in response to non-payment of financial support, but mere suspension.

No provision has been made for terms of representatives, it being assumed that their tenure shall be at the pleasure of the appointing State.

Article 18 - General institutional matters. Paragraph 1 rules, it should be noted, are subject to further provisions in Article 19. Recognition that flexibility should be provided for such rules was expressed in article 24 of the 1953 Geneva Committee draft and article 10 of the 1979 ILA draft. Court approval of rules for the Procuracy and Secretariat appears appropriate in view of the need to assure that such rules are fair and conform to legal requirements. Participation by the Procurator in formulation of Court rules recognizes the desirability that such rules interrelate properly with Procuracy procedures and capabilities.

Paragraph 2 gives the Court, a neutral body, a key role in shaping the budget of the Tribunal, but leaves a veto power with the Standing Committee, which represents the States obliged to meet the budget. Prior draft statutes did not deal in detail with budgetary approval. See 1953 Geneva Committee article 23 and 1979 ILA article 17.

Paragraph 5 parallels article 14 of the 1953 Geneva Committee draft, which has no counterpart in the 1979 ILA draft, as to judges. Expansion to other Tribunal officers is clearly appropriate. Expansion to other parties before the Court is necessary in the interest of fairness. (See. e.g., the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (Council of Europe, May 1969; E.T.S. No. 69)).

Paragraph 6's requirement of a solemn declaration parallels article 13 of the 1953 Geneva Committee draft and article 11 of the 1979 ILA draft, but is expanded to include officers of the Tribunal.

Part IV: Tribunal standards

Article 19 - Standards for rules and procedures. The standards of fairness which are to be guaranteed in all proceedings before the organs of the Tribunal and which are to be reflected in the rules to be promulgated by the said Organs enboding those rights are contained in the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1980 Body of Principles on the Protection of Persons from All Forms of Arbitrary Arrest and Detention, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the 1969 Inter-American Convention on Human Rights. These standards are also embodied in the resolutions of the XIIth International Congress of Penal Law held in Hambourg 1979 whose draft and explanatory notes are in 49 Revue International de Droit Penal vol. 3, 1978. These provisions are particularly consonant with the European Convention for the Protection of Human Rights and Fundamental Freedoms and Additional Protocols. (See A. Robertson, Human Rights in Europe (1977), and D. Poncet, La Protection de l'Accusé par la Convention Europeènne des Droits de l'Homme (1977). See also, e.g., L. Sohn and T. Buergenthal, International Protection of Human Rights (1973)).

Part V: Principles of accountability (provisions in the nature of a General Part)

The principles of accountability set forth in Part VI are from the General Part of the Draft International Criminal Code in M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (Sijthoff, 1980).

Article 20 - Definitions. Paragraph 1 defines international crimes with reference to the Convention, thus permitting expansion.

Paragraph 2 incorporates by reference the definition of a State as recognized under international law. This approach was preferred to repetition of one of the generally accepted formulations of a definition of a State because use of such a formulation would call for definition of the terms used in it, such as the Montevideo Convention's provision that a State has the capacity to conduct "international relations". See the Convention on the Rights and Duties of States of 26 December 1933 (United Nations, Treaty Series, vol. 165, p. 19). See also, United Nations debates on statehood in connection with Israel and Liechtenstein (Official Records of the Security Council, Third Year, 383rd meeting, No. 128, pp. 9-12, and ibid., Fourth Year, 433rd meeting, No. 35, pp. 4-5).

For the sake of convenience, the term "State" is deemed to include groups of States acting collectively.

Paragraph 3 exemplifies a correlation between "person" and individual", and confines the meaning of these terms to exclude such entities as corporations or other so-called juridical persons.

Paragraphs 4 and 5. Begin with another correlation for the sake of convenience, with respect to the terms "group" and "organization." The definition is provided because of the use of these terms in provisions dealing with collective responsibility, which is discussed below.

Paragraph 6. On participation in a group action is designed for the same purpose. The model of responsibility arose out of the Nuremberg trials and Tokyo war crimes trials. (See article 9 of the London Charter of 8 August 1945, Control Council Ordinance No. 10 of 20 December 1945; for a discussion of the basis of this responsibility and the cases decided at Nuremberg and Tokyo, see L. Friedman, The Law of War: A Documentary History (1972); see also Wright, History of the United Nations War Crimes Commission (1949)).

Paragraphs 7 and 8. Are basically the provisions of the Model Penal Code relating to solicitation and conspiracy, American Law Institute Model Penal Code (1962). (See generally M.C. Bassiouni, Substantive Criminal Law (1978), and W. LaFave and A. Scott, Criminal Law (1972) see also for a comparison with the German Penal Code, G. Fletcher, Rethinking Criminal Law (1978)).

The definition of "solicitation" was found to be workable under civil law, as well as common law systems. On the other hand, the concept of conspiracy is not generally recognized under the civil law systems, so that inclusion of this term required a common law definition even though the requirement of an "overt act" brings such a definition close to preparatory acts in civilist-Romanist systems. (See R. Merle and A. Vitu, Traite de Droit Criminel (1967). It is to be noted that conspiracy and participation in a group action are separate terms with separate definitions. The concept, however, is found in the Nuremberg and Tokyo War Crimes trials.

In paragraph 9, "Attempt" was given a definition based on the Model Penal Code, but with modifications reflecting the concern of civil law jurists. For example, the term "preparation" has been omitted and "substantial step" has been amplified by the addition of the words "unequivocal and direct." This modification was intended to provide a meaning that would be recognized under civil law as being as limited as the meaning that these provisions would be given under common law systems. See Fletcher, op. cit.

The definitions for the terms "participation in a group action," "solicitation," "conspiracy" and "attempt" are provided in the "General Part." Such conduct in reference to the proscriptions of the "Special Part" is included in the "General Part" as opposed to the "Special Part" as is more consonant with the civil law system. (See generally R. Merle and A. Vitu, Traite de Droit Criminel (1967); P. Bouzat and J. Pinatel, Traite de Droit Penale (mise a jour 1975); H.H. Jescheck, Lehrbuch des Strafrechts (1975)).

Paragraphs 10 and 11. Deal with "person in authority" and "omission" and are included for the purpose of criminalizing failure of persons in authority to fulfill their legal duties arising out of any specific duty referred to in the "Special Part."

It is clear that the definitions provided reflect a certain conceptual choice and the attempt to integrate civilist-Romanist and common law principles and those principles which have emerged from the history and practice of international criminal law. (In that respect see S. Glaser, Infractions Internationale (1957) and S. Plawski, Etude des Principes Fondamentaux du Droit International Penal (1972)).

Article 21 - Responsibility. The basis of responsibility of accountability follows the "Definitions" and precedes "Elements of an International Crime" because of the view that the various levels and types of accountability should be set forth first so as to define to whom and on what basis responsibility can be imputed. This approach neither fits the common law nor the civil law models. It was deemed appropriate subject to the special status of these Tribunals and the historical peculiarities of international criminal law in light of the precedents of the Leipzig War Crimes Trials, though these were subject to German laws, and the Nuremberg and Tokyo War Crimes Trials. There is no analogy to be found in the writings of scholars to that approach. This identification of criminally accountable subjects should be read in pari materiae with the Provision on "Definitions."

Under paragraph 1 through 5, criminal responsibility is assigned not only to committing a crime, but also to attempting, soliciting or conspiring to commit any crime. However, because the element of harm is required unless that requirement is modified by the definition of the specific offence, criminal responsibility for acts not constituting a "commission" are controlled by the definitions of the crime, which may have a different requirement. Other provisions relating to individual responsibility are taken from parallel provisions of national penal codes. It was noted that the provision relating to responsibility for acts of others is not intended to create a new crime, but rather to express the principle of derivative responsibility which exists in one way or another in every penal system. These provisions are more in conformity to the common law approach than to the continental approach.

The provisions regarding group responsibility were framed to serve two purposes: to make groups themselves accountable under the Article dealing with penalties, and to prevent an individual from escaping responsibility where he provided a group with continued intangible support despite its foreseeable criminal conduct as reflected in the principles of the Nuremberg and Tokyo War Crimes Trials. Special provision is made for responsibility of persons in authority in order to incorporate responsibility for failure to act. This provision is based on military law and command responsibility as it is incorporated in the Four Geneva Conventions of 12 August 1949 and in particular in the 1977 Additional Protocol Amending the Geneva Conventions of August 12, 1949 concerning failure of superiors to control acts of subordinates and other sources of international criminal law.

Paragraph 6, on State responsibility, is essentially drawn from the draft principles of State responsibility (A/CN.4/246) adopted by the International Law Commission. P. Guggenheim, Traite de Droit International (1952) and C. Eagleton, The Responsibility of States in International Law (1928); Strupp, Handbuch des Volkerrechts - Das volkerrechtliche Delikt (1920) and more recently, F. Munch, Das volkerrechtiliche Delikt (1963) and H.H. Jescheck, Die Verantwortlichkeit der Staatsorganen - Nach Volkerstrafrecht (1952)).

These provisions are intended to cover both responsibility for failure to act and non-state entities that subsequently become states by analogy to principles of state succession in international law. (See generally D.P. O'Connell, State Succession in International Law (1967)).

Article 22 - Elements of an international crime. This provision seeks to synthesize common law and civil law concepts as well as to take into account fundamental principles of international criminal law in providing for and defining the four essential elements of an international crime. There seems to be agreement on the need for all such elements, even though there are divergences with respect to the meaning and content of each one. Probably the most authoritative work on the subject is Stefan Glaser, Infraction Internationale (1957). In it, Glaser starts, as does this Article, with the material element, but then interjects certain legal justifications before dealing with the mental element. He concludes his work with participation and complicity. In this respect, a conceptual difficulty arises and the choice was to separate the required elements of a crime from the "responsibility," and conditions of "exoneration." The approach of dividing "Responsibility," "Element of an International Crime," and "Exoneration" into three different provisions seeks to avoid doctrinal differences between common law and civil law by devising a neutral approach.

The material element satisfies both the common law and civil law systems, as does to a great extent the mental element, though it is couched in more objective terms.

In recognition of the fact that most civil law criminal codes do not specify causation as a separate element, the element of causation could be interpreted as included in the material element of a crime in civil law systems and separate for common law systems.

It was agreed that the mental element should not extend to mere negligence, but it was feared that mere exclusion of negligence would result in responsibility under civil law systems for mental states between mere negligence and recklessness. Accordingly, the decision was made to list the mental states of intent, knowledge, and recklessness with the understanding that recklessness went beyond the dolus eventualis, described under the 1976 German Penal Code as a state of mind such that the person knew that harm would result.

For common law systems, however, a separate provision on causation was added.

The fourth such element, harm, was recognized as requiring interpretation in connection with the offence in question. It was determined that provision should be made for circumstances where an offence did not require an outcome whose character would match the usual meaning of the word "harm." Similar concern was voiced regarding the element of causation, so that it was determined to qualify the listing of elements with a clause providing that these elements may be altered by the definition of a given crime.

Article 23 - Immunities. This provision is set forth immediately after principles of responsibility and imputability, the elements of a crime, because of the peculiarity of international law with respect to immunities which derive from the principles of sovereignty. (See Sutton, "Jurisdiction Over Diplomatic Personnel and International Organizations' Personnel for Common Crimes and for Internationally Defined Crimes," in M.C. Bassiouni and V.P. Nanda, A Treatise in International Criminal Law (1973), Vol. II, p. 97. See also Oppenheim, International Law (8th ed., Lauterpacht, 1955), p. 757; Harvard Research on International Law, Diplomatic Privileges and Immunities, 26 A.J.I.L. 15-187 (Supp. 1932); and Immunite, Extraterritorialite et Droit d'Asile en Droit Penal International, 49 Revue Int'le de Droit Penal, No. 2 (1978)).

This text is based on the provisions of: 1961 Vienna Convention on Diplomatic Relations; 1963 Convention on Consular Relations; 1968 United Nations Draft Convention on Special Missions; 1946 Convention on the Privileges and Immunities of the United Nations; 1947 Convention on the Privileges and Immunities of the Specialized Agencies; Draft Articles on the Representation of States in their Relations with International Organizations of the International Law Commission, 1972; Draft Articles on the Protection and Inviolability of Diplomatic Agents and Other Persons Entitled to Special Protection Under International Law, of the Organization of American States, 1971; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance, 1971; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents; the General Agreement of Privileges and Immunities of the Council of Europe of 1949, the Supplementary Agreement of 18 March 1950, and the four additional Protocols to the General Agreement on Privileges and Immunities of the Council of Europe (1952, 1961).

The text also takes into account customary principles of international law on the immunity of Heads of State and the practice of states. The nature of the immunity provided herein is, however, more narrowly circumscribed, as it is not absolute. The text obligates the Contracting Parties whose national is the subject of any immunity category contained herein to take appropriate action against such persons, but permits waiver of that jurisdiction in favour of the International Court much as do the NATO and Warsaw Pact countries on Status of Forces Agreement; (see Coker, "The Status of Visiting Military Forces in Europe," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law (1973) Vol. II, p. 115.)

Article 24 - Penalties. Separate provisions are made for punishment of different types of offenders, all subject to the requirement in Section 1 that punishment by proportional to seriousness of the violation and the harm threatened or caused as well as to the degree of responsibility of the actor.

The Court is directed to develop appropriate Rules before exercising its jurisdiction. It must be noted that principles of legality are not violated by these provisions because the Court should first promulgate the penalties and the criteria for their application.

Paragraph 3 recognizes the principle of the Nuremberg Tribunals that organizations as such may be punished by means of fines. (See Dinstein, infra). This provision goes beyond continental principles.

Paragraph 4, punishment of states by imposition of fines is provided, it being considered beyond the scope of the court's ability to impose other sanctions. (See Triffterer, "Jurisdiction Over States for Crimes of State," and Baxter, "Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law (1973) Vol. II, pp. 86-96 and 65-85. See also Munch, "State Responsibility in International Law," in Bassiouni and Nanda, supra, Vol. I, pp. 143 et seq.; C. Eagleton, The Responsibility of States in International Law (1924); C. de Visscher, La responsabilite des Etats (1924); F. Munch, Das volkerrechtliche Delikt (1963); J. Castillon, Les Reparations allemandes - Deux experiences (1919-1932, 1945-1952), (1953), and H.H. Jescheck, Die Verantwortlichkeit der Staatsorganen - Nach Volkersstrafrecht (1952)).

Paragraph 5 confers discretion on the court whether to impose cumulative sentences for crimes arising from a single transaction.

Paragraph 6, dealing with mitigation, provides for the possibility that the fact that an accused was acting under orders could be considered a mitigating factor. This reflects the content of Article 8 of the London Charter of 8 August 1945 establishing the International Military Tribunal at Nuremberg. (See Y. Dinstein, The Defense of "Obedience to Superior Orders" in International Law p. 260 and 283 (1965)).

Article 25 - Exoneration. While the civil law system would view the conditions of exoneration listed in this Article as a questionable combination of principles of responsibility and legal defence, it was felt that a single provision containing all conditions which ultimately result in exoneration from responsibility, irrespective of their doctrinal or dogmatic basis should be placed together, as it gives these aspects a sense of cohesion and practical use by an international tribunal.

The self-defence provision in paragraph 2, is based on that contained in article 2, paragraph 2(a) of European Convention for the Protection of Human Rights and Fundamental Freedoms as well as on the language used in the Model Penal Code. The requirement that the defender reasonably believes that forceful response is necessary is a common law requirement which is superfluous for civil law systems. On the other hand, the introduction of the requirement that the response be to an "imminent" use of unlawful force may be viewed under the common law as surplusage.

The defence of necessity is limited in paragraph 3 to use of force not likely to produce death as a policy decision to restrain individuals.

Coercion, under paragraph 4, was limited as a defence to situations where the threat or use of force is "imminent."

Paragraph 5 makes obedience to superior orders a defence where the person accused was not in a position to know of the criminal nature of his acts. Conversely, paragraph 6 protects persons from prosecutions for refusing to follow orders to commit crimes.

Paragraph 7 adopts the formulation of the Model Penal Code relating to mistake of law or fact, conditioning this defence on negation of criminal intent.

Paragraph 8, on double jeopardy, simply seeks to give effect to the principle non bis in idem. The fourth paragraph recognizes the competence of the International Criminal Court to overlook pardons and amnesties of other jurisdictions in order to avoid that states resort to that practice from negotiating a person's punishability. It applies to the actual conduct involved rather than to any legal characterization of that conduct by any State.

Paragraph 9 is based on the Model Penal Code's provision on the defence of insanity. This differs from civilist systems where such a condition is deemed a pre-condition to criminal responsibility.

Paragraph 10 on the defence of intoxication springs from the same source, and excludes voluntary intoxication as a defence to crimes requiring intent.

The renunciation principles set forth in Section 11 also stem from the Model Penal Code but are in keeping with the continental approach.

This provision includes principles of justification, conditions negating criminal responsibility, excusability and procedural defences. From a Romanist-Civilist perspective it is doctrinally challengeable on the very grounds that it encompasses too much diversity. However, its justification rests on pragmatic reasons which avoid the dogmatism that has been at the basis of so much debate between European penalists for so long.

Article 26 - Statute of Limitation. The approach adopted measures the limitation period by the maximum potential penalty required for similar offences under the national law of the State where the crime was committed as is the case under penalties. It should be noted that, under this approach, where the maximum penalty is life imprisonment or death, there is no limitation period. Also, it was necessary to add paragraph 1 (c) because offences by States are punishable only by fines under this Code. This approach was preferred notwithstanding the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, of 9 December 1968 (see also 39 Revue Internationale de Droit Penal (1968) dedicated to this topic, and the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 1974). In fact, the result of this approach and that of the Conventions referred to above, is for all practical purposes the same except for minor offences and in fact avoids the difficulties which have prevented the ratification of these treaties by a number of states.

Part VI: Duties of States parties

Article 27 - General principles. The basis of international enforcement and co-operation derives from the maxim aut dedere aut judicare from Hugo Grotius, De Jure Belli ac Pacis (1624). It is now recognized as a general principle of international law to "prosecute or extradite"; (see Bassiouni, "International Extradition and World Public Order," in Aktuelle Problems des Internationalen Strafrechts (1970) pp. 10, 15 (ed. D. Oehler and P.G. Pötz)) and it is the conceptual basis of the indirect enforcement scheme, that international criminal law has relied upon. It is embodied in international criminal law conventions. The mechanism by which the indirect enforcement scheme operates, is that a state obligates itself under an international convention to include appropriate provisions in its national laws which would make the internationally proscribed conduct a national crime. This approach is found in all international criminal law conventions establishing such a duty upon its Contracting Parties. (See e.g., the Four Geneva Conventions of 12 August 1949 in their respective Articles 49-50/50-51/129-130/146-147). It is also the case with respect to all other international criminal law conventions.

Article 28 - Surrender of accused persons. Surrender of the accused is equivalent to extradition. Because of the importance of extradition in this enforcement scheme, it is covered herein with as much detail as possible in light of existing problems perceived in the practice. The "political offence exception" is excluded from all international crimes herein. (See article VII of the 1948 Genocide Convention; the European Convention on the Suppression of Terrorism of 27 January 1977; the 1973 Draft Additional Protocol Amending the Geneva Conventions of 12 August 1949, Protocol I, Article 78. See also Bassiouni, "Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949," 8 Rutgers-Camden L.J. 185 (1977); D. Poncet and P. Neyroud, L'Extradition et l'Aisle Politique en Suisse (1976); C. Van den Wijngaert, The Political offence exception to extradition: The delicate problem of balancing the rights of the individual and international public order (1980)). The language used in this article is patterned after the

1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. (See e.g., M.C. Bassiouni, International Extradition and World Public Order (1974), and I. Shearer, Extradition in International Law (1971). See also the European Convention on the Suppression of Terrorism of 1979 and the European Convention on Extradition of 13 December 1957. See also, Legal Aspects of Extradition Among European States (Council of Europe, 1970). For different national perspectives, see 38 Revue Int'le de Droit Penal (1968), and T. Vogler, Auslieferungsrecht und Grundgesetz (1969). For a historical perspective, see A. Billot, Traite de l'Extradition, (1874). See also,M. Pisani and F. Mosconi, Codice Delle Convenzioni di Estradizione e di Assistenza Giudiziaria in Materia Penale (1979)). In general the laws of the requested State are applicable as is the case in all multilateral and bilateral extradition treaties.

Article 29 - Judicial Assistance and Other Forms of Co-operation. The requested party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting objects, records or documents to be produced in evidence.

The requested party shall effect service of writs and records of judicial decisions which are transmitted to it for this purpose by the requesting party. Service may be effected by simple transmission of the writ or record to the person to be served. Other formalities shall be established by Rules of the Court. See the 1959 European Convention on Mutual Assistance in Criminal Matters, and in part on the 1972 European Convention on Transfer of Proceedings in Criminal Matters. See also, Grutzner, "International Judicial Assistance and Co-operation in Criminal Matters," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law, Vol. 2, pp. 189 and 217-218 (1973). See also, Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters (Council of Europe, 1972); Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters (Council of Europe 1971); de Schutter, "International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries," 14 Neth. Int'l. L. Rev. 382 (1967); Grützner, International Judicial Assistance and Co-operation in Criminal Matters, and Markees, "The Difference in Concept Between Civil and Common Law Countries as to Judicial Assistance and Co-operation in Criminal Matters," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise in International Criminal Law, Vol. 2, pp. 189 and 171 (1973). See also, H. Grützner, Internationales Rechtshilfeverkehr (1967). For the text of these and other treaties see, M. Pisani and F. Mosconi, Codice Delle Convenzioni di Estradizione e di Assistenza Giudiziaria in Materia Penale (1979)).

Article 30 - Recognition of the judgements of the International Penal Tribunal. This article is applicable to: (a) sanctions involving deprivation of liberty; (b) fines or confiscations; (c) disqualifications. A State party shall under the conditions provided for in this Convention enforce a sanction imposed by the Court, and vice versa. (See the 1970 European Convention on the International Validity of Criminal Judgements. See also Aspects of International Validity of Criminal Judgements (Council of Europe, 1968) and Explanatory Report on the European Convention on the International Validity of Criminal Judgements (Council of Europe, 1970). See also Harari, McLean and Silverwood, "Reciprocal Enforcement of Criminal Judgements, 45 Revue Internationale de Droit Penal 585 (1974); D. Oehler, "Recognition of Foreign Penal Judgements and their Enforcement," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law, vol. II, p. 261 (1973); Schearer, "Recognition and Enforcement of Foreign Criminal Judgement," 47 Aust. L.J. 585 (1973); D. Oehler, Internationalen Strafrecht (1973). For the Benelux Convention, see Convention Concerning Customs and Excise, 5 September, 1972,

Belgium-Luxembourg-The Netherlands, United Nations, Treaty Series, vol. 247, p. 329. See also K. Kraelle, Le Benelux Commente, Textes Officiels 147, 209, 306 (1961); De Schutter, "International Criminal Co-operation: The Benelux Example," in M.C. Bassiouni and V.P. Nanda (eds), A Treatise in International Criminal Law, Vol. 2, p. 261 (1973). The Scandinavian countries' arrangement for recognition and enforcement of penal judgements is reproduced in H. Grützner, Internationales Rechtshilfeverkehr in Strafsache, pt. IV (1967). The arrangement between France and certain African states is reproduced in 52 Rev. Critique de Droit International Prive 863 (1973)).

Article 31 - Transfer of offenders and execution of sentences. This article relies on the concepts embodied in the 1970 European Convention on the International Validity of Criminal Judgements and the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. It also relies on the treaties on the execution of penal sentences between the United States and Mexico, 5 November 1976, between the United States and Canada, 2 March 1977, and between the United States and Bolivia, 10 February 1978, all treaties having entered into force. Furthermore, special reliance was placed on United States legislation implementing the above treaties, 18 U.S.C., Sections 4100-4115. (See Bassiouni, "Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada," 11 Vanderbilt J. Transnational L. 249 (1978); Bassiouni, "A Practitioner's Perspective on Prisoner Transfer," 4 Nat'l J. Crim. Defense 127 (1978); Abramovsky and Eagle, "A Critical Evaluation of the Newly-Ratified Mexican-American Transfer of Penal Sanctions Treaty," 64 Iowa L. Rev. 325 (1979) and Professor Vagt's response thereto in the same issue).

A scheme for transfer of offenders can be said to rely in part on the assumption that a given state will recognize the criminal judgement of another and of the Court. The manner in which this article is drafted makes that assumption. (See in particular article 6 of the 1970 European Convention on the International Validity of Criminal Judgements).

Part VII: Treaty provisions

The treaty provisions are somewhat standard, except for the reservations clause which though in keeping with the Vienna Convention on treaty interpretation also takes into account the relevant aspects of the "Advisory Opinion By The International Court of Justice on Reservations to the Convention on the Prevention and Punishment of Genocide," 1951 I.C.J. 15.

One of the conditions for this Convention's implementation is, of course, the need for the Standing Committee to be created and to start functioning and that is why a special provision has been made to that effect.

IV. DRAFT ADDITIONAL PROTOCOL FOR THE PENAL ENFORCEMENT OF THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

PART I: NATURE OF THE PROCESS

Article 1

PURPOSE AND INSTITUTIONAL FRAMEWORK

1. There are hereby established penal measures for the implementation of article V of the Convention on the Suppression and Punishment of the Crime of Apartheid, that is to say, adjudication of culpability and imposition of punishment for crimes of apartheid as stated in article II of the Apartheid Convention.

2. The following enforcement organs shall enforce the provisions of this Protocol according to their powers and duties as described in this Protocol: a Charging Committee; a Prosecutorial Commission; a panel of judges to adjudicate a crime of apartheid, hereinafter referred to as the "Tribunal"; and, a Standing Committee of States Parties.

Article 2

JURISDICTION AND COMPETENCE

1. The enforcement organs established in article 1 shall have the power to investigate, prosecute and adjudicate violations of the Convention on the Suppression and Punishment of the Crime of Apartheid, and, in the case of the Tribunal, to impose penal sanctions against those found responsible for the Commission of a crime of apartheid as defined in article II of the said Convention.

2. The enforcement organs established in article 1 shall have universal jurisdiction in their investigation, prosecution, adjudication, and punishment of the crime of apartheid.

3. The power and authority to investigate all complaints and claims of violations of the Convention on the Suppression and Punishment of the Crime of Apartheid shall be in the Charging Committee, whose functions are described in article 5.

4. The power and authority to prosecute cases whose investigation have been completed by the Charging Committee before the Tribunal shall be in the Prosecutorial Commission whose functions are described in article 6.

5. The power and authority to adjudicate criminal charges of apartheid, determination of guilt and innocence, and the imposition of sanctions on the basis of cases presented by the Prosecutorial Commission shall be in the Tribunal whose functions are described in article 7.

Article 3

SANCTIONS

1. The Tribunal shall have the power to impose the following sanctions with respect to the following types of persons who have been found to be responsible of the following types of conduct:

(a) Terms of deprivation of liberty and lesser penalties where the accused is a natural person who has been determined to be guilty of a "grave crime" under article II of the Convention on the Suppression and Punishment of the Crime of Apartheid, that is to say:

(i) Murder;

(ii) Torture;

(iii) Cruel, inhuman or degrading treatment or punishment; or

(iv) Arbitrary arrest and detention.

(b) Fines and injunctive orders where the accused is a natural or juridical person and has been determined to be responsible for any conduct prohibited by article II of the Convention on the Suppression and Punishment of the Crime of Apartheid.

(c) Terms of deprivation of liberty when the accused is a natural person, and fines where the accused is either a natural or a juridical person, and has been determined to be responsible for violations of lawful orders of the Court.

2. Procedural and other aspects of sanctions are described in article 8.

Article 4

SUBJECTS UPON WHOM THE ORGANS OF ENFORCEMENT SHALL EXERCISE THEIR JURISDICTION

The organs of enforcement shall exercise their jurisdiction over natural persons and legal entities as defined in Part VI.

PART II: THE PENAL PROCESS

Article 5

INITIATION OF THE PROCESS

1. A complaint or crime of violation of the Convention on the Suppression and Punishment of the Crime of Apartheid shall be brought by anyone to the Charging Committee who shall receive and investigate any such information.

2. Upon review of the information and on the basis of a majority vote by the Charging Committee that it believes a violation of the Convention has taken place it may submit it to the Prosecutorial Commission along with its investigation and findings to prosecute the person believed to have committed such a crime.

3. Nothing herein shall preclude the Charging Committee from undertaking any action other than submission of a case to the Prosecutorial Commission which would be in conformity with the intents and purposes of this Protocol and of the Convention on the Suppression and Punishment of the Crime of Apartheid.

Article 6

THE PROSECUTION AND PRE-TRIAL PROCESS

1. The Prosecutorial Commission shall undertake no action with respect to any alleged violation of this Protocol or of the Convention on the Suppression and Punishment of the Crime of Apartheid unless it is so instructed by the Charging Committee.

2. The Prosecutorial Commission upon being instructed by the Charging Committee to proceed with the prosecution of a given case shall prepare the said case for submission to the Court for adjudication.

3. In aid of such preparation the Prosecutorial Commission may request the Tribunal to issue orders in the nature of:

(i) Arrest warrants;

(ii) Subpoenas;

(iii) Injunctions;

(iv) Search warrants;

(v) Warrants for surrender of an accused so as to enable the accused to be transported to attend proceedings and to transit States without interference.

4. Any pre-trial order in aid of the preparation of a case for adjudication shall be issued by the Tribunal in accordance with the standards set forth in this Convention in Part V.

5. Prior to commencement of the adjudication on the ultimate merits of a given case, the Tribunal shall conduct a preliminary hearing to determine:

(a) Whether the case is founded in fact and law;

(b) Whether prior proceedings has the case in accordance with the principle of non bis in idem;

(c) Whether there are circumstances that would render the trial unreliable or unfair; and

(d) Set a schedule for the adjudication and determine relevant procedural questions pertaining to the adjudication.

6. After the preliminary hearing described in paragraph 5 above the Tribunal may either dismiss the case or hold it for adjudication.

Article 7

THE ADJUDICATION PROCESS

1. The Tribunal shall conduct its hearings in accordance with the standards set forth in Part V.

2. After hearing evidence and arguments in a public hearing except as the Tribunal may otherwise decide if it is in the best interest of the accused or in the best interest of justice the Tribunal shall deliberate in camera and shall thereafter upon reaching a determination announce its decision orally in summary fashion or by a complete reading of a written opinion in open Court.

3. If an opinion is announced orally in summary fashion the written opinion shall be submitted no less than 30 days from the date of the oral opinion.

4. The date in which the written opinion shall be deposited with the Secretariat of the Tribunal shall be the effective date of judgement.

5. Any judge may issue a separate concurring or dissenting opinion.

6. All decisions of the Tribunal shall take effect 30 days after the effective date of judgement in order to permit post-trial modifications of the Tribunal's determination as described in article 9.

Article 8

THE SANCTIONING PROCESS

1. Upon a determination by the Tribunal that the person charged is responsible for a crime within the jurisdiction and competence of the Tribunal, a hearing shall be held to determine the appropriate sanction for purposes of hearing evidence and arguments of mitigation and aggravation.

2. The Tribunal shall then pronounce its determination of the applicable sanction in accordance with article 3 of this Protocol.

3. Decisions relating to sanctions shall be reached and announced in the same manner as decisions regarding determination of responsibility as stated in article 7.

4. The sanctioning hearing shall be held anytime after the effective date of entry of the Court's determination of responsibility which is after 30 days of the date of recording of the judgement provided that no post-adjudication review procedures have been initiated pursuant to article 9. In the event that post-trial procedures have been initiated, the sanctioning hearing shall commence after the date of entry of judgement on the said hearing.

Article 9

THE POST-ADJUDICATION REVIEW PROCESS

1. Within 30 days of the effective date of entry of a determination of responsibility by the Tribunal the Prosecutorial Commission or the accused may file a petition for review with the Tribunal for purposes of vacating or modifying any part or all of the Tribunal's determination.

2. The bases upon which such a petition for review can be presented are:

(a) Discovery of evidence unknown at the time of the prior determination which if known at the time would have materially affected the outcome of the determination;

(b) The Court was misled as to material affecting the outcome of the determination;

(c) On the face of the record the facts alleged are not proven beyond a reasonable doubt; or

(d) The facts alleged and proved do not constitute responsibility for a crime of apartheid.

3. The Tribunal shall hold such hearings in accordance with the same standards and procedures set forth for adjudication of responsibility pursuant to article 6 of this Protocol.

4. Upon a determination on the merits of the petition for review the Tribunal shall announce its decision in the same manner prescribed in article 7 and the determination shall be final upon its recording.

PART III: THE ENFORCEMENT ORGANS

Article 10

THE TRIBUNAL

1. The Tribunal shall consist of five judges, no two of whom shall be of the same nationality, who shall be elected by representatives of States Parties to this Protocol acting through the Standing Committee of States Parties.

2. Election of judges shall be by secret ballot at a meeting called for that purpose by the Standing Committee of States Parties from a list of nominees submitted by States Parties, no more than two of which shall be submitted by the same State Party.

3. Nominees shall be distinguished experts in the fields of international criminal law and human rights or other jurists qualified to serve on the highest courts of their respective States.

4. In electing judges due consideration shall be given to the diversity of personal backgrounds and experience and to the representation of the major legal and cultural systems of the world.

5. Judges shall have no occupation or business that would conflict with the performance of their duties on the Tribunal.

6. Judges shall be compensated for time spent on Tribunal matters and on a basis proportionate to the salaries of judges of the International Court of Justice.

7. The five judges shall be elected for terms of three years, which can be renewed.

8. No judge shall perform any judicial function with respect to an accused of the same nationality or with respect to any matter with which the judge was involved in any other capacity.

9. A judge may withdraw from a case or be excluded for good cause by unanimous vote of the other judges.

10. A judge may be removed from the Tribunal for good cause by a unanimous vote of the other judges.

11. Except with respect to judges who have been removed, judges may continue in office beyond their term as acting judges until their replacement assumes the office and shall continue in office to complete work on any pending matter in which they were involved.

12. The judges of the Tribunal shall elect a President and such other officers as they deem appropriate. The president shall serve for a term of one year which is renewable.

Article 11

THE CHARGING COMMITTEE

1. The Charging Committee shall be the three members of the Commission on Human Rights designated pursuant to article IX of the Convention on the Suppression and Punishment of the Crime of Apartheid.

2. Meetings may be held regularly or on an ad hoc basis to perform the functions required by this Protocol.

3. The Charging Committee shall adopt rules to govern performance of its functions.

4. The members of the Charging Committee shall elect every year a President who may be re-elected.

5. Members of the Charging Committee shall be reimbursed for their expenses and compensated for their services on the same basis as for the performance of their functions under article IX of the Convention on the Suppression and Punishment of the Crime of Apartheid and under existing United Nations procedures.

6. The Charging Committee may designate qualified experts to investigate and research matters considered by the Committee. The compensation of such experts shall be determined by the Committee on an ad hoc basis.

Article 12

THE PROSECUTORIAL COMMISSION

1. The Prosecutorial Commission shall consist of the members of the Ad Hoc Working Group of Experts established under resolution 2 (XXIII) of the Commission on Human Rights.

2. Meetings of the Commission may be held regularly or on an ad hoc basis to perform its functions under this Protocol.

3. The Prosecutorial Commission shall adopt rules to govern performance of its functions.

4. The members of the Commission shall elect a President every year who can be re-elected.

5. Members of the Prosecutorial Commission shall be reimbursed for their expenses and compensated for their services on the same basis as for their functions under article IX of the Convention on the Suppression and Punishment of the Crime of Apartheid and under existing United Nations procedures.

6. The Prosecutorial Commission may engage the services of a qualified expert to present cases before the Tribunal. The compensation of such experts shall be determined by the Commission on an ad hoc basis.

Article 13

THE STANDING COMMITTEE OF STATES PARTIES

1. The Standing Committee shall consist of one representative appointed by each State Party to this Protocol.

2. The Standing Committee shall elect by majority vote a President and such other officers as it deems appropriate for one year who may be re-elected.

3. The President shall convene meetings in accordance with such rules as may be adopted by the Standing Committee.

4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Protocol and may:

(a) Determine the operating budget of the organs of enforcement set up under this Protocol and costs relating to the machinery of enforcement and in general all financial and administrative matters arising under this Protocol including assessing States Parties for their pro rata share of the costs incurred.

(b) Encourage States to accede to this Protocol;

(c) Propose international instruments to enhance the performance of the Tribunal; and

(d) Encourage States to assist the enforcement organs of this Protocol and to comply with the Tribunal's determinations.

5. The Standing Committee may exclude from participation representatives of States Parties that have failed to provide financial support to the Tribunal as required by this Protocol or that have failed to carry out other express obligations under this Protocol.

PART IV: INSTITUTIONAL MATTER

Article 14

RULE MAKING

1. Each of the enforcement organs and the Standing Committee shall formulate their own rules of procedures to fulfil the interests and purposes of this Protocol and in accordance with the standards of fairness as stated in Part V of this Protocol.

2. The rules of the Charging Committee and of the Prosecuting Commission shall first be approved by the Tribunal before they become effective.

3. To insure the independence and impartiality of the Tribunal its rules shall not be reviewable. The Standing Committee may, however, request the Tribunal to consider proposed rules or reconsider established ones. Nothing herein precludes an accused or the Prosecutorial Commission from presenting to the Tribunal a challenge to a rule for failure to comply with the provisions of this Protocol or its standards in Part V.

4. No rule shall take effect until 60 days after publication.

5. All rules and amendments shall be published and made available to the public through the Division of Human Rights of the United Nations.

6. All Administrative and financial matters pertaining to this Protocol shall be undertaken by the Division of Human Rights of the United Nations which shall appoint with the approval of the Standing Committee a chief administrative officer to carry out these functions.

7. All costs and expenses incurred by the administration of this Protocol shall be borne by the States Parties who shall be assessed by the Standing Committee on a pro rata basis.

8. In all matters except judicial matters in which this Protocol or its provisions are called into question, the President of the Standing Committee of States Parties shall be the competent authority.

9. In all judicial matters and matters involving the Organs of Enforcement of this Protocol the President of the Tribunal shall be the competent authority and he may delegate any member of the Charging Committee or Prosecutorial Commission to act on his behalf or appoint a special expert on an ad hoc basis.

PART V: STANDARDS

Article 15

STANDARDS FOR RULES AND PROCEDURES

1. In all proceedings and in the formulation of any rules by the organs of enforcement, the accused where applicable shall be entitled to those fundamental human rights enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which are:

(a) The presumption of innocence

The presumption of innocence is a fundamental principle of criminal justice. It includes inter alia:

1. No one may be convicted or formally declared guilty unless he has been tried according to law in a fair trial;

2. No criminal punishment or any equivalent sanction may be imposed upon a person unless he has been proven guilty in accordance with the law;

3. No person shall be required to prove his innocence;

4. In case of doubt the decision must be in favour of the accused.

(b) Procedural rights ("equality of arms")

The accused shall have substantial parity in proceedings and procedures and shall be given effective ways to challenge any and all evidence produced by the prosecution and to present evidence in defence of the accusation.

(c) Speedy trial

Criminal proceedings shall be speedily conducted without, however, interfering with the right of the defence to prepare adequately for trial. To this effect:

1. Time limitations should be established for each stage of the proceedings and should not be extended without reason by the appropriate Chamber of the Court.

2. Complex cases involving multiple defendants or charges may be severed by the appropriate Chamber of the Court when it is deemed in the interest of fairness to the parties and justice to the case.

3. Administrative or disciplinary measures shall be taken against officials of the Tribunal who deliberately or by negligence violate the provisions of this Convention and the rules of this Tribunal.

(d) Evidentiary questions

1. All procedures and methods for securing evidence which interfere with internationally guaranteed human rights shall be in accordance with the standards of justice set forth in this Convention and in the rules of the Tribunal.

2. The admissibility of evidence in criminal proceedings must take into account the integrity of the judicial system, the rights of the defence, the interests of the victim and the interests of the world community.

3. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, violate the provisions of this Convention, and rules of this Tribunal shall hold them inadmissable.

4. Evidence obtained by means of lesser violations shall be admissible only subject to the judicial discretion of the Court on the basis of the veracity of the evidence presented and the values and interests involved.

(e) The right to remain silent

Anyone accused of a criminal violation has the right to remain silent and must be informed of this right.

(f) Assistance of counsel

1. Anyone suspected of a criminal violation has the right to defend himself and to competent legal assistance of his own choosing at all stages of the proceedings.

2. Counsel shall be appointed ex officio whenever the accused by reason of personal conditions is unable to assume his own defence or to provide for such defence, and in those complex or grave cases where in the best interest of justice and in the interest of the defence such counsel is deemed necessry by the Court.

3. Appointed counsel shall receive reasonable compensation from the Tribunal whenever the accused is financially unable to make such compensation.

4. Counsel for the accused shall be allowed to be present at all critical stages of the proceedings.

5. Counsel for the accused or the accused shall be provided with all incriminating evidence available to the prosecution as well as all exculpatory evidence as soon as possible but no later than at the conclusion of the investigation or before adjudication and in reasonable time to prepare the defence.

6. Anyone detained shall have the right of access to and to communicate in private with his counsel personally and by correspondence, subject only to reasonable security measures decided by a judge of the Court.

(g) Arrest and detention

1. No one shall be subjected to arbitrary arrest or detention.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by this Protocol and rules of the Tribunal and only on the basis of a determination by the Court.

3. No one shall be arrested or detained without reasonable grounds to believe that he committed a criminal violation within the jurisdiction of the Tribunal.

4. Anyone arrested or detained shall be promptly brought before a judge of the Court and shall be informed of the charges against him; after appearance before such judicial authority he may be returned to the custody of the arresting authority but he shall be subject to the jurisdiction of the Court even when in the custody of a State Party.

5. Preliminary or provisional arrest and detention shall take place only whenever necessary and as much as possible should be reduced to a minimum of cases and to the minimum of time.

6. Preliminary or provisional detention shall not be compulsory but subject to the determination of the Court and in accordance with its rules.

7. Alternative measures to detention shall be used whenever possible and include inter alia:

Bail;

Limitations of freedom of movement;

Imposition of other restrictions.

8. No detainee shall be subject to rehabilitative measures prior to conviction unless he freely consents thereto.

9. No administrative preventive detention shall be permissible as part of any criminal proceedings.

10. Any period of detention prior to conviction shall be credited toward the fulfillment of the sanction imposed by the Court.

11. Anyone who has been the victim of illegal or unjustified detention shall have the right to compensation.

(h) Rights and interests of the victim

The rights and interests of the victim of a crime shall be protected, in particular:

1. The opportunity to participate in the criminal proceedings;

2. The right to protect his civil interests;

3. Due regard shall be given in formulation of rules of the organs of the Tribunal to the principle of non bis in idem, but a seemingly duplicative prosecution shall not be barred provided that the record in the prior proceeding is taken into account along with any prior measures in respect of guilt of the accused.

4. Arrest and detention shall be in conformity with the Standard Minimum Rules for Treatment of Prisoners and the Body of Principles on the Protection of Persons from All Forms of Arbitrary Arrest and Detention of the United Nations.

5. Maximum flexibility regarding restrictive measures should be encouraged, including use of such mechanisms as house arrest, work release and bail, and credit shall be given for any pre-conviction restrictions to an accused.

6. The Tribunal shall include all of the above in the formulation of its rules of practice and procedures which shall be effective upon promulgation.

7. No proceedings before the Tribunal shall commence prior to the promulgation of the rules of practice and procedures of the Court, the Procuracy and the Secretariat.

PART VI: PRINCIPLES OF ACCOUNTABILITY

(PROVISIONS IN THE NATURE OF A GENERAL PART)

Article 16

DEFINITIONS

1. An international crime is any offence arising out of the provisions of this Statute and any supplemental agreement thereto.

2. A State is an international legal entity defined under international law.

(a) This term is used without prejudice to questions of recognition or membership in the United Nations.

(b) This term also includes a group of States acting collectively.

3. The words "person" or "individual" for the purposes of this Protocol are used interchangeably and each one of them refers to a physical human being alive.

4. For the purposes of this Protocol, the words "group" and "organization" are interchangeable. A group consists of more than one person, acting in concert with respect to the performance of a particular act.

5. The term "entity" is used herein to include groups, organs of state, states or groups of states.

6. Participation in group action is a person's conduct which directly contributes to the group's ability to perform a given act or which directly influences the decision of the group to perform a given act.

7. A person commits solicitation when, with the intent that an offence be committed, he instigates, commands, encourages or requests another to commit that offence.

8. A person commits conspiracy when, with intent to commit a specific offence, he agrees with another to the commission of that offence and one of the members of the conspiracy commits an overt act in furtherance of the agreement.

9. A person commits an attempt when, with the intent to commit a specific offence, he engages in unequivocal and direct conduct which constitutes a substantial step toward the commission of that offence and which if not for a fortuitous event or misapprehension of the actor, would result in the completion of the crime.

10. A person in authority is a person who has legal authority under domestic law or a person who by virtue of the power structure of a group is deemed to be in command or has the power to command others, and to whom obedience is generally expected.

11. Omission by a State, group or organization or failure to act occurs whenever a person in authority having power to act and having knowledge of the facts requiring action fails to take reasonable measures to prevent, or terminate the commission of a crime or to apprehend, or prosecute, or punish any person who has or may have committed a crime. Omission by an individual is conscious failure to act in accordance with a pre-existing legal obligation.

12. The masculine "he" used throughout this article refers equally to the feminine "she".

Article 17

RESPONSIBILITY

1. A person is criminally responsible under this article when he reaches the age of eighteen.

2. Direct personal responsibility

(a) A person who commits or attempts to commit a crime is responsible for it and criminally punishable under article 20 and also articles 3 and 8.

(b) A person who conspires with another or solicits another to commit a crime as defined is criminally responsible for it and criminally punishable.

(c) A person who commits a crime is not relieved from responsibility by the sole fact that he was acting in the capacity of Head of State, responsible Government official, acting for or on behalf of a State, or pursuant to "superior orders" except where the provisions of article 21, paragraph 5, are applicable.

3. Responsibility for the conduct of others

(a) A person is responsible for the conduct of another if, before, during or after the commission of a crime, and with the intent to promote or facilitate the commission of a crime, he aids, abets, solicits, conspires or attempts to aid another person in the planning, perpetration or concealment of the crime, or facilitates the concealment or escape of a perpetrator.

(b) A person is not responsible for the acts of others if that individual is a victim of the crime, or when, before the commission of the crime, that person terminates his efforts of participation as described in paragraph 3 (a) and such termination wholly deprives others of his efforts and of their effectiveness or if such a person gives timely warning and advice to appropriate Government authorities.

(c) The vicarious responsibility for the conduct of another under this section is not dependent upon the conviction of a person accused as a principal.

(d) A person is responsible for the conduct of another with respect to any crime committed in furtherance of a solicitation, conspiracy and for those crimes which are reasonably foreseeable to be committed by others in furtherance of a common criminal scheme, design or plan.

4. Collective responsibility

(a) A group or organization other than a State or an organ of a state is collectively responsible for its acts, irrespective of the responsibility of its members.

(b) A person is responsible for crimes committed by a group or organization, if he knew of or could reasonably foresee the commission of such crime and remained a member thereof.

5. Responsibility of persons in authority

(a) A person in authority in a State, group or organization is personally responsible for the commission of a crime when such crime is committed at his instigation, suggestion, command or request, or if he fails to act.

6. State responsibility

(a) Conduct for which states are responsible

1. A State is responsible for any crime committed on its behalf, behest or benefit by a person in authority, regardless of whether such acts are deemed lawful under its municipal law.

2. Conduct is attributed to a State if it is performed by persons or groups acting in their official capacity, who under the domestic law of that state possess the authority to make decisions for the State or any political subdivision thereof or possess the status of organs, agencies or instrumentalities of that state or a political subdivision thereof.

3. Conduct outside the scope of authority of any of the entities listed in paragraph 6 (a) 2 of this article is attributed to the State.

(b) State responsibility for failure to act

1. Failure to act by a State in accordance with its obligation under this Code shall constitute an international offence.

2. Any revolutionary movement which establishes a State or overthrows a Government is responsible in the new State or new Government to prosecute or extradite any individual within such group or any individual who has been omitted from the group for any international crime. Failure to do so shall constitute a basis for State responsibility.

Article 18

ELEMENTS OF AN INTERNATIONAL CRIME

1. Definition

(a) An international crime shall contain four elements: a material element, a mental element, a causal element and harm, as defined in sections 2 through 5 inclusive, except when in the definition of a given crime these requirements are altered.

2. Material element

(a) Any voluntary act or omission which constitutes part of a crime as defined in article 21 will constitute the material element.

3. Causal element

(a) Conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred, and that the result was a foreseeable consequence of such conduct.

4. Harm

(a) The element of harm shall depend upon the definition of the crime, except where no harm is needed in the definition of the crime.

5. Mental element

(a) The mental element of an offence at the time of the commission of the material element shall consist of either intent, knowledge, or recklessness, unless the definition of the crime specifies any of these three.

(b) A person "intends" to accomplish a result or engage in conduct described by the law defining the offence, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

(c) A person "knows" or acts "knowingly" when he is consciously aware of the attendant circumstances of his conduct or of the substantial probability of existing facts and circumstances likely to produce a given result.

(d) A person is reckless or act recklessly when he consciously disregards a substantial and unreasonable risk that a likely result would be a foreseeable consequence of such conduct.

Article 19

IMMUNITY

1. For purposes of this article, no person shall enjoy any international immunity except that Head of State, Head of Government, official representative of a State having diplomatic status, employees of international organizations and the members of the families and staffs of the above enumerated persons shall be exempt and immune from the criminal process of all States other than their own and this International Criminal Tribunal, provided that in the event of the commission of a crime as defined herein, the State Party whose national is entitled to the immunity and exemption stated herein shall undertake to investigate, prosecute and punish the allegation or crime charged.

2. Any State may waive this immunity on behalf of its nationals without prejudice to its interests in favour of any other State.

3. Any person who falls into any of the categories of paragraph 1 of this article may specifically waive that immunity with the consent of the State of which he is a national or of the international organization by which he is employed without prejudice to that State or organization.

4. A person who no longer has the privileges of the positions covered by immunity in paragraph 1 of this article may no longer benefit from said immunity except with respect of those acts committed or alleged to have been committed while that person held the position that granted immunity.

Article 20

PENALTIES

1. Punishability

(a) All crimes defined in this article are punishable in proportion to the seriousness of the violation, to the harm threatened or caused, and to the degree of the responsibility of the individual actor in accordance with a schedule to be promulgated by rules of the Tribunal before it exercises its jurisdiction in a given case.

2. Penalties for individuals

(a) Penalties for persons who have been convicted of the commission of a crime shall consist of imprisonment or such alternatives to imprisonment or fines as promulgated by the International Criminal Court.

3. Penalties for a group or organization

(a) Penalties for crimes for which groups are collectively responsible under article 21, paragraph 4, shall consist of fines or other sanctions established in accordance with the principle of proportionality set forth in paragraph 1 of this article and as promulgated by the rules of the Court.

(b) Fines shall be collectively levied against the assets of group and individual participants and enforced by the States Parties wherein such assets may be found.

4. Penalties for States

(a) Penalties for States which are responsible for crimes shall consist of fines assessed on the basis of proportionality as set forth in section 1 of this article, without prejudice to the duties or reparations and civil damages.

(b) Such fines shall be due from a State, provided that they do not critically impair the economic viability of the State.

(c) The determination and assessment of fines against a State shall be made by the Court and the enforcement of such fines shall be by and through the United Nations.

(d) The provisions of this article are without prejudice to the rights and duties of the United Nations to impose sanctions against a State as provided for in the United Nations Charter.

(e) Special remedies

Nothing in this article shall prevent the Criminal Court to rely on its inherent judicial power to order a State to cease and desist from a given activity which is an international crime or to order by injunctions the correction of previous violations and prevent their reoccurrence.

5. Multiple crimes and penalties

(a) The Court may with respect to a single criminal transaction involving the commission of more than one crime all of which are related and are based on substantially the same facts impose a single penalty with discretion concerning aggravating and mitigating circumstances as may be found by the Court.

6. Mitigation of punishment

(a) A person acting pursuant to superior orders may present such a claim in mitigation of punishment.

(b) Subject to the defence of double jeopardy a person who was sentenced in one State for substantially the same criminal conduct and resentenced by the Court shall receive credit for any part of a sentence already executed.

(c) The Court may take into account any mitigating fact such as imperfect or incomplete defences stated in article 21.

Article 21

EXONERATION

1. Definition

(a) A person shall be exonerated from responsibility arising under this Protocol if in the commission of an act which constitutes a crime any of the defences stated in paragraphs 2 through 11 inclusive is applicable.

2. Self-Defence (Individual)

(a) Self-defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that he reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.

3. Necessity

(a) A person acts under necessity when by reason of circumstances beyond his control, likely to create a private or public harm, he engages in conduct which may otherwise constitute a crime which he reasonably believes to be necessary to avoid the imminent greater harm likely to be produced by such circumstances, but not likely to produce death.

4. Coercion

(a) A person acts under coercion when he is compelled by another under an imminent threat of force or use of force directed against him or another, to engage in conduct which may otherwise constitute a crime which he would not otherwise engage in, provided that such coerced conduct does not produce a greater harm than the one likely to be suffered and is not likely to produce death.

5. Obedience to superior orders

(a) A person acting in obedience to superior orders shall be exonerated from responsibility for his conduct which may otherwise constitute a crime or omission unless, under the circumstances, he knew that such act would constitute a crime.

6. Refusal to obey a superior order which constitutes a crime.

(a) No person shall be punished for refusing to obey an order of his Government or his superior which if carried out, would constitute a crime.

7. Mistake of law or fact

(a) A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements.

8. Double Jeopardy

(a) The Court may not retry or resentence the same individual for the same conduct irrespective of what the crime or charge may be.

(b) In the event a person has been tried by the national courts of a State Party he could be retried for the same conduct by the Court but he shall receive credit for a sentence rendered by a national criminal court and executed by that state or any other State.

(c) No individual who has been tried and convicted or acquitted on the merits by the Court shall be retried or resentenced by the domestic court of any State Party.

(d) Amnesty or pardon by any State shall not constitute a bar to adjudication before the Court and shall not be deemed to fall within the defence of double jeopardy.

9. Insanity

(a) A person is legally insane when, at the time of the conduct which constitutes a crime, he suffers from a mental disease or mental defect, resulting in his lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and such mental disease or mental defect caused the conduct constituting a crime.

10. Intoxication or drugged condition

(a) A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by the said crime.

(b) Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime.

(c) With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

11. Renunciation

(a) It shall be a defence to the crimes of attempt, conspiracy and solicitation if a person renounces or voluntarily withdraws from the commission of the said crimes before any harm occurs and if he has engaged in any individual activity by doing any of the following:

(i) Wholly deprives others from the use or benefit of his participation in the commission of the crime;

(ii) Notifies law enforcement officials in time in order to prevent the occurrence or the commission of the crime.

Article 22

STATUTE OF LIMITATION

1. Duration

(a) No prosecution or punishment by the Court of an international crime shall be barred by a period of limitations of lesser duration than the maximum penalty ascribed to the crime in question.

(b) The period of limitation shall commence at the time that legal proceedings under the provisions of this Protocol may commence but shall not apply to any period during which a person is escaping or evading appearance before the appropriate authorities. It is interrupted by the arrest of the accused but shall recommence ab initio if the accused or convicted person escapes and in no case shall it run for a period which would be longer than twice the original period of limitation.

(c) In the case of State responsibility, the period of limitation for commencing any action before the Court shall be measured with reference to the acts of those State officials whose conduct has implicated the responsibility of the State in question.

PART VII: DUTIES OF STATES PARTIES

Article 23

GENERAL PRINCIPLES

1. States Parties shall surrender upon request of the Tribunal any individual where it appears that there are reasonable grounds to believe that such a person has committed the international crime of apartheid.

2. States Parties shall provide the Tribunal with all means of judicial assistance and co-operation, including but not limited to letters rogatory, service of writs, assistance in securing testimony and evidence, transmittal of records and transfer of proceedings.

3. States Parties shall recognize the judgements of the Tribunal and execute provisions of such judgements in accordance with their national laws.

4. In the event the Tribunal does not have detentional facilities under its direct control, States Parties will honour requests from the Tribunal to execute its sentences in accordance with their own correctional systems, but subject to continuing jurisdiction of the Tribunal over the transferred offender.

5. States Parties may receive requests for transfers of offenders.

6. States Parties to this Protocol undertake to provide co-operation to organs of enforcement in accordance with the terms of this Protocol, and in particular to:

(a) Organs of enforcement on a pro rata basis as determined by the Standing Standing Committee of States Parties.

(b) Budgetary needs of the organs of enforcement shall be computed after taking into account income from voluntary contributions and fines collected by the Tribunal.

Article 24

SURRENDER OF ACCUSED PERSONS

1. States Parties shall surrender upon a request of the Tribunal any individual sought to appear before the Tribunal for any proceeding arising out of the Tribunal's jurisdiction provided that the Tribunal's request shall be based on reasonable grounds to believe that the person sought has committed a violation of the Convention on the Suppression and Punishment of the Crime of Apartheid.

2. The following acts shall not be a bar to surrender a person to the Tribunal for any acts constituting a crime:

(a) That the person sought to be surrendered claims or the State wherein he may be located claims that the act falls within the meaning of the "political offence exception";

(b) That the individual is a national of the requested State;

(c) That the requested State otherwise imposes certain conditions or restrictions to the practice of extradition to and from other States.

3. Procedures regulating such transfers shall be determined by the rules of the Tribunal subject to the laws of the requested state.

Article 25

JUDICIAL ASSISTANCE AND OTHER FORMS OF CO-OPERATION

1. The States Parties shall provide the Tribunal with all means of judicial assistance and co-operation including but not limited to letters rogatory, service of writs, assistance in securing testimony and evidence, transmittal of records, transfer of proceedings where applicable.

2. The procedures for such judicial assistance and other forms of co-operation shall be determined by the Tribunal's rules of practice.

Article 26

RECOGNITION OF THE JUDGEMENTS OF THE TRIBUNAL

1. The States Parties agree to recognize the judgements of the Tribunal and to execute its provisions. For the purposes of double jeopardy and evidentiary matters the Tribunal shall recognize the penal judgements of the States Parties.

2. The Tribunal's rules of practice shall govern the recognition of the judgements of the Tribunal and those of the States Parties.

Article 27

TRANSFER OF OFFENDERS AND EXECUTION OF SENTENCES

1. In the event the Tribunal does not have detentional facilities under its direct control it may request a State Party to execute the sentence in accordance to that Party's correctional system and in that case the Tribunal shall continue to exercise jurisdiction over the offender including his transfer to another State.

2. In the event the Tribunal has placed an offender in its own detention facilities, this person may by agreement transfer to his country of origin.

3. The Tribunal's rule of practice shall determine the basis and condition of the transfer of offenders and the execution of sentences.

PART VIII: TREATY PROVISIONS

Article 28

ENTRY INTO FORCE

1. This Protocol is open for signature to all States Parties to the Convention on the Suppression and Punishment of the Crime of Apartheid, including after its entry into force.

2. This Protocol is subject to ratification, instruments of ratification being deposited with the Secretary-General of the United Nations.

3. Accession to this Protocol shall be effected by deposit of an instrument of accession with the Secretary-General of the United Nations.

4. This Protocol shall enter into force on the thirtieth day after the deposit of the sixth instrument of ratification or accession, and for States thereafter ratifying or acceding to this Protocol, on the thirtieth day after deposit of the applicable instrument.

5. The Secretary-General of the United Nations shall inform all signatory States of:

(a) All signatures, ratifications, accessions and reservations to this Protocol; and

(b) The date of entry into force of this Protocol.

6. This Convention, of which the Arabic, Chinese, English, French, Spanish and Russian texts are equally authentic, shall be deposited in the archives of the United Nations and copies thereof shall be transmitted to all signatories.

Article 29

RESERVATIONS

1. States may make any reservations to this Protocol but shall not be deemed States Parties for the purposes of representation in the Standing Committee if the reservation is as to a material aspect of the Tribunal's jurisdiction, competence and the effects of its judgements.

2. The Secretary-General shall keep separate count of signatories making reservations not in conformity of paragraph 1 of this article.

Article 30

INITIAL IMPLEMENTATION STEPS

1. Upon entry into force of this Convention, the Secretary-General of the United Nations shall call the first meeting of the Standing Committee, and shall preside over that meeting until a presiding officer is chosen.

2. The Standing Committee shall undertake as its first order of business measures toward election of judges of the Tribunal.

Article 31

AMENDMENTS

1. This Protocol may at any time be amended by a vote of three-fourths of the members of the Standing Committee, subject to ratification of such amendments by the same number of States Parties represented in the Standing Committee.

COMMENTARY

DRAFT OPTIONAL PROTOCOL FOR THE PENAL ENFORCEMENT OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

The provisions of this Protocol are largely self-explanatory and require little in the form of commentary. This is particularly obvious in view of the commentary to the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes. Consequently, the commentary which follows is a chronological listing of observations which are more descriptive of the system proposed than its specific details. To facilitate linkage between the provisions of the Protocol and this commentary, an outline of the provisions of the Protocol follows:

Part I: Nature of the Process

Article 1	Purpose and institutional framework
Article 2	Jurisdiction and competence
Article 3	Sanctions
Article 4	Subjects upon whom the organs of enforcement shall exercise their jurisdiction

Part II: The penal process

Article 5	Initiation of the process
Article 6	The prosecution and pre-trial process
Article 7	The adjudication process
Article 8	The Sanctioning process
Article 9	The Post-adjudication review process

Part III: The enforcement organs

Article 10	The Tribunal
Article 11	The Charging Committee
Article 12	The prosecutorial Commission
Article 13	The standing Committee of States Parties

Part IV: Institutional matter

Article 14	Rule-making

Part V: Standards

Article 15	Standards for rules and procedures

Part VI: Principles of accountability (Provisions in the nature of a general part)

Article 16	Definitions
Article 17	Responsibility
Article 18	Elements of an international crime
Article 19	Immunities
Article 20	Penalties
Article 21	Exoneration
Article 22	Statute of limitation

Part VII: Duties of States Parties

Article 23	General principles
Article 24	Surrender of accused persons
Article 25	Judicial assistance and other forms of co-operation
Article 26	Recognition of the judgements of the Tribunal
Article 27	Transfer of offenders and execution of sentences

Part VIII: Treaty provisions

Article 28	Entry into force
Article 29	Reservations
Article 30	Initial implementation steps
Article 31	Amendments

1. This document does not require an amendment to the Charter of the United Nations nor a separate multilateral convention but only an Additional Protocol to the International Convention for the Suppression and Punishment of the Crime of Apartheid.

2. The Additional Protocol is predicated on the authority of article V of the Apartheid Convention and thus has a legislative basis.

3. It establishes penal procedures and sanctions in accordance with article V of the Apartheid Convention for violations of article II of the said Convention.

4. The structure, institutions and organs of enforcement rely essentially on existing institutions. This applies to the Charging Committee, the Prosecutorial Commission and the Division of Human Rights of the United Nations. The Tribunal, however, is a new institution but it relies in its functions on the other already existing organs. Institutional matters are dealt with in a way to minimize the creation of new institutional entities and bodies. It emphasizes the utilization of existing United Nations organs with the addition of new functions and of course the addition of the Standing Committee and the Tribunal. However, all administrative and financial matters have been established in a way to preserve the above stated policy.

5. The enforcement organs were designed to facilitate their implementation and would present few practical difficulties.

6. It is to be noted however that the Tribunal will have no direct enforcement mechanism and that it relies essentially on the States Parties.

7. The Standing Committee of States Parties though a new institution will present few problems of implementation. It will have certain general policy functions as well as specific administrative and technical functions on which it will rely on existing institutions.

8. The jurisdiction and competence of the enforcement organs are universal in geography but limited to violations of article II of the Apartheid Convention.

9. A distinction between a "crime" and "grave crime" is made in article 3 of the Protocol with respect to sanctions and is both self-explanatory and justified in view of the need to have the Tribunal concern itself only with the more serious violations.

10. The jurisdiction of the organs of enforcement shall extend not only to natural persons but to legal entities based on the belief that as a policy greater impact could be obtained by subjecting corporations and public entities to criminal responsibility even though sanctions against them would be in the nature of fines and injunctions.

11. The penal process commences only upon a decision of the Charging Committee which may interact with the Standing Committee for purposes of mediation of any complaint or claims and their possible resolution outside the framework of the penal process. The Charging Committee, however, is the exclusive authority competent to decide on whether the penal process shall be set in motion. Because of the composition of the Charging Committee it is clear that such a body would have the necessary sensitivity to make the appropriate decisions as to the prosecutorial or non-prosecutorial and to undertake any other appropriate measure.

12. The Prosecutorial Commission acts only pursuant to a determination made by the Charging Committee. In fact the Prosecutorial Commission has no autonomous decision-making and acts exclusively in the prosecution of cases. The Prosecutorial Commission, however, has the power to resort to a variety of measures which may be necessary for the effective performance of its prosecutorial functions.

13. The adjudication process describes the manner in which hearings on the determination of guilt or innocence shall be conducted which are much the same as for the sanctioning process.

14. The standards and procedures for each of the organs responsible for the investigation, prosecution, adjudication and sanctioning are subject to certain minimum standards of fairness described in Part V. Each enforcement organ is to promulgate its rules which are to be published so as to inform the public. This approach maximizes efficiency and legislative economy.

15. To preserve the right of appeal required by the International Covenant on Civil and Political Rights a post-adjudication process is established.

16. The judicial integrity, impartiality, and independence of the Tribunal is emphasized by the provisions of article 10 of the Protocol.

17. The costs of operating this system will be borne by the States Parties and the mechanics for it will be through the Standing Committee. The actual administration of the budget will be left to an administrator who will be appointed by the Division of Human Rights with the approval of the Standing Committee. This is designed to reduce the necessity of creating new institutions.

18. In keeping with the policy prevailing throughout this Protocol all administrative matters and support will be given by the Division of Human Rights which will be charged to the account of the Protocol and paid through the budget as approved by the Standing Committee.

19. A provision is established for the enforcement organs to rely on experts for ad hoc assignments which is a device designed to eliminate the need for permanent staffing beyond the administrative and support staff which the Division of Human Rights is to provide.

20. The section's function for the organs of enforcement and the court registry function for the Tribunal shall be performed by the Division of Human Rights.

21. In so far as the organs of enforcement have no direct enforcement capabilities these duties are to be carried out by the States Parties in accordance with their undertakings as stated in Part VII. Among those duties are those of recognition of the Tribunal orders and their enforcement in accordance with the natural laws of the requested States Parties whose co-operation is requested.

22. A General Part describing the basic principle of accountability is also included so that the Protocol contains in effect a special part as is also found in criminal codes namely the Apartheid Convention and more specifically article II thereof which is incorporated by reference in this Protocol; a General Part which is made part of this Protocol; and, a sanctioning part which is part of the Protocol. These provisions satisfy the requirements of nullum crimen sine lege, nullum poena sine lege with the exception of the lack of specific sentencing parameters namely the leniency of imprisonment for each crime and the amount of fine to be levied. This short-coming however can be cured by the appropriate enactment of the Tribunal rules which could embody those with specificity. The promulgation and publication of these rules containing specific sentencing considerations would satisfy the requirements of the provisions of legality recognized in most legal systems of the world.

23. The standards of fairness which are to be guaranteed in all proceedings before the enforcement organs and which are to be reflected in the rules to be promulgated by the said enforcement organs embodying those rights which are contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Body of Principles on the Protection of Persons from All Forms of Arbitrary Arrest and Detention, the European Convention on the Protection of Fundamental Freedoms, and the Inter-American Convention on the Protection of Human Rights. These standards are also embodied in the resolutions of the XIIth International Congress of Penal Law held in Hamburg in 1979, whose draft and explanatory notes are to be found in 49 Revue Internationale de Droit Penal, vol. 3, 1978.

These provisions are consonant with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, and additional Protocols. See A. Robertson, Human Rights in Europe (1977), and D. Poncet, La Protection de l'Accuse par la Convention Europeenne des Droits de l'Homme (1977). They are also consonant with the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the Inter-American Convention on Human Rights (1969), and other applicable conventions. See, e.g., L. Sohn and T. Buergenthal, International Protection of Human Rights (1973).

24. The principles of accountability set forth in Part VI are from the General Part of the Draft International Criminal Code in M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code (Sijthoff 1980), pp. 141 et. seq. and excerpts thereof.

Article 16 - Definitions

Paragraph 1 defines international crimes with reference to the Protocol thus permitting expansion.

Paragraph 2 incorporates by reference the definition of a State as recognized under international law. This approach was preferred to repetition of one of the generally accepted formulations of a definition of a State because use of such a formulation would call for definition of the terms used in it, such as the Montevideo Convention's provision that a State has the capacity to conduct "international relations", Convention on Rights and Duties of States of 26 December 1933, United Nations, Treaty Series, vol. 165, p. 19; see also United Nations debates on Statehood in connection with Israel and Liechtenstein (Official Records of the Security Council, Third Year, 383rd meeting, No. 128, pp. 9-12, and ibid., Fourth Year, 433rd meeting, No. 35, pp. 4-5).

For the sake of convenience, the term "State" is deemed to include groups of States acting collectively.

Paragraph 3 exemplifies a correlation between "person" and "individual", and confines the meaning of those terms to exclude such entities as corporations or other so-called juridical persons.

Paragraph 5 begins with another correlation for the sake of convenience, with respect to the terms "group" and "organization". The definition is provided because of the use of these terms in provisions dealing with collective responsibility, which is discussed below.

Paragraph 6 on participation in a group action, is designed for the same purpose. The model of responsibility arose out of the Nuremberg trials and Tokyo war crimes trials. See article 9 of the London Charter of 8 August 1945, Control Council Ordinance No. 10 of 20 December 1945; for a discussion of the basis of this responsibility and the cases decided at Nuremberg and Tokyo, see L. Friedman, The Law of War: A Documentary History (1972); see also Wright, History of the United Nations War Crimes Commission (1949).

Paragraphs 7 and 8 are basically the provisions of the Model Penal Code relating to solicitation and conspiracy, American Law Institute Model Penal Code (1962). See generally M.C. Bassiouni, Substantive Criminal Law (1978), and W. LaFave and A. Scott, Criminal Law (1972); see also for a comparison with the German Penal Code, G. Fletcher, Rethinking Criminal Law (1978).

The definition of "solicitation" was found to be workable under civil law, as well as common law systems. On the other hand, the concept of conspiracy is not generally recognized under the civil law systems, so that inclusion of this term required a common law definition even though the requirement of an "overt act" brings such a definition close to preparatory acts in civilist-Romanist systems. See R. Merle and A. Vitu, Traite de Droit Criminel (1967). It is to be noted that conspiracy and participation in a group action are separate terms with separate definitions. The concept, however, is found in the Nuremberg and Tokyo War Crimes trials.

In paragraph 9 "attempt" was given a definition based on the Model Penal Code but with modifications reflecting the concern of civil law jurists. For example, the term "preparation" has been omitted and "substantial step" has been amplified by the addition of the words "unequivocal and direct". This modification was intended to provide a meaning that would be recognized under civil law as being as limited as the meaning that these provisions would be given under common law systems. See Fletcher, op. cit.

The definitions for the terms "participation in a group action", "solicitation", "conspiracy" and "attempt" are provided in the "General Part". Such conduct, in reference to the proscriptions of the "Special Part", is included in the "General Part" as opposed to the "Special Part" as is more consonant with the civil law system. (See generally R. Merle and A. Vitu, Traite de Droit Criminel (1967); P. Bouzat and J. Pinatel, Traite de Droit Penale (mise a jour 1975); H.-H. Jescheck, Lehrbuch des Strafrechts (1975)).

Paragraphs 10 and 11 deal with "person in authority" and "omission" and are included for the purpose of criminalizing failure of persons in authority to fulfil their legal duties arising out of any specific duty referred to in the "Special Part".

It is clear that the definitions provided reflect a certain conceptual choice and the attempt to integrate civilist-Romanist and common law principles and those principles which have emerged from the history and practice of international criminal law. (In that respect see S. Glaser, Infractions Internationale (1957) and S. Plawski, Etude des Principes Fondamentaux du Droit International Penal (1972)).

Article 17 - Responsibility

The basis of responsibility or accountability follows the "Definitions" and precedes "Elements of an International Crime" because of the view that the various levels and types of accountability should be set forth first so as to define to whom and on what basis responsibility can be imputed. This approach fits neither the common law nor the civil law models. It was deemed appropriate subject to the special status of these Tribunals and the historical peculiarities of international criminal law in light of the precedents of the Leipzig War Crimes Trials, though these were subject to German laws, and the Nuremberg and Tokyo War Crimes Trials. There is no analogy to be found in the writings of scholars to that approach. This identification of criminally accountable subjects should be read in pari materiae with the provision on "Definitions".

Under paragraphs 1 through 5 criminal responsibility is assigned not only to committing a crime, but also to attempting, soliciting or conspiring to commit any crime. However, because the element of harm is required unless that requirement is modified by the definition of the specific offence, criminal responsibility for acts not constituting a "commission" are controlled by the definitions of the crime, which may have a different requirement. Other provisions relating to individual responsibility are taken from parallel provisions of national penal codes. It was noted that the provision relating to responsibility for acts of others is not intended to create a new crime but rather to express the principle of derivative responsibility which exists in one way or another in every penal system. These provisions are more in conformity to the common law approach than to the continental approach.

The provisions regarding group responsibility were framed to serve two purposes: to make groups themselves accountable under the article dealing with penalties, and to prevent an individual from escaping responsibility where he provided a group with continued intangible support despite its foreseeable criminal conduct as reflected in the principles of the Nuremberg and Tokyo War Crimes Trials. Special provision is made for responsibility of persons in authority in order to incorporate responsibility for failure to act. This provision is based on military law and command responsibility as it is incorporated in the Formal Geneva Convention of 12 August 1949 and in particular in article 76 of the 1977 Additional Protocol Amending the Geneva Conventions of 12 August 1949 concerning failure of superiors to control acts of subordinates and other sources of international criminal law.

Paragraph 6 on State responsibility is essentially drawn from the draft Principles of State Responsibility adopted by the International Law Commission (A/CN.4/246). See also P. Guggenheim, Traite de Droit International (1952) and C. Eagleton, The Responsibility of States in International Law (1928); Strupp, Handbuch des Volkerrechts - Das volkerrechtliche Delikt (1920), and more recently F. Munch, Das volkerrechtliche Delikt (1963) and H.-H. Jescheck, Die Verantwortlichkeit der Staatsorganen - Nach Volkerstrafrecht (1952).

These provisions are intended to cover both responsibility for failure to act and non-State entities that subsequently become States by analogy to principles of State succession in international law. (See generally D.P. O'Connell, State Succession in International Law (1967)).

Article 18 - Elements of an International Crime

This provision seeks to synthesize common law and civil law concepts as well as to take into account fundamental principles of international criminal law in providing for and defining the four essential elements of an international crime. There seems to be agreement on the need for all such elements, even though there are divergences with respect to the meaning and content of each one. Probably the most authoritative work on the subject is Stefan Glaser, Infraction Internationale (1957). In it, Glaser starts, as does this article, with the material element, but then interjects certain legal justifications before dealing with the mental element. He concludes his work with participation and complicity. In this respect, a conceptual difficulty arises and the choice was to separate the required elements of a crime from the "responsibility", and conditions of "Exoneration". The approach of dividing "Responsibility", "Element of an International Crime", and "Exoneration" into three different provisions seeks to avoid doctrinal differences between common law and civil law by devising a neutral approach.

The material element satisfies both the common law and civil law systems, as does to a great extent the mental element, though it is couched in more objective terms.

In recognition of the fact that most civil law criminal codes do not specify causation as a separate element, the element of causation could be interpreted as included in the material element of a crime in civil law systems and separate for common law systems.

It was agreed that the mental element should not extend to mere negligence, but it was feared that mere exclusion of negligence would result in responsibility under civil law systems for mental states between mere negligence and recklessness. Accordingly, the decision was made to list the mental states of intent, knowledge, and recklessness with the understanding that recklessness went beyond the dolus eventualis, described under the 1976 German Penal Code as a state of mind such that the person knew that harm would result.

For common law systems, however, a separate provision on causation was added.

The fourth such element, harm, was recognized as requiring interpretation in connection with the offence in question. It was determined that provision should be made for circumstances where an offence did not require an outcome whose character would match the usual meaning of the word "harm". Similar concern was voiced regarding the element of causation, so that it was determined to qualify the listing of elements with a clause providing that these elements may be altered by the definition of a given crime.

Article 19 - Immunities

This provision is set forth immediately after principles of responsibility and imputability, the elements of a crime, because of the peculiarity of international law with respect to immunities which derive from the principles of sovereignty. (See Sutton, "Jurisdiction Over Diplomatic Personnel and International Organizations' Personnel for Common Crimes and for Internationally Defined Crimes", in M.C. Bassiouni and V.P. Nanda, A Treatise in International Criminal Law (1973), vol. II, p. 97. See also Oppenhiem, International Law (8th ed., Lauterpacht, 1955), p. 757; Harvard Research on International Law, Diplomatic Privileges and Immunities, 26 A.J.I.L. 15-187 (Supp. 1932); and "Immunité, Extraterritorialité et Droit d'Asile en Droit Penal International", 49 Revue Internationale de Droit Penal, No. 2 (1978)).

This text is based on the provisions of: 1961 Vienna Convention on Diplomatic Relations; 1963 Convention on Consular Relations; 1969 United Nations Draft Convention on Special Missions; 1946 Convention on the Privileges and Immunities of the United Nations; 1947 Convention on the Privileges and Immunities of the Specialized Agencies; Draft Articles on the Representation of States in their Relations with International Organizations of the International Law Commission, 1972; Draft Articles on the Protection and Inviolability of Diplomatic Agents and Other Persons Entitled to Special Protection Under International Law of the Organization of American States, 1971; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortions that are of International Significance, 1971; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; The General Agreement of Privileges and Immunities of the Council of Europe of 1949; the Supplementary Agreement of 18 March 1950; and, the four additional Protocols to the General Agreement on Privileges and Immunities of the Council of Europe (1952, 1961).

The text also takes into account customary principles of international law on the immunity of Heads of State and the practice of States. The nature of the immunity provided herein is, however, more narrowly circumscribed, as it is not absolute.

The text obligates the contracting parties whose national is the subject of any immunity category contained herein to take appropriate action against such persons, but permits waiver of that jurisdiction in favour of the International Court much as do the NATO and Warsaw Pact countries on Status of Forces Agreement; (see Coker, "The Status of Visiting Military Forces in Europe", in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law (1973) vol. II, p. 115).

Article 20 - Penalties

Separate provisions are made for punishment of different types of offenders, all subject to the requirement in section 1 that punishment be proportional to seriousness of the violation and the harm threatened or caused as well as to the degree of responsibility of the actor.

The International Criminal Court is directed to develop appropriate rules before exercising its jurisdiction. It must be noted that principles of legality are not violated by these provisions because the Court should first promulgate the penalties and the criteria for their application.

Paragraph 3 recognizes the principle of the Nuremberg Tribunals that organizations as such may be punished by means of fines. See Dinstein, infra. This provision goes beyond continental principles.

Under paragraph 4, punishment of States by imposition of fines is provided, it being considered beyond the scope of the court's ability to impose other sanctions. (See Triffterer, "Jurisdiction Over States for Crimes of State", and Baxter, "Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability", in M.C. Bassiouni and V.P. Nanda (eds), A Treatise on International Criminal Law (1973) vol. II, pp. 86-96 and 65-85. See also Munch, "State Responsibility in International Law", in Bassiouni and Nanda, supra, Vol. I, pp. 143 et seq.; C. Eagleton, The Responsibility of States in International Law (1924); C. de Visscher, La responsabilite des Etats (1924); F. Munch, Das volkerrechtliche Delikt (1963); J. Castillon, Les Reparations allemandes - Deux experiences (1919-1932, 1945-1952), (1953), and H.-H. Jescheck, Die Verantwortlichkeit der Staatsorganen - Nach Volkersstrafrecht (1952)).

Paragraph 5 confers discretion on the Court whether to impose cumulative sentences for crimes arising from a single transaction.

Paragraph 6, dealing with mitigation, provides for the possibility that the fact that an accused was acting under orders could be considered a mitigating factor. This reflects the content of article 8 of the London Charter of 8 August 1945 establishing the International Military Tribunal at Nuremberg. (See Y. Dinstein, The Defense of "Obedience to Superior Orders" in International Law, p. 260 at 283 (1965)).

Article 21 - Exoneration

While the civil law system would view the conditions of exoneration listed in this article as a questionable combination of principles of responsibility and legal defence, it was felt that a single provision containing all conditions which ultimately result in exoneration from responsibility, irrespective of their doctrinal or dogmatic basis should be placed together, as it gives these aspects a sense of cohesion and practical use by an international tribunal.

The self-defence provision, paragraph 2, is based on that contained in article 2, paragraph 2 (a), of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as on the language used in the Model Penal Code. The requirement that the defender reasonably believe that forceful response is necessary is a common law requirement which is superfluous for civil law systems. On the other hand, the introduction of the requirement that the response be to an "imminent" use of unlawful force may be viewed under the common law as surplusage.

The defence of necessity is limited in paragraph 3 to use of force not likely to produce death as a policy decision to restrain individuals.

Coercion, under paragraph 4, was limited as a defence to situations where the threat or use of force as "imminent".

Paragraph 5 makes obedience to superior orders a defence where the person accused was not in a position to know of the criminal nature of his acts. Conversely, paragraph 6 protects persons from prosecutions for refusing to follow orders to commit crimes.

Paragraph 7 adopts the formulation of the Model Penal Code relating to mistake of law or fact, conditioning this defence on negation of criminal intent.

Paragraph 8 on double jeopardy simply seeks to give effect to the principle non bis in idem. Subparagraph (d) recognizes the competence of the International Criminal Court to overlook pardons and amnesties of other jurisdictions in order to avoid that States resort to that practice from negotiating a person's punishability. It applies to the actual conduct involved rather than to any legal characterization of that conduct by any State.

Paragraph 9 is based on the Model Penal Code's provision on the defence of insanity. This differs from civilist systems where such a condition is deemed a pre-condition to criminal responsibility.

Paragraph 10 on the defence of intoxication springs from the same source, and excludes voluntary intoxication as a defense to crimes requiring intent.

The renunciation principles set forth in section 11 also stem from the Model Penal Code but are in keeping with the continental approach.

This provision includes principles of justification, conditions negating criminal responsibility, excusability and procedural defenses. From a Romanist-Civilist perspective it is doctrinally challengeable on the very grounds that it encompasses too much diversity. However, its justification rests on pragmatic reasons which avoid the dogmatism that has been at the basis of so much debate between European penalists for so long.

Article 22 - Statute of Limitation

The approach adopted measures the limitation period by the maximum potential penalty required for similar offences under the national law of the State in which the crime was committed as is the case under Penalties. It should be noted that,

under this approach, where the maximum penalty is life imprisonment or death, there is no limitation period. Also, it was necessary to add paragraph 1 (c) because offences by states are punishable only by fines under this Code. This approach was preferred notwithstanding the Convention on Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity, of 9 December 1968; (see also 39 Revue Internationale de Droit Penal (1968) dedicated to this topic, and the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes of 1974). In fact, the result of this approach and that of the Conventions referred to above, is for all practical purposes the same except for minor offences and in fact avoids the difficulties which have prevented the ratification of these treaties by a number of States.

The duties of States Parties are to provide financial support for the enforcement organs and for the effective function and implementation of this Protocol. In addition they must provide such judicial assistance and co-operation as to make this Protocol effective. In particular, the means of surrendering of accused persons to the Tribunal much as an obligation to extradition between States, noting, however, that the crime of apartheid is not to be considered within the meaning of the political offence exception (see M.C. Bassiouni, International Extradition and World Public Order (1974)). Other forms of judicial assistance involves the traditional method of letters rogatory, securing of testimony, transmittal of records, etc. In addition the very important provisions dealing with recognition of the judgements of the Tribunal so that they may be given effect in the States which are States Parties. A provision is also made for the transfer of offenders and execution of sentencing which may be a useful device. To a large extent the model for these provisions may be found in M.C. Bassiouni, International Criminal Law: A Draft International Criminal Code, pages 107 through 130.

The treaty provisions are somewhat standard, except for the reservations clause which though in keeping with the Vienna Convention on treaty interpretation also takes into account the relevant aspects of the Advisory Opinion By the International Court of Justice On Reservations To The Convention On The Prevention And Punishment of Genocide, 1951 I.C.J. 15.

One of the conditions for this Protocol's implementation is, of course, the need for the Standing Committee to be created and to start functioning and that is why a special provision has been made to that effect.