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## **International Service for Human Rights Dossier on the International Criminal Court**

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# International Service for Human Rights Dossier on the International Criminal Court

By Beth Van Schaack, with Jonathan Huston,  
Anne Rubesame and Cathy Ivanic

Edited by Beth Van Schaack

## I. Introduction

The idea of a permanent international criminal court is not a new one, but only in the last ten years has the political will within the international community developed to such an extent that concerted work towards the attainment of this goal began and the Court became a reality. This new momentum is in part due to the tragic outbreak of violence in the former Yugoslavia and Rwanda that shocked the world's conscience. These events motivated the international community to seek an end to impunity for international crimes and a mechanism to deter such crimes in the future.<sup>1</sup> Recently, state delegates met in Rome, Italy to finalize work on a Statute that will establish a permanent international criminal court to try the "most serious crimes of concern to the international community as a whole."<sup>2</sup>

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held from 15 June to 17 July 1998 (Diplomatic Conference) marked the culmination of a formal process that began in 1989 when the General Assembly asked the International Law Commission (ILC) to address the establishment of a permanent international criminal court and then to create a draft Statute.<sup>3</sup> After the draft had been examined by an ad hoc committee, the General Assembly in 1995 created a subsidiary body, the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom), to take off where the ILC and the ad hoc committee left off.<sup>4</sup> After convening six separate sessions, the PrepCom produced a revised draft Statute which served as the basis for the negotiations in Rome.<sup>5</sup> The Diplomatic Conference was attended by delegations from almost 200 states,<sup>6</sup> over 30 observers and intergovernmental organizations, and hundreds of non-governmental organizations

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<sup>1</sup> For a more detailed description of the historical background of the International Criminal Court, see this dossier's predecessor dossier "The International Criminal Court: Towards a Fair and Effective Human Rights Tribunal" (April 1998). This document is available from the International Service for Human Rights ("ISHR").

<sup>2</sup> Preamble, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (17 July 1998).

<sup>3</sup> See General Assembly Resolutions 45/41 (28 November 1990), 46/54 (9 December 1991), 47/33 (25 November 1992), and 48/31 (9 December 1993).

<sup>4</sup> General Assembly Resolution 50/46 (11 December 1995).

<sup>5</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. No. A/Conf.183/2/Add.1 (14 April 1998) (PrepCom Report).

<sup>6</sup> Participants included 193 states, namely the 185 member states of the UN, plus the six non-members (the Holy See, Kiribati, Nauru, Switzerland, Tonga and Tuvalu) and the two territories in free association with New Zealand that participate in some UN organizations in their own capacity (the Cook Islands and Niue).

(NGOs) representing all segments of international civil society.<sup>7</sup> Never before have NGOs participated to such a degree in a treaty-drafting Diplomatic Conference.

Throughout the Diplomatic Conference, work proceeded at many levels—in the Committee of the Whole, Working Groups, informal meetings among states, and so-called “informal informals.” Much of the real negotiating and decision-making took place in the latter two fora, which were usually inaccessible to NGOs such that lobbying and access to up-to-date information was difficult at times. In the first three weeks of the conference, many of the more technical provisions of the Statute were finalized and sent to the Drafting Committee. However, by the fourth week, the most contentious issues—concerning the crimes within the jurisdiction of the Court, the jurisdictional structure of the Court, the role of the Security Council vis-à-vis the Court, and the available trigger mechanisms—seemed no closer to resolution than they had at the beginning of the Conference.

In order to advance the negotiations toward consensus and completion, a “Bureau” of certain states<sup>8</sup> convened<sup>9</sup> to draft first a “Discussion Paper”<sup>10</sup> and then a “Proposal”<sup>11</sup> concerning Part 2 of the Statute (jurisdiction, admissibility and applicable law). The Discussion Paper was released Monday, July 6 and presented the beginnings of a “package” of provisions that included several options addressing the most difficult issues. These unresolved issues included: (1) whether treaty crimes, aggression and war crimes in internal armed conflict should be included within the jurisdiction of the Court; (2) the threshold for war crimes; (3) the list of prohibited weapons; (4) the power of the Prosecutor to initiate investigations and prosecution; (5) whether the Court would have automatic jurisdiction over crimes or whether states could “opt in to” or “opt out of” jurisdiction over certain crimes; (6) the preconditions for the exercise of jurisdiction; and (7) the role of the Security Council. The Discussion Paper framed the debates in the Committee of the Whole, in which states indicated their preferences given the options presented.<sup>12</sup>

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<sup>7</sup> In 1997, the General Assembly passed a resolution recognizing the right of NGOs to be invited to the Diplomatic Conference. U.N.G.A. Res. A/Res/52/160 (15 December 1997).

<sup>8</sup> The membership of the Bureau remains elusive. Reportedly, it was composed of the Chairs of the Working Groups and/or the officers of the Committee of the Whole as enumerated in the Final Act of the Statute plus other states. The group apparently included the representatives from Argentina (Fernandez de Gurmendi), Romania (Ivan), Lesotho (Mochochoko), Japan (Nagamine), Egypt (Bassiouni), and Dominica (Benjamin).

<sup>9</sup> It remains unclear if the Chairman of the Conference, Mr. Philippe Kirsch, convened the Bureau.

<sup>10</sup> Bureau Discussion Paper on Part 2: Jurisdiction, Admissibility and Applicable Law, U.N. Doc. No. A/Conf. 183/C.1/L.53 (6 July 1998) (Discussion Paper). In drafting the Discussion Paper, the Chairman is said to have met with over 60 other delegations in order to determine their “bottom line” positions. Certain states, Costa Rica in particular, took issue with the Chair’s exclusionary methods as not within the “spirit of the conference.” This behind the scenes activity took place against troubling rumors that the like-minded member states would succumb to the pressure of other nations to lower their demands regarding the final content of the treaty.

<sup>11</sup> Bureau Proposal on Part 2: Jurisdiction, Admissibility and Applicable Law, U.N. Doc. No. A/Conf. 183/C.1/L.59 (10 July 1998) (Proposal).

<sup>12</sup> According to figures compiled by the Coalition for an International Criminal Court, (1) the majority of states felt there was not enough time to include treaty crimes, but 92 states wanted to include the crime of aggression and 73 wanted to include war crimes committed in internal armed conflict; (2) 76% of states could live with the compromise threshold for war crimes; (3) the majority of states supported the short list of prohibited weapons; (4) 76% argued that the prosecutor should be able to initiate proceedings; (5) 73%

These debates then served as a basis for the drafting of the Proposal, a more complete “package” released on Friday, July 10 that contained fewer unresolved options. The Proposal contained the following elements with respect to the crimes within the jurisdiction of the Court: (1) the exclusion of treaty crimes and the crime of aggression unless definitions could be reached in the days that followed; (2) the choice between a high or a low threshold for war crimes (despite the fact that many states indicated that they preferred no threshold requirement); (3) the exclusion of nuclear and blinding laser weapons and landmines but a revision clause; and (4) the inclusion of war crimes committed in internal armed conflict, although the threshold requirement governing some provisions was quite high. The Proposal also contained a labyrinthine array of jurisdictional options that had the potential to treat the three crimes differently when it came to the consequences of ratification and the preconditions for the exercise of jurisdiction.<sup>13</sup> Finally, the requirement that the Court refrain from investigation unless the Security Council specifically authorized it to go forward was replaced by a provision that would allow the Security Council to suspend an investigation if it acts under Chapter VII.

Again, delegates discussed the outstanding options in the Committee of the Whole. Many participants in the Conference critiqued the Bureau for ignoring the “virtual vote” taken on the Discussion Paper and retaining options that had received little support during the Committee of the Whole discussions. Others argued, however, that such concessions were necessary to keep key states engaged in the negotiations.

Finally, a Final Proposal was released piecemeal late Thursday, July 16 and was presented as a “take it or leave it” document. On Friday evening, July 17, a packed and expectant Committee of the Whole adopted the Rome Statute of the International Criminal Court (Statute) after the Committee soundly rejected eleventh hour amendments by India and the United States.<sup>14</sup> The adoption of the Statute was met with an explosion

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supported the Court having automatic jurisdiction over the core crimes; (6) 79% of states argued that so long as one of four enumerated states were states parties or accepted the jurisdiction of the Court, the Court would have jurisdiction (the Republic of Korea proposal); and (7) the majority if states favored some role for the Security Council to block the Court (the Singapore proposal).

<sup>13</sup> For example, it provided that the crime of genocide would be subject to automatic jurisdiction, such that when a state became a Party to the Statute it would automatically accept the jurisdiction of the Court with respect to the crime of genocide. As a precondition to the exercise of jurisdiction over genocide, the Court would have had to determine that at least one listed state was a Party to the Statute. With respect to crimes against humanity and war crimes, one option would have subjected these crimes to automatic jurisdiction as well, whereas another would require states to specifically declare that they accept the jurisdiction of the Court over these crimes. There were three options governing the preconditions on the exercise of jurisdiction by the Court with respect to these latter two crimes: (1) one of four listed states would have to be Parties; (2) both the territorial and custodial state would have to be Parties; or (3) the state of nationality of the accused would have to be a State Party. In short, the options presented baffled most participants to the Conference.

<sup>14</sup> India proposed that nuclear and other weapons of mass destruction be reintroduced into the list of war crimes, and that the UN Security Council be denied any relationship to the Court. The delegate in particular argued that allowing the Council to refer cases to the Court was tantamount to allowing states that would be immune from the Court’s jurisdiction, because they would not ratify the treaty, to control the Court. Malawi and Chile supported a motion by Norway that no action be taken on the Indian amendments. When put to a vote, the Norwegian “no-action motion” was accepted by 114 states and opposed by 16. Twenty abstained. This was a prelude to a second proposed amendment from the United States which focused on the preconditions to the exercise of jurisdiction and proposed that the consent of the state of the nationality

of applause. The Committee then moved to Plenary during which time the United States requested an unrecorded vote on the Statute. According to the official vote, only seven state delegations opposed the Statute. Because this was an unrecorded vote and only three of the delegations took the opportunity to explain their vote (Israel, the United States and China), the identity of these seven “no” votes remains a bit of a mystery. According to one media account, the seven were: Israel, Mexico, China, the Sudan, Turkey, Indonesia, and the United States. Another identifies: Iraq, Libya, China, Indonesia, Turkey, Israel, and the United States. A third replaces Iraq and the Sudan with Iran. An unofficial ISHR analysis based on a color photograph of the voting board and the U.N. seating chart concludes that China, Iraq, Israel, Qatar, Sri Lanka, the Sudan and the United States voted against the Statute. The following states (21) abstained: Algeria, Bahrain, Ethiopia, India, Indonesia, Iran, Kuwait, Lao People's Democratic Republic, Libyan Arab Jamahiriya, Malaysia, Mexico, Morocco, Nepal, Oman, Saudi Arabia, Singapore, Syrian Arab Republic, Trinidad and Tobago, Turkey, Uzbekistan and Viet Nam.<sup>15</sup>

Interestingly, the United Arab Emirates joined Egypt and Jordan in defecting from the Arab bloc (which had apparently agreed to abstain) by voting for the treaty, while Iraq, Qatar and the Sudan voted against it. Both Pakistan and Bangladesh voted for the Statute despite India’s angry rhetoric and somewhat incongruous abstention.

State delegations must now bring the Statute home for consideration and, it is hoped, ratification by their national governments. At least twenty-six states already signed the Statute and Final Act at the signing ceremony. The Statute shall remain open for signature until 31 December 2000 (Article 125) and will enter into force upon the deposit of the 60<sup>th</sup> instrument of ratification (Article 126).

This dossier was drafted by ISHR representatives who attended the Diplomatic Conference on the basis of their notes, discussions with delegates, official Conference

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of the accused be required in addition to other states before the Court could exercise jurisdiction. Once again, Norway proposed that no action be taken on the United States amendment, and this motion was accepted by a resounding majority of 113, with 25 abstentions.

<sup>15</sup> According to the ISHR analysis, the following representatives (120) voted in favor of the Statute: Afghanistan, Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chile, Columbia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo (former Zaire), Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, El Salvador, Egypt, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Holy See, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Republic of Korea, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritius, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, the Russian Federation, Samoa, San Marino, Sao Tome and Principe, Senegal, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Thailand, The Former Yugoslav Republic of Macedonia, Togo, Tunisia, Ukraine, United Arab Emirates, United Kingdom, the United Republic of Tanzania, Uruguay, Venezuela, Zambia, and Zimbabwe. The following states (45) did not participate in the vote: Antigua and Barbuda, Bahamas, Barbados, Belize, Bhutan, Cambodia, Chad, Cook Islands, Democratic People's Republic of Korea, Equatorial Guinea, Eritrea, Fiji, Gambia, Grenada, Guyana, Honduras, Kiribati, Kyrgyzstan, Lebanon, Maldives, Marshall Islands, Mauritania, Micronesia, Mongolia, Myanmar, Nauru, Niue, Palau, Papua New Guinea, Republic of Moldova, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Somalia, Suriname, Tajikistan, Tonga, Turkmenistan, Tuvalu, Uganda, Vanuatu, Yemen and Yugoslavia.

documents, and reports issued by NGOs and the Coalition for an International Criminal Court during the Conference.<sup>16</sup> It provides a brief overview of this Statute with an emphasis on the way in which the key outstanding issues were resolved at the Diplomatic Conference and the positions taken by various state delegations. It focuses on the debates surrounding substantive law and the jurisdictional regime at the expense of the more technical provisions governing the conduct of investigations and trial. It is meant to act as a handbook for NGOs so that they better understand the provisions of this complex Statute.

## I. The Structure and Administration of the Court

### A. Composition

Part 4 of the Statute concerns the composition and administration of the Court. According to Article 34, the Court shall be composed of four main organs: a Presidency, the judicial Chambers (with appeals, trial and pre-trial divisions), the Office of the Prosecutor, and the Registry. The Presidency is composed of judges elected by the other judges and is responsible for the proper administration of the Court (with the exception of the Prosecutor's Office). Any State Party may nominate judges who must (1) be of high moral character, (2) be fluent in one of the working languages of the Court, (3) have competence in criminal law or international law (including human rights law); (4) be a national of a State Party. Judges shall be elected by the Assembly of States Parties according to Article 112. In so doing, States Parties must ensure (1) that the world's principal legal systems and geographic areas are represented, (2) gender balance, and (3) judicial expertise in specific issues, such as violence against women and children. The judges will then be assigned to one of the three judicial divisions depending upon their experience and expertise.

The Office of the Prosecutor is responsible for receiving information concerning crimes within the jurisdiction of the Court and commencing investigations and prosecutions. The Prosecutor is elected by members of the Assembly of States Parties. The Registry is responsible for the non-judicial aspects of the Court, most notably the establishment of a Victims and Witnesses Unit which shall provide protective measures, counseling, and other assistance to witnesses and victims that appear before the Court.

Part 11 of the Statute establishes an Assembly of States Parties which, for example, provides management oversight to the organs of the Court, decides the budget for the Court, considers issues of non-cooperation of States (both parties and non-parties), and addresses disputes between States Parties over the interpretation of the Statute.

### B. Financing the Court

Article 115 determines that the funds for the Court "shall be provided by the following sources: a) assessed contributions made by States Parties, b) funds provided by

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<sup>16</sup> ISHR is particularly indebted to the Coalition for organizing and facilitating NGO participation in the Conference and for keeping NGOs constantly informed about the status of negotiations.

the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.” This wording emerged from Dutch proposal that had also provided for initial funding by the United Nations only. This proposal was widely supported by the like-minded states. During the discussion, the United States insisted on financing the Court out of ‘states’ contributions only (with the exception of cases referred to the Court by the Security Council). The United States was supported by China, Oman, Mexico and the Russian Federation. Despite a strong lobbying effort, the Article includes financing by the United Nations, but the United States did manage to eliminate the provision calling for financing by the United Nations alone in the initial years of the Court.

Voluntary contributions are another possible source of financing the Court. Governments, individuals, international organizations and corporations are all welcome to make contributions according to Article 116. Egypt and other Arab states wanted to ban voluntary contributions by NGOs. Bosnia and Herzegovina was in favor of setting up a trust fund to avoid private contributions being confined to specific activities. In the end, the consensus was to allow for as many voluntary contributions as possible. The relevant criteria for acceptance of contributions are to be determined by the Assembly of States Parties.

### C. Reservations and Amendments

Article 120 is clear that no reservations may be made to the Statute. Seven years after the entry into force of the Statute, States Parties may propose amendments to the Statute according to Article 121. Amendments may be adopted by consensus, or barring that by a two-thirds majority. However, amendments involving provisions other than Article 5 (crimes within the jurisdiction of the Court) do not enter into force until seven-eighths of the Assembly has deposited instruments of ratification or acceptance of the amendments with the Secretary-General. Amendments regarding crimes within the jurisdiction of the Court enter into force with respect to States Parties which have accepted the amendment one year after the state deposits an instrument of ratification or acceptance. If a State Party does not accept an amendment, the Court cannot exercise its jurisdiction over a crime committed by that Party’s national or on that party’s territory.

## II. Trigger Mechanisms, Preconditions to the Exercise of Jurisdiction, and Admissibility

Questions of jurisdiction were among the most controversial issues in the drafting of the Statute. The resolution of these controversies was key to the attainment of a final agreement, and will ultimately determine the power and effectiveness of the Court.

Perhaps more so than for other parts of the Statute, the most crucial exchanges in the debate over jurisdiction were held behind doors largely closed to non-government participants, as well as to many smaller or marginalized government participants. While the debate over jurisdiction was wrapped in legal language, it was primarily a political debate, inflaming passions not only in Rome but also back in the capital cities. In more than one capital (most notably in the United States, the United Kingdom and France), various ministries and branches of government squared off over the broad principles and narrow technicalities of jurisdiction, and at least one capital (the United States) resorted

to the traditional diplomatic mechanisms of *demarches* and geopolitical and economic pressure to make its views known.

It is thus not surprising that the precise flow of the debate over jurisdiction remains shrouded in mystery. The following paragraphs will attempt to lift the veil somewhat.

## A. Trigger Mechanisms

“Trigger mechanisms” indicate the way in which proceedings are initiated before the Court. Article 13 of the final Statute provides for three trigger mechanisms: referral of a situation to the Prosecutor by a State Party; referral of a situation to the Prosecutor by the Security Council acting under Chapter VII of the United Nations Charter; and the *proprio motu* (on his or her own motion) initiation of an investigation by the Prosecutor.

### 1. Referral by a State Party

Referral of a situation by a State Party was by far the least controversial trigger mechanism, but it is also generally regarded as the least effective. Like-minded states and NGOs in particular argued that states are more likely to succumb to political and economic pressures than the Security Council or an independent Prosecutor, and are hence less likely to initiate proceedings against citizens of a state that may be able to take retaliatory measures against them. This fear finds significant support in the behavior of states with regard to the referral procedures of existing human rights conventions and committees.

The final Statute allows any State Party to refer situations to the Prosecutor. This provision follows a proposal submitted by the United Kingdom at the last PrepCom. Other state referral options would have restricted the right to refer situations to states which have accepted jurisdiction over the crime in question, or to “interested” State Parties, such as the territorial state, custodial state, the state of nationality of the suspect, and the state of nationality of the victim. The former option was initially supported by China and New Zealand. It may have restricted the possibility of state referrals, but it also would have reduced the possibility of politically-motivated referrals and may also have provided an incentive to accept the jurisdiction over crimes. The latter option, subject to some variation, was initially supported by Chile, Iraq, Israel, Japan, Lebanon, Libya, Mexico, Morocco, Nigeria, Pakistan, Saudi Arabia, the Sudan, Tunisia, the United Arab Emirates and Ukraine. It would have seriously restricted the possibility of state referrals, and would have confused the initiation of proceedings with the preconditions to the exercise of jurisdiction. Some states (such as Chile, Colombia, Iran, Japan, Mexico, Slovenia, Spain, Syria and Venezuela) would have granted non-State Parties the right to refer situations to the Prosecutor, but it was widely agreed that such a provision would remove an incentive for joining the Statute and would smack of hypocrisy. Early on in the debate, all these options ceded to the United Kingdom proposal that was ultimately adopted.

The proposal of the United Kingdom also explicitly mentioned the referral of “situations,” rather than the more restrictive “cases” or “matters.” Once a situation has

been referred to the Prosecutor, he or she may proceed to investigate particular cases within that situation. This mechanism simplifies referrals to the Prosecutor and allows the Prosecutor more flexibility in conducting specific investigations. Mexico, Turkey and Ukraine initially argued for some variant of the “case” or “matter” terminology, but these proposals quickly disappeared.

## 2. Referral by the Security Council

The ability of the Security Council to refer cases was more hotly contested. Although Chapter VII of the United Nations Charter appears to give the Security Council the authority to maintain peace and security by all means necessary, presumably also by referral to an international tribunal, some states (notably India, Iran, Iraq, Libya, Pakistan, the Sudan and Syria) were concerned that such a referral mechanism would unduly bolster the power of the Security Council. India in particular was adamant about this point and pursued it until the last evening of the Conference, when its final proposal to eliminate the role of the Security Council was soundly defeated in the Committee of the Whole.

In accordance with an option presented in the Draft Statute issued at the last PrepCom, some delegations (Brazil, the Netherlands and the United States) advocated inclusion of Chapter VI referral power by the Security Council. Given that Chapter VII power has been interpreted broadly in the case of the establishment of the Yugoslav and Rwanda tribunals, thus ostensibly covering situations in which Chapter VI would normally apply, these proposals were quickly mooted. Other delegations wished to include referrals by the General Assembly in addition to or instead of the Security Council (Algeria, Egypt, Jamaica, Libya, Mexico and Trinidad and Tobago), and some called for referrals by the United Nations Human Rights Commission (Afghanistan and Jordan), but these proposals expired in the face of opposition by the permanent members of the Security Council and others. (A rather obscure proposal by Mexico calling for replacement of the phrase “the Security Council” with “the relevant principal organ of the United Nations” throughout the Statute went largely unnoticed). The final text simply acknowledges the authority of the Security Council to refer situations under its Chapter VII powers, without any of the further elaboration provided by options in the Draft Statute issued by the PrepCom.

## 3. *Proprio Motu* Prosecutor

By far the most controversial trigger mechanism was that of *proprio motu* (or *ex officio*) initiation of investigations by the Prosecutor. Article 15 grants the Prosecutor the power to launch investigations of his or her own accord, “on the basis of information on crimes within the jurisdiction of the Court.” The Prosecutor is called upon to “analyse the seriousness of the information received,” drawing from additional information provided by “states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.” The Prosecutor is then required to submit requests for authorization of investigation to a Pre-Trial Chamber, consisting of either a single judge or of three judges elected to the Court (according to Article 39). The Pre-Trial Chamber examines the request and

decides whether there is a “reasonable basis to proceed with an investigation,” including an initial assessment of whether the case falls within the jurisdiction of the Court.

Article 42 provides that the Office of the Prosecutor shall “act independently as a separate organ of the Court.” The Office consists of a head Prosecutor and one or more Deputy Prosecutors, each of whom must serve full-time and have a strong background in criminal justice. The Prosecutor and the Deputy Prosecutors are elected by the Assembly of State Parties, and are to be assisted by legal experts on issues including sexual and gender violence and violence against children—two provisions that were included due to the coordinated lobbying of the Women’s and Children’s Caucuses.

Based on the information provided to him or her, the Prosecutor shall initiate an investigation according to Article 53, unless he or she determines there is no reasonable basis to proceed, taking into consideration the likelihood that the crime has been committed, concerns of complementarity and jurisdiction, the interests of the victims, the condition of the suspect, and so on. The Pre-Trial Chamber may, either on its own initiative or at the request of the State Party making the referral or the Security Council, review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider.

Articles 60 and 61 outline additional functions of the Pre-Trial Chamber, including rulings on detention and release, confirmation and modification of charges, and so on. According to Article 64, the Trial Chamber may refer other preliminary issues to the Pre-Trial Chamber and may exercise functions of the Pre-Trial Chamber if necessary and applicable.

The idea of the Pre-Trial Chamber was floated as an option in the PrepCom by Germany and Argentina to address concerns that the Prosecutor might become too powerful or be deluged with information on potential crimes. The introduction of the Pre-Trial Chamber provides a safeguard to the far-reaching independence of the Prosecutor. At the beginning of the Conference, it was quickly linked to the proposal for a *proprio motu* Prosecutor as a viable means of alleviating the moderate concerns of some delegations who wished to see the Prosecutor embedded in an effective system of checks and balances.

The inclusion of the Pre-Trial Chamber did little, however, to squelch the more radical fear that granting *proprio motu* powers to the Prosecutor may trigger a loose cannon by providing the opportunity for politically motivated and spurious prosecutions. This fear permeated the interventions of a number of delegations throughout the Conference, most notably of the United States, joined by a collection of many of its traditional adversaries and rivals as well as some allies (Afghanistan, Algeria, Azerbaijan, Bahrain, Bangladesh, China, Cuba, Egypt, Ethiopia, India, Indonesia, Iran, Iraq, Israel, Japan, Libya, Nigeria, Oman, Pakistan, the Russian Federation, Saudi Arabia, Sri Lanka, Tunisia, Turkey, the United Arab Emirates, Ukraine, Uruguay, Viet Nam and Yemen). The Bureau’s Proposal included a rather amorphous option calling for “additional safeguards.” This option appeared to lure six delegations away from the camp of states in complete opposition to the *proprio motu* Prosecutor (Algeria, Bangladesh, Indonesia, Iran, Israel and Oman), but failed to generate much enthusiasm (or specificity) and ultimately fell by the wayside. Kenya, initially opposed to the *proprio motu* Prosecutor, later adopted a more flexible attitude.

The United States at times couched its opposition to the *proprio motu* Prosecutor in terms of concern for the effectiveness of the Court. In an intervention on the Discussion Paper, the U.S. delegation stated the belief that the *proprio motu* Prosecutor was “superficially attractive” but would “in practice actually weaken the Court.” Furthermore, it argued that “this is an overreaching proposal which transforms the Court into an institution quite different” from what the U.S. government ever imagined it to be and that would “undermine the credibility and operational viability” of the Court. It would also “discourage many governments from joining the Court.” At the final meeting of the Committee of the Whole on the last night of the Conference, the U.S. delegation argued that the *proprio motu* Prosecutor “is an institutional weakness that can easily break through the delicate boundaries of this Statute, to overwhelm the Court with complaints and embroil it in controversy and confusion.”

In this context, it must be noted that in the case of the Rwanda and Yugoslav tribunals, the Prosecutor was granted considerable autonomy by the Security Council, after initial referral of the entire “situation” to the Prosecutor. The United States criminal justice system also provides prosecutors with considerable independence to initiate investigations. It is therefore probable that the concern of the United States delegation was not with the *proprio motu* power of the Prosecutor as such, but with the *proprio motu* power of a Prosecutor elected by an international body and not subject to Security Council and hence United States supervision.

Other voices criticizing the *proprio motu* Prosecutor were less self-serving. Although ultimately in favor of the *proprio motu* provision, the United Kingdom was concerned that the Prosecutor might become overburdened with potential cases, and thus forced to make quasi-political decisions on which cases to pursue. Iran (with endorsement from Japan) argued that *proprio motu* powers were “premature,” emphasizing that the Court was not to become a supernational body, but rather a multilateral treaty organization. Iran joined Cuba, Iraq, Libya, the Russian Federation and others in voicing the fear that a *proprio motu* Prosecutor might be subject to political pressures. India and Israel contended that the Prosecutor would not have the international legitimacy to pursue investigations of his or her own accord, and hence would be ineffective.

The bulk of NGOs, like-minded states, and many African states took the position that only a *proprio motu* Prosecutor could guarantee the political independence of the Court. This coalition of advocates for a *proprio motu* Prosecutor argued that individuals are less subject to geopolitical manipulation than states and less consumed by obtrusive self-interest than at least some of the permanent members of the Security Council. In this regard, they cited the relative success of the *proprio motu* Prosecutors in the two international tribunals. These states ultimately stood by their positions and ultimately carried the day, despite some rumors that a strategic sacrifice may be made. Ultimately, the debate over preconditions to the exercise of jurisdiction drowned out the debate over the *proprio motu* Prosecutor, and it was this debate that became the primary target for the opponents of a strong and independent Court.

## B. Preconditions to the Exercise of Jurisdiction

Due to the comprehensive powers allocated to the Security Council under Chapter VII of the United Nations Charter, the Court has jurisdiction over any situations referred by the Security Council, regardless of whether the states concerned have accepted jurisdiction of the Court. Other than in conjunction with the discussion of the Security Council as a trigger mechanism, this aspect of jurisdiction was never a topic of debate.

Determining the preconditions to the exercise of jurisdiction was far more complicated in the case of State Party referrals or *proprio motu* investigations by the Prosecutor. This debate over jurisdiction took place against the tension created by the conflicting constraints of established international law, domestic and international political considerations, and the desire to establish an effective Court. The compromise solution adopted after last-minute deliberations satisfied no one, but appeared to be the only basis that would achieve anything approaching consensus.

According to Article 12(2), the Court may exercise its jurisdiction in the case of State Party referral or *proprio motu* investigation only if the “State on the territory of which the conduct in question occurred” or the “State of which the person accused of the crime is a national” has accepted jurisdiction of the Court with respect to the particular crime in question (i.e. genocide, war crimes or crimes against humanity).<sup>17</sup> The question of how states accept the jurisdiction of the Court will be discussed in the section on “Crimes with the Jurisdiction of the Court”; the following discussion will focus on which states must accept jurisdiction in order for the Court to exercise its power.

The compromise solution creates a Court with jurisdiction over the crimes committed by citizens or on the territory of the community of states which are Party to the Statute. Although this solution is conceptually clean, it severely limits the range of cases that can be brought before the Court, given the considerable number of states likely not to ratify the Statute, and given that citizens of many of these non-Party states are likely to become perpetrators of crimes within the jurisdiction of the Court.

This compromise solution was the final settling point in negotiations that extended from the PrepCom meetings to the last minutes of the Diplomatic Conference. Early on, Germany and the United States established themselves as the most vocal supporters of the two most extreme positions in the jurisdictional debate. Germany advocated granting the Court “universal jurisdiction” over all core crimes, following the precedent set by some human rights conventions which indicate that these crimes may be prosecuted by all states. This proposal would have created a true supernational criminal court with worldwide jurisdiction. At one point in time or another over the course of the conference, numerous states came out in favor of this proposal (notably Azerbaijan, Belgium, Bosnia and Herzegovina, Burundi, Cameroon, Congo, Costa Rica, Croatia, Djibouti, Ecuador, Guinea, Italy, Jordan, Liechtenstein, Mali, the Netherlands, New Zealand, Norway, Portugal, Romania, Senegal, Sierra Leone, Spain, Trinidad and Tobago, Ukraine, the United Republic of Tanzania and Venezuela). However, this proposal was quickly branded as too “extreme” and premature by its opponents and was not even included as an option in the first Discussion Paper issued by the Bureau.

The United States, among others, argued that extending universal jurisdiction to a supernational court was in contravention of established international law and would

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<sup>17</sup> In the case of crimes committed on board vessels or aircraft, the state of registration of the vessel or aircraft is considered the territorial state.

seriously undermine the legitimacy of the Court. It is also clear that the United States was not willing to allow an international court to exercise jurisdiction over its own citizens without its consent (even though foreign states routinely exercise jurisdiction over United States citizens and the United States even more routinely exercises jurisdiction over foreign citizens). In an aggressive and controversial intervention on the Discussion Paper, the United States asserted that “there are too many governments which would never join this treaty and which, at least in the case of the United States, would have to actively oppose this Court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the Court,” although it conceded that the principle of universal jurisdiction was “theoretically attractive.” It stated that prosecuting officials and personnel of a government without the government having accepted the jurisdiction of the Court would be “a form of extraterritorial jurisdiction that would be quite unorthodox in treaty practice.” Although the United States argued early on that consent of the nationality state should be necessary for the Court to exercise jurisdiction, it did not explicitly introduce this proposal until the Discussion Paper. The United States proposal called for the acceptance of jurisdiction only by the state of nationality of the accused; other permutations of the U.S. stance called for inclusion of other states in addition to the nationality state, such as the territorial state and the custodial state (i.e., the state where the suspect is being held or where the suspect is resident). Over the course of the Conference, the following states endorsed at least one of these variants: Algeria, Gabon, Indonesia, Iran, Israel, Mexico, Sri Lanka, the Sudan and Turkey.

At the last PrepCom, the United Kingdom introduced a compromise proposal between these two extreme positions which called for acceptance of jurisdiction by both the territorial state and the custodial state. In the first debate of the Conference, the United Kingdom modified its proposal, dropping the requirement of the custodial state. Both the original U.K. proposal and the modified U.K. proposal survived until the Discussion Paper; the Proposal included only the original U.K. proposal. Sometime advocates of the U.K. proposals included Afghanistan, Austria, Canada, China, Colombia, Côte d'Ivoire, Denmark, Egypt, France, Greece, India, Jamaica, Japan, Malawi, Nigeria, Norway, Oman, Pakistan, Peru, Romania, the Russian Federation, Sierra Leone, Slovenia, Switzerland and the United Republic of Tanzania. Iran eventually also moved from the nationality state camp to the more permissive U.K. camp in the spirit of compromise. Including the territorial state would have helped allay the concerns of those searching for a customary nexus between the relevant state and crime committed.

In the first discussion of jurisdiction in the Committee of the Whole, the Republic of Korea floated a compromise proposal resembling the German position that would have called for any one of the following states to accept jurisdiction: the territorial state, the custodial state, the nationality state of the suspect, or the nationality state of the victim. This proposal immediately attracted the interest of many delegations and NGOs alike, since it was a more palatable variant approaching universal jurisdiction. Although the Korean proposal subsequently became the basis for additional negotiations and compromise proposals, it also had the effect of further marginalizing the more extreme German position, partially explaining why the German proposal was no longer included in the Discussion Paper and the Bureau Proposal notwithstanding its wide support.

By the time of the release of the Discussion Paper, the Republic of Korea compromise had already emerged as the predominant proposal. In the debates that followed, support for this proposal clearly swamped support for either of the U.K. proposals as well as the U.S. proposal. In the Proposal, the South Korean solution was the only option included for the crime of genocide, and by far the most popular of the three options (which also included the original U.K. proposal and the U.S. proposal) for crimes against humanity and war crimes. Nevertheless, in the interest of appeasing the most forceful opponents of any variant of universal jurisdiction, the final draft of the Rome Statute had whittled the Korean proposal down to its final incarnation that was ultimately adopted for all crimes.

Despite this compromise, the United States continued to insist on the inclusion of the state of nationality of the accused, asserting that although “the United States is second to none in acknowledging the importance of universality of jurisdiction, in its proper context and scope of operation, for the effective vindication of international law,” it also “must emphasize that this treaty takes the principle of universal jurisdiction far outside any acceptable scope or context.” In particular, the “crimes included in the treaty . . . go beyond grave breaches of the Geneva Conventions and include crimes for which it is not even arguable that universal jurisdiction exists in any context” and “one cannot through this treaty create and impose the jurisdiction of an international court on States which do not join.” Perhaps more so than with other provisions of the Statute, this insistence on including the nationality state of the accused explains the U.S. rejection of the treaty. In the final meeting of the Committee of the Whole, the United States proposed changing the disjunctive terminology of the compromise solution (“territorial state or nationality state”) to a conjunctive terminology (“territorial state and nationality state”), but was overwhelmingly defeated.

NGOs and many like-minded states were particularly disappointed that the Court will not have jurisdiction when the custodial state is a party to the Statute or has accepted the Court’s jurisdiction. Including the custodial state would have greatly facilitated the prosecution of international criminals, since it would have restricted their travel options to states not party to the Statute. However, the omission of the custodial state was a key factor in inducing important states such as France and the Russian Federation to endorse the treaty. Furthermore, it was already clear by the time the compromise was introduced that the United States would not be joining the Statute, and hence the state generally most eager to arrest international criminals and take them into custody would not be party to the Statute.

### C. Admissibility

The question of admissibility concerns whether the Court can try a case that has been referred to it. This decision concerns three principles: the principles of complementarity, the principle of *ne bis in idem*, and the nature of the crimes referred.

#### 1. Complementarity

The principle of complementarity represents a bedrock principle of the Court that first finds expression in the Preamble and in Article 1. Article 17 elaborates that the

Court cannot proceed with a particular case unless the state is “unwilling or unable genuinely” to carry out the investigation or prosecution. In other words, the principle of complementarity establishes a relationship of primacy for the national criminal justice system. According to Article 19, it is within the competence of the Court to determine whether it has jurisdiction under the principle of complementarity, subject to challenges by the accused, states which have jurisdiction over the case, and states from whom acceptance of jurisdiction is required under Article 12.

Article 17 was debated intensely at the PrepComs and was subject only to slight drafting changes at the Conference. These changes were made as a concession to Mexico, which had originally proposed a much more restrictive version of complementarity. It is somewhat surprising that the debate on Article 17 was not reopened; the phrase “unwilling or unable” is only vaguely defined, and appears to allow the Court considerable discretion in asserting its jurisdiction. It is also notable that the opinion of NGOs, delegates, and academics diverge widely in their predictions as to how permissively this phrase will be interpreted in practice.

Complementarity was however often cited during the debates on trigger mechanisms and preconditions to the exercise of jurisdiction. The main line of argument (espoused primarily by the non-aligned states) held that *proprio motu* powers of the Prosecutor combined with a permissive regime of state acceptance of jurisdiction would undermine the principle of complementarity by taking cases away from states that are willing and able (at least according to their own assessment) to prosecute a case. It is difficult to determine the legal basis of this argument, but it is easy to see that if any one of a number of states can accept jurisdiction of the Court, and if the Prosecutor is authorized to initiate investigations *proprio motu*, it would be politically easier for the Court to assert jurisdiction over a particular case under the principle of complementarity.

The United States proposed an additional article during the last PrepCom that purported to clarify the principle of complementarity, but in effect introduced a number of procedural hurdles that obstructed the discretion of the Court in asserting jurisdiction. In particular, the proposed Article addressed the referral of “matters,” not “cases,” adding an additional layer of constraints on determining complementarity; it introduced time provisions that could have significantly delayed the initiation of a prosecution; and it did not provide safeguards to prevent the destruction of evidence or the absconding of suspects. Generally regarded as poorly drafted, the proposed Article was skeptically received by the Conference and revised numerous times, until it appeared in its current reluctant manifestation as Article 18. The final version addresses the referral of “situations,” harmonizing the terminology with the rest of the Statute; reduces the possibility of delay; and provides for protections against destruction of evidence and absconding.

## 2. *Ne Bis in Idem*

The principle of *ne bis in idem* ensures that no individual can be tried more than once for the same crime. Article 20 implements this principle in three ways: (1) no person shall be tried before the Court with respect to conduct for which the person has already been tried by the Court; (2) no person shall be tried by another court for a crime referred to in Article 5 for which that person has already been tried by the Court; and (3)

no person who has been tried by another court for certain conduct shall be tried by the Court unless the other proceedings were either for the purposes of shielding the person from criminal responsibility or were not conducted independently or impartially.

### 3. The Nature of the Crimes Referred

According to the Preamble and Article 1, the Court shall have jurisdiction over only the most serious crimes of international concern. This principle is reinforced in Article 17(1)(d), according to which the Court must determine whether a particular case referred to the Court is of sufficient gravity to justify further action.

#### D. Role of the Security Council

After the PrepComs, there was some concern that the Security Council would attempt to establish an exclusive right to approve referral of situations or cases to the Court. This idea was anathema not only to those states opposing any involvement of the Security Council, but also to NGOs and like-minded states desiring a Court politically independent of the Security Council. A proposal floated by Singapore (with the probable backing of the United Kingdom) at the PrepComs granted the Security Council the right to block an investigation or prosecution. This proposal had the advantage that all five permanent members of the Security Council would have to agree to block a case. If the Security Council were given the affirmative right to approve situations or cases, any one of the permanent members could effectively veto a prosecution.

The role of the Security Council in approving or blocking prosecutions was closely linked to the inclusion of aggression as a crime under the jurisdiction of the Court, since Article 39 of the Charter of the United Nations reserves a special role for the Council in the determination of aggression. Once it became clear that aggression would not be immediately included in the Statute, the debate over the power of the Security Council to approve or block cases subsided somewhat. In one of its rare and thus notable concessions, the United States delegation reluctantly agreed to some variant of the Singapore compromise in its intervention on the Discussion Paper. A version of the Singapore proposal appears in the Statute as Article 16, giving the Security Council the renewable right to defer investigations and prosecutions for a period of 12 months.

### III. Crimes within the Jurisdiction of the Court<sup>18</sup>

Article 5 of the final PrepCom Report had provided for jurisdiction over four “core crimes”—genocide, aggression, war crimes and crimes against humanity—and had envisioned further work on the inclusion of so-called treaty crimes (crimes of terrorism, narcotics trafficking and crimes against United Nations personnel). The final Statute limits itself to those four core crimes, although a definition of aggression is still lacking. With respect to treaty crimes, crimes against U.N. personnel were subsumed within the war crimes section, and as discussed below the other two treaty crimes will be considered

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<sup>18</sup> Refer to the annex for the full text of these provisions.

by the first Review Conference in accordance with Resolution E of the Final Act and Article 123.

Pursuant to Article 12, states that ratify the Statute automatically accept the jurisdiction of the Court with respect to all of the crimes referred to in Article 5. However, as discussed below, states can “opt out” of the Court’s jurisdiction with respect to war crimes for a limited period of time according to Article 124 (Transitional Provision). The Bureau’s Discussion Paper had provided one option at Article 7bis for an “opt in” regime governing one or more core crimes.<sup>19</sup> In the Committee of the Whole discussions, the majority of states insisted on automatic or inherent jurisdiction for all core crimes. Only a minority of states (Algeria, Brazil, China, Ethiopia, France, India, Indonesia, Iran, Israel, Libya, Nigeria, Oman, the Russian Federation, Sri Lanka, the Sudan, Turkey, United Arab Emirates, the United States, Uruguay and Yemen) supported the “opt in” option. This latter option was replaced by the “opt out” regime of Article 124 in the Bureau’s Proposal, apparently as a concession to France.

#### A. Genocide

The definition of the crime of genocide was uncontroversial, and the Statute simply reproduced the definition found in Article 2 of the 1948 Genocide Convention. The final PrepCom Report had also included the text of Article 3 of the Convention which lists prohibited forms of participation in genocide: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. In contrast, the final Statute addresses these forms of participation in Article 23 governing individual criminal responsibility with respect to all crimes. That Article provides that a person shall be criminally responsible and liable for punishment for a crime if that person: commits a crime; orders, solicits or induces the commission of a crime; contributes to the commission pursuant to a common purpose; or attempts to commit such a crime. This Article references incitement only with respect to genocide.<sup>20</sup> Conspiracy per se has been replaced by the doctrine of common purpose.

#### B. Crimes Against Humanity

The definitions of the other three core crimes proved to be quite contentious. The PrepCom Report at Article 5 had bracketed various elements of the definition of crimes against humanity, including the precise acts that would constitute crimes against humanity and (1) whether such acts had to be part of a widespread *or* systematic attack or part of a widespread *and* systematic attack; (2) whether such acts must have a nexus (or link) to armed conflict; and (3) whether such acts had to be motivated by discriminatory intent.<sup>21</sup> Although the International Law Commission and the International Criminal

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<sup>19</sup> See Discussion Paper at p. 14. According to this draft provision, upon ratification, states could indicate their acceptance the jurisdiction of the Court over only certain crimes (with the exception of genocide which would have been subject to universal jurisdiction). Without such an acceptance, cases involving a state’s nationals or territory could not come before the Court.

<sup>20</sup> It reads: “(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide.”

<sup>21</sup> See PrepCom Report, pp. 30-32.

Court for the Former Yugoslavia in the *Prosecutor v. Dusko Tadic* case have determined that crimes against humanity need only be connected to a widespread *or* systematic attack, several states (such as India, the United Kingdom, France, Egypt, Turkey, the Russian Federation, Japan, Uruguay, Peru and the United States) argued that proof that the attack manifested both characteristics should be required. Similarly, although most contemporary definitions of crimes against humanity do not require that the acts have a nexus to armed conflict, at the Diplomatic Conference a number of states from the Middle East (such as Syria, United Arab Emirates, Bahrain, Lebanon, Saudi Arabia, Tunisia, Morocco, Kuwait and Iraq) and others (India, China, the Russian Federation and Ukraine) insisted that the Statute include this requirement. Finally, a few states argued that discriminatory grounds for all crimes against humanity should be included in the chapeau.

## 1. Prohibited Acts

The delegates to the Diplomatic Conference determined that the following acts would constitute crimes against humanity under Article 7(1): murder, extermination, enslavement, deportation or forcible transfer, imprisonment or other severe deprivation of physical liberty, torture, rape and other forms of sexual violence, persecution, enforced disappearance of persons, apartheid, and other inhumane acts of a similar character. These acts are further defined in Article 7(2). This enumeration contains several important and occasionally contentious components.

First, in addition to deportation, the forcible transfer of persons is listed as a crime against humanity. This covers acts such as ethnic cleansing within the borders of a state. Nepal had argued that this provision should apply to persons “habitually resident” in an area. However, at the insistence of the United States and others, this provision applies only to those victims “lawfully present” in the area from which they are transferred, which could exclude squatter and refugee populations. This provision originally included the term “movement of persons” without reference to “expulsion,” but Israel and India insisted upon the formulation found in the final text. Even with this language, Israel opposed the inclusion of this provision altogether, and in its explanation of vote on the final day of the conference, Israel claimed to have voted “no” to the Statute on the basis of this provision’s inclusion.

Second, states engaged in protracted debates over the precise wording of the imprisonment section. Some states (Bahrain, Colombia, Israel, Japan, Republic of Korea, Singapore, Slovenia, Thailand, Turkey and the United States) wanted the provision to be limited to “detention” or “imprisonment,” whereas the majority of states (including Argentina, Belgium, Bosnia and Herzegovina, Costa Rica, Denmark, Germany and the United Kingdom) favored reference to “deprivation of liberty” more generally to cover concentration camp and house arrest situations. The United States, along with the United Kingdom and United Arab Emirates, successfully fought for the inclusion of the word “severe” to exclude short-term detentions.

Third, crimes of gender violence feature prominently in the crimes against humanity section. The inclusion of “forced pregnancy” proved to be one of the most contentious issues of the conference. Bosnia and Herzegovina argued forcefully and convincingly for its inclusion on the ground that it represents a unique crime separate

from both rape and unlawful confinement. Bosnia and Herzegovina was frequently supported by both Rwanda and Turkey. Other state delegations argued that the notion of forced pregnancy was contained within the other crimes (the position of Egypt, Iran, Philippines and United Arab Emirates), that the definition of the crime was too vague (Finland), or that they had constitutional or moral constraints on recognizing forced pregnancy as a crime (Colombia, the Holy See, India, the Russian Federation, San Marino and Venezuela). In the enslavement provision, Italy had proposed that the language read “in the course of trafficking in persons, in particular women and children, for the purpose of sexual exploitation.” However, the Women’s Caucus lobbied to have the final clause removed so as to not limit the reasons for which trafficking can be undergone. With respect to the crime of persecution, the Holy See in particular wanted the term “gender” removed unless its meaning was clarified in order to ensure that separate religious facilities and facilities for men and women would be excluded. The final Statute provides a limited definition of “gender” at paragraph 3: “For the purpose of this Statute it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.”

Fourth, the prohibition against torture is broader than that found in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) which prohibits only state action.<sup>22</sup> In contrast, the Statute’s definition requires only that the victim be in the custody or under the control of the accused; the accused need not be a state agent. For acts to constitute torture under Article 1(1) of the Torture Convention, they must be perpetrated for one of the following purposes: (1) to obtain from the victim or a third person information or a confession; (2) to punish the victim for an act he or a third person has committed or is suspected of having committed; (3) to intimidate or coerce the victim or a third person; or (4) for any reason based on discrimination of any kind. The Statute does not require the prosecution to prove such specific intent on the part of the accused in order to obtain a conviction for torture.

Fifth, the crime of apartheid was included upon a proposal by Bangladesh, India, Lesotho, Malawi, Namibia, South Africa, Swaziland, the United Republic of Tanzania, and Trinidad and Tobago.<sup>23</sup> Some of these states unsuccessfully proposed that apartheid constitute a war crime as well.<sup>24</sup>

Finally, there were several unsuccessful attempts to expand the list of enumerated acts. For example, Cuba unsuccessfully argued that “economic, financial and commercial blockades intentionally causing great suffering or seriously injuring physical integrity or mental or physical health” be included as a crime against humanity.<sup>25</sup> Similarly, when it became clear that there may not be adequate time for the Statute at the outset to encompass so-called treaty crimes, Algeria, India, Sri Lanka and Turkey proposed the

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<sup>22</sup> The Torture Convention prohibits torture when “such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Torture Convention, Article 1(1).

<sup>23</sup> U.N. Doc. A/Conf.183/C.1/L.12 (22 June 1998).

<sup>24</sup> U/N/ Doc. No. A/Conf.183/C.1/L.13 (22 June 1998) (Proposal by Lesotho, Malawi, Namibia, South Africa, Swaziland and the United Republic of Tanzania).

<sup>25</sup> U.N. Doc. No. A/Conf. 183/C.1/L.17 (23 June 1998).

addition of “terrorism” as a crime against humanity.<sup>26</sup> This proposal received some support from states such as Azerbaijan, Benin, Guatemala, Lebanon, Mexico, Samoa and Uganda. Other states (such as Canada, Denmark, Liechtenstein Oman, and the United States) opposed this proposal on the grounds that terrorism has never been a crime against humanity and that there is no satisfactory definition of the crime. A few states (such as Afghanistan, Qatar and United Arab Emirates) advocated the inclusion of terrorism so long as the definition excluded acts taken within the context of national liberation movements. Other states (such as Cuba) argued that the definition of terrorism should track that of the General Assembly and should not include reference to “acceptable” grounds for terrorism that were rejected by that body. This proposal to include terrorism as a crime against humanity was ultimately rejected.

## 2. The Common Elements

With respect to the common elements of all crimes against humanity, the Canadian delegation successfully proposed a chapeau (heading) that deleted the war nexus and the discriminatory intent requirement that had been suggested in previous versions. It also provided that the enumerated acts “must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” The text includes the disjunctive formula—the attack must be widespread *or* systematic—as opposed to a conjunctive formula—requiring that the attack be widespread *and* systematic. However, the definition of “attack against any civilian population” provided at Article 7(2)(a) still seems to require the prosecution to prove that the attack was both widespread *and* systematic. According to that definition, an “attack against a civilian population” is “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

In informal discussions, states advanced various definitions of “widespread” and “systematic.” France defined “widespread” as a massive attack directed against a large number of persons that excludes isolated offences. Switzerland explained that the concept of “widespread” was necessary to cover unconnected acts committed within a conflict. France suggested that “systematic” implied planning or a consistent pattern. The United States suggested that “the attack constitutes or is part of, or in furtherance of, a preconceived plan or policy, or repeated practice over a period of time.”<sup>27</sup> The United Kingdom linked the term to a plan or coordinated activity and Austria linked the term to a “scheme.” Canada argued that the term “in furtherance of a policy” marked a lower threshold than “systematic”, which implied methodical or organized action.

In a meeting with the NGO Coalition, the Canadian delegation indicated that it was their intention that the future Court interpret the terms “organizational” and “policy”

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<sup>26</sup> Their proposal defined terrorism as: “a crime committed against persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it.” U.N. Doc. No. A/Conf.183/C.1/L.27 (29 June 1998).

<sup>27</sup> U.N. Doc. No. A/AC.249/1998/DP.11 (2 April 1998) (United States Elements Paper) at 3.

quite broadly to include, for example, radio broadcasts inciting people to violence as occurred in Rwanda. However, even with this broad interpretation, this definition of attack could exclude situations in which the policy was that of a rebel (i.e. not a state) group (unless such a group meet the definition of “organization”) or in which there were random acts of violence perpetrated against a civilian population (such as a “pogrom”) that were not the result of a policy.

## B. War Crimes

### 1. Threshold for War Crimes Jurisdiction

Article 8(1) provides for a threshold requirement for all war crimes: the Court has jurisdiction over war crimes “*in particular* when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes.” In the Diplomatic Conference, the United States (at various times along with Algeria, China, Ghana, India, Iran, Israel, Nepal, Nigeria, Pakistan, the Russian Federation, Sri Lanka, Thailand, Turkey and Uruguay) steadfastly supported their original proposal which would have limited the Court’s jurisdiction to war crimes “only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” The United States consistently claimed that this provision was jurisdictional and not definitional, such that it would not affect the definition of war crimes. At the last PrepCom, the alternative formulation was proposed that was ultimately accepted. Although many states argued for no threshold requirement (including Australia, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Botswana, Cameroon, Chile, Colombia, Congo, Croatia, Cyprus, Dominican Republic, Ecuador, Egypt, Ethiopia, Finland, Gabon, Greece, Guinea, Guinea-Bissau, Indonesia, Iraq, Ireland, Liechtenstein, Lithuania, Mali, Namibia, the Netherlands, New Zealand, Norway, Peru, Philippines, Qatar, Republic of Korea, Sierra Leone, Slovakia, Slovenia, Sweden, Switzerland, Syria, Togo and Trinidad and Tobago), the “in particular” formulation emerged as a compromise position for many of these states that was also supported by Afghanistan, Andorra, Austria, Azerbaijan, Brazil, Burundi, Comoros, Cuba, Denmark, France, Georgia, Germany, Guatemala, Japan, Jordan, Kuwait, Lesotho, Malta, Mozambique, Nicaragua, Oman, Poland, Portugal, Romania, South Africa, Spain, Uganda and the United Kingdom.

### 2. International Armed Conflict

Article 8 of the Statute governs war crimes committed in both internal and international armed conflict, but the list of crimes relevant to international war is much longer than that for civil wars. Since almost all contemporary conflicts are “non-international,” this limits the scope of the Statute.

There was general consensus from the outset that the Statute should include Article 8(2)(a) which addresses “grave breaches” of the Geneva Conventions of 12 August 1949. This provision governs certain acts (which include wilful killing, torture, wilfully causing great suffering, extensive destruction of property, the taking of hostages, etc.) when committed against persons or property “in the hands of” a party to an international armed conflict.

Specific provisions of Article 8(2)(b) (“other serious violations of the laws and customs applicable to international armed conflict”) proved to be more contentious, however. For example, Article 8(2)(b)(viii) treats as a serious violation the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.” Several states (Algeria, Egypt, Greece, Republic of Korea, Kuwait, Libya, Saudi Arabia, Syria, Thailand, Tunisia and United Arab Emirates) wanted additional reference to the “establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory” although this provision was deleted.

Article 8(2)(b)(xxvi) prohibits “conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities.” China in particular advocated the deletion of this section altogether. Lebanon achieved the insertion of the qualifier “national” such that the conscription or enlistment of children in rebel armies may not constitute a war crime in an international armed conflict. Certain participants (Belgium, Brazil, Denmark, Tunisia, UNICEF and the Children’s Caucus) unsuccessfully argued that the minimum age should be eighteen rather than fifteen.

Article 8(2)(b)(iv) prohibits “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” The International Committee of the Red Cross forcefully but unsuccessfully opposed the inclusion of the terms “clearly excessive” (a United States proposal) and “overall” on the grounds that they are not present in Additional Protocol I to the 1949 Geneva Conventions from which the Statute’s text is drawn.

Even more contentious was the list of prohibited weapons which revealed a deep divide between NATO and Non-Aligned states that bifurcated the Like-Minded Group. In the Bureau’s Discussion Paper, one option would have provided a “short list” of prohibited weapons that included chemical and biological weapons, excluded nuclear weapons and landmines, and included a “revision clause” that provided that other weapons could be included once “they become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties.” A second option would have included a “long list” comprised of these weapons plus nuclear and blinding laser weapons and landmines. A third option would have simply prohibited “employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international humanitarian law.”<sup>28</sup> Subsequently, Iraq advanced an unsuccessful proposal to include reference to “weapons containing depleted uranium.”

In Committee of the Whole discussions, a slim majority of states favored the “short list” of prohibited weapons, although some states called for an elaboration of the revision clause. However, a number of states (Afghanistan, Algeria, Angola, Bahrain, Bangladesh, Benin, Botswana, Brazil, Burundi, Comoros, Costa Rica, Egypt, Ethiopia,

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<sup>28</sup> Bureau Discussion Paper, pp. 5-8.

Ghana, Guatemala, India, Indonesia, Iran, Iraq, Jordan, Libya, Madagascar, Mexico, Mozambique, Namibia, Nepal, Nicaragua, Nigeria, Oman, Philippines, Qatar, Saudi Arabia, Slovakia, South Africa, Sri Lanka, Syria, Trinidad and Tobago, the United Republic of Tanzania, Uganda, Venezuela, Viet Nam, Yemen and Zimbabwe) at one point in the conference advocated the inclusion of nuclear weapons and/or landmines. As a result of last minute negotiations, the Statute governs the use of a short list of prohibited weapons in international armed conflict.<sup>29</sup> Although biological and chemical weapons are not specifically listed, the Peace Caucus has argued that such weapons would be covered by the sub-paragraphs dealing with poisonous weapons generally.<sup>30</sup>

### 3. Internal Armed Conflict

Until the Bureau issued its Proposal, the inclusion in the Statute of war crimes committed in internal armed conflict remained uncomfortably uncertain. Several states (such as Algeria, Bahrain, China, India, Indonesia, Iraq, Libya, Nepal, Pakistan, Saudi Arabia, Sri Lanka, the Sudan, Thailand, Turkey, Uruguay and Viet Nam) opposed any mention in the Statute of war crimes committed in internal armed conflict. A handful of states (Namibia, Oman, Qatar, Syria and Yemen) would have accepted the inclusion of war crimes committed in internal armed conflicts only in the case of the complete collapse of the state as occurred in the former Yugoslavia. Indonesia, the Philippines, Thailand and Viet Nam argued that war crimes committed within internal armed conflicts should be excluded from the Court's jurisdiction if there is an element of "foreign interference" in the conflict. A few states (such as Afghanistan, Azerbaijan, Bangladesh, Egypt, Iran, the Russian Federation and Turkey) could accept the inclusion of Article 8(2)(c), which reproduces the text of common Article 3 to the Geneva Conventions of 12 August 1949, but not Article 8(2)(e), which tracks the text of the Protocol II Additional to the Geneva Conventions. These states justified their opposition on the grounds that they were not parties to Protocol II even though it is widely believed that many of the acts listed there are criminalized under general international law.

In order to render sub-paragraph 2(e) more palatable, the Bureau added sub-paragraph (f) which provides that sub-paragraph 2(e) "applies to armed conflicts that take place in a territory of a state when there is protracted armed conflict between governmental armed authorities and organized armed groups or between such groups." This language, drawn from a Sierra Leone proposal, replaced a previous formulation in the Bureau's Discussion Paper that would have limited the applicability of Article 8(2)(e) to "armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations." Many participants in the conference (including the ICRC, Angola, Australia, Bosnia and Herzegovina, Canada, Costa Rica, Denmark, Finland, Germany, Hungary, Italy, Liechtenstein, Sierra Leone, the Solomon Islands, South Africa, Spain, Swaziland, Sweden, Malawi, Mauritius, Mexico, Mozambique, Namibia, New Zealand, Norway, Portugal, the United Republic of

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<sup>29</sup> Refer to the annex for a complete list of prohibited weapons (Article 8(2)(xvii)- (xx)).

<sup>30</sup> Article 8(2)(xvii) and (xviii).

Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the United States and Zambia) successfully opposed this language on the grounds that it excluded conflicts between dissident forces and required proof that troops were under “responsible command” and controlled part of the territory of a state. The language chosen renders it more likely that internal armed conflicts will come within the terms of the Statute because it does not require dissident troops to be under responsible command or to control territory and it applies to armed conflicts between dissident groups.

Furthermore, both sections (c) and (e) are governed by the proviso at Article 8(3) that nothing in these sections “shall affect the responsibility of a Government to maintain and re-establish law and order in the state or to defend the unity and territorial integrity of the state, by all legitimate means.” The Statute also emphasizes that in order for a situation to constitute an armed conflict, it must involve armed confrontation of a military nature between two or more armed groups. As such, riots and demonstrations do not amount to armed conflicts within the meaning of these provisions.

The Statute provides jurisdiction before the Court over the certain acts when committed in either internal or international armed conflicts. Other acts are prohibited *only* in international armed conflicts.<sup>31</sup> It is noteworthy and unfortunate that the provisions governing internal armed conflicts do not include a list of prohibited weapons. Although the Statute’s lists of prohibited acts in internal and international armed conflict do differ, it is important to note that many acts that are ostensibly prohibited only in international armed conflicts can also fall under sub-paragraphs (c) and (e) such that the Court would have jurisdiction when such acts are committed in internal armed conflicts. For example, acts which may be characterized as “outrages upon person dignity,” as listed under Article 8(2)(b)(xxi) governing international armed conflicts, may also constitute “violence to life and person” or “cruel treatment” under Article 8(2)(c)(i) governing internal armed conflicts.

#### 4. Transitional Provision With Respect to War Crimes (Article 124)

The Bureau’s Proposal contained a separate “Transitional Provision” that limits the jurisdiction of the Court specifically with respect to war crimes. This provision allows states to effectively “opt out” of the jurisdiction of the Court in instances in which war crimes are committed on their territory or by their nationals. This proposal emerged as an alternative to the “opt in” regime that appeared as an option in the final PrepCom Report and the Bureau’s Discussion Paper and that would require states to specifically accept the jurisdiction of the Court with respect to certain crimes.

This Transitional Provision was included in the final package at Article 124, which reads:

a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [war crimes] when a crime is

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<sup>31</sup> Compare Articles 8(2)(a) and (b) with Articles 8(2)(c) and (e).

alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time.

In other words, once a state becomes a party to the Statute, it has the right to declare that it does not accept the jurisdiction of the Court over war crimes committed in both international and internal armed conflicts in their territory or by their nationals for a period of seven years after the Statute's entry into force with respect to that particular state.

This provision was apparently included at the behest of France and the United States although the latter insisted that "opt out" regime include crimes against humanity as well as war crimes. Article 124 has been critiqued by human rights NGOs as a major loophole that incorporates impunity for war crimes into a Court that is being established to prosecute these crimes. In fact, the French delegation in a meeting with NGOs admitted that the loophole provided by this provision could generate some "perverse effects." The fear is that national militaries will exert pressure on their governments to exercise this option when they ratify the Statute.

#### D. Aggression

The PrepCom Report included aggression as a core crime and provided three possible definitions of the crime.<sup>32</sup> One such definition was drawn from the definition in General Assembly Resolution 3314 of 1974 and provided for jurisdiction where an individual in a position of military control committed any of the following acts against another state: invasion; military occupation; annexation; bombardment; blockade of ports; attack on land, sea or air; the dispatch of armed bands; etc. This definition was supported at various times in the debates by Afghanistan, Algeria, Bahrain, Cameroon, Congo, Cuba, Iran, Iraq, Italy, Kuwait, Lebanon, Libya, Mozambique, Nigeria, Oman, Qatar, Saudi Arabia, the Sudan, Syria, Thailand, Tunisia and United Arab Emirates. Germany proposed an alternative definition drawn from the ILC's Nuremberg principles that prohibited the initiation or carrying out of an armed attack by a state against the territorial integrity or political independence of another state and the planning or ordering thereof. This definition was supported by Angola, Belgium, Denmark, Ethiopia, France, Germany, Greece, Japan, Republic of Korea, Latvia, Malawi, Poland, the Russian Federation, Senegal, Slovenia, Sweden, Trinidad and Tobago, Ukraine, the United Kingdom and Venezuela.

The Bureau's Discussion Paper presented delegations with two options: a modified German proposal or deletion of aggression entirely. In the two rounds of Committee of the Whole discussions, over eighty countries indicated that they wanted aggression included in the Statute, although over half wanted a more precise definition or a definition that included more elements from G.A. Resolution 3314. Syria in particular characterized the omission of aggression as an unacceptable concession to the "veto power" of the five permanent members of the Security Council. Likewise, Cameroon argued that aggression was the "mother of all crimes" such that its inclusion was essential. Toward the end of the conference, several countries (such as Australia, Bosnia

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<sup>32</sup> See PrepCom Report at 12 and 14-16.

and Herzegovina, Ghana, Italy, Lesotho, Malawi, Mali, Malta, Mauritius, Namibia, Nicaragua, the Netherlands, Norway, Philippines, Slovakia, South Africa, Swaziland, Sweden, Uganda, the United Kingdom and Zambia) argued for the deletion of aggression entirely, purportedly on the basis of lack of time. Several of these states advocated the establishment of a review conference to consider aggression further once the Statute enters into force.

Despite broad support for the inclusion of aggression generally, even by the end of the Conference, states were unable to devise a satisfactory definition of the crime. In the Statute, the crime is listed at Article 5 as a core crime that will come within the jurisdiction of the Court “once a provision is adopted in accordance with articles 110 and 111 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”

The inclusion of aggression in the Statute has the potential to implicate the role of the Security Council vis-à-vis the Court. The PrepCom Report at Article 10(4) provided two options for this role.<sup>33</sup> Under one option, the Court would not have jurisdiction over the crime of aggression unless the Security Council first determined that the state that is the subject of the complaint engaged in an act of aggression. Under the second option, a determination that a state committed an act of aggression was to be binding on the deliberations of the Court.

In the Diplomatic Conference, certain states (such as Bangladesh, China, France, Japan, Malawi, Pakistan, the Russian Federation, Slovenia, Thailand, the United Kingdom and the United States) argued that before the Court would have jurisdiction over the crime of aggression, the Security Council must first conclude that an act of aggression had in fact occurred. In particular, Nigeria argued that the role of the Security Council is defined by the Charter, so involvement by the Council in such a case is impossible to avoid. Nigeria (with support from Cuba and Jordan) did suggest, however, that the General Assembly could also play a role in the determination of an act of aggression. Other states (such as Cote d’Ivoire, Cuba, Germany, India, Libya, Mexico, Slovakia, Tunisia and Venezuela) opposed any role for the Security Council in the prosecution of acts of aggression. These states argued that such a political decision should not taint the work of a judicial body and that the Council rarely labels the acts of states as acts of aggression. The final Statute leaves open the role to be played by the Security Council with respect to the determination of an act of aggression when it indicates at Article 5(2) that when a provision governing aggression is adopted it shall “be consistent with the relevant provisions of the Charter of the United Nations.”

#### E. Treaty Crimes

The PrepCom Report contemplated that the Court would have jurisdiction over three so-called “treaty crimes”—crimes of terrorism, crimes against United Nations and associated personnel, and crimes involving the illicit traffic in narcotics.<sup>34</sup> A group of occasionally vocal states (such as Bolivia, Burkina Faso, Comoros, Congo, Costa Rica, Cuba, India, Mozambique, Namibia, Samoa, Sri Lanka, Trinidad and Tobago and

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<sup>33</sup> PrepCom Report at pp. 40-41.

<sup>34</sup> See PrepCom Report at pp. 32-35.

Tunisia) argued that all three crimes should be included. By the end of the conference, however, the vast majority of states (including Australia, Austria, Bahrain, Botswana, Brazil, Chile, China, Cyprus, the Czech Republic, Ethiopia, Finland, France, Gabon, Germany, Ghana, Greece, Guinea, Guinea-Bissau, Iran, Israel, Japan, the Republic of Korea, Kuwait, Libya, Morocco, the Netherlands, Senegal, Sierra Leone, Slovakia, Slovenia, Syria, Tunisia, Turkey, the United Kingdom, the United States, Uruguay, Viet Nam and Yemen) argued against the inclusion of treaty crimes at all, many ostensibly on the basis of lack of time. Other states (such as Belgium, China, Denmark, Ireland, Italy, Jamaica, Liechtenstein, New Zealand, Nicaragua, Norway, Poland, the Russian Federation, Spain, Sweden, Switzerland, Thailand, Uganda and Venezuela) suggested that such crimes should be subject to a revision conference.

Ultimately, crimes of narcotics and terrorism were not included in the Statute. Resolution E of the Final Act recommends that the Review Conference “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”<sup>35</sup> Crimes against United Nations and related personnel were included within the war crimes provision pursuant to a Spanish proposal to that effect that received support from the UN High Commissioner for Refugees.

#### F. Elements of Crimes

At the last PrepCom meeting, the United States proposed that the Conference negotiate the precise elements for each of the crimes included within the Statute (i.e. each and every war crime and crime against humanity). The vast majority of states agreed that if elements must be included they (1) could be drafted by the Assembly of States Parties, (2) should not delay the entry into force of the Statute, and (3) should guide, but not bind, the judges. A fair number of states argued for their exclusion altogether on the grounds that such elements were foreign to their legal systems and that the judges could develop the precise elements of crimes in their adjudication of specific situations. According to Article 9 of the Final Statute, the Assembly of States Parties will adopt elements of crimes to “assist the Court in the interpretation and application of articles 6, 7 and 8.”

#### G. Relationship Between the Statute and Customary International Law

According to Article 10 “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.” This Article is of critical importance because it ensures that the Statute in no way affects existing or developing international customary law norms. For example, experts on humanitarian law, such as the ICRC, agree that due to the necessity of gaining agreement among states, the list of war crimes contained in Article 8(2)(e) is incomplete in that it does not reference prohibited weapons in internal armed conflict. This omission does not jeopardize the existing prohibition of the use of certain weapons in internal armed conflict. Likewise, Article 8(2)(b) does not specifically mention

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<sup>35</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/C.1/L.76/Add.14 (16 July 1998) at p. 8.

chemical or biological weapons which are the subject of several comprehensive international instruments such as the Geneva Gas Protocol and the Chemical Weapons Convention.

#### H. Applicable Law

In addition to the Statute and the future Elements of Crimes and Rules of Procedure and Evidence, the court is authorized by Article 21 to apply the following other sources of law:

1. Applicable treaties and principles of international law;
2. General principles of law derived from national laws of legal systems of the world, provided that those principles are not inconsistent with the Statute or international law.
3. Principles and rules of law from previous decisions.

#### IV. General Principles of Law

General principles of law describe the conditions under which an individual is either held criminally responsible for certain conduct or is exonerated notwithstanding his or her criminal conduct. General principles generally correspond to the “general part” of national penal codes. The general principles governing trials before the Court are outlined in Part 3 of the Statute.

##### A. Jurisdiction over Natural Persons

Articles 25 and 27 indicate that the Court shall have jurisdiction over natural persons only, regardless of their official capacity. Brazil, France and the Solomon Islands unsuccessfully argued that the Court should also have jurisdiction over so-called “legal” or “moral” persons, i.e. corporations. The Statute makes clear at Article 23(4) that the determination of individual criminal responsibility does not affect the civil responsibility of states under international law.

##### B. Individual Responsibility

Article 25(2) dictates that individuals who commit “crimes within the jurisdiction of the Court shall be individually responsible and liable for punishment.” According to Article 25(3), criminal responsibility under the Statute extends beyond the primary perpetrator of the offense to those who (1) order, solicit or induce the commission of a crime; (2) aid, abet or otherwise assist in the commission of a crime; (3) contribute to the commission of such a crime by a group acting under a common purpose; or (4) attempt to commit a crime by taking a “substantial step” toward completion. Individuals shall be liable for incitement only in respect of genocide.

##### C. Superior Responsibility

The scope of the responsibility of superiors for the acts of their subordinates constituted one of the most debated provisions of this Part. According to the international law doctrine of superior liability, if superiors (whether military or non-military) knew or should have known that their subordinates had committed, were committing, or were going to commit crimes, such superiors are liable for those crimes if they fail to prevent or punish them. Under general international law, military and non-military superiors are held to the same standard of accountability—they are liable if they *knew or should have known* about the criminal activity of their subordinates. At the insistence of the United States delegation, however, Article 28 treats the responsibility of civilian and military leaders separately and differently and increases the burden of proof on the prosecution to prove that non-military leaders should be held accountable for the acts of their subordinates.<sup>36</sup> It is important to note that the provisions governing military superiors also cover individuals “acting as” military commanders, such as civilian mayors in charge of troops or paramilitary forces or dispatching police in a state of martial law. China unsuccessfully sought to apply the doctrine to military commanders only, and South Africa sought to differentiate between full command, operational command, and administrative command.

#### D. Grounds for Excluding Culpability

Article 31 includes a non-exhaustive list of grounds for excluding criminal responsibility, i.e. defenses to criminal activity. For example, according to sub-paragraphs (a) and (b), persons may not be criminally responsible if at the time they acted, they were suffering from a mental defect or were intoxicated such that they did not appreciate the unlawfulness or nature of their conduct or if they did not have the capacity to control their conduct.

Self defense or the defense of others may also negate criminal responsibility according to sub-paragraph (c). Individuals are not responsible if they acted reasonably to defend themselves or another individual against an imminent and unlawful use of force. They must, however, act in a manner proportionate to the degree of danger posed. In the case of war crimes, persons will not be liable for war crimes if they acted to protect property that was “essential for accomplishing a military mission.” This latter provision was inserted at the insistence of France and was quite controversial because its application could be contrary to the general principle of law that deadly force may not be used in the defense of property. Delegates such as Belgium clarified that this provision was applicable only to truly “vital” property such as that property required for the provision of essential services. Likewise, under certain circumstances outlined in sub-paragraph (d), individuals are not liable for criminal conduct caused by duress.

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<sup>36</sup> According to Article 28(1)(a) military commanders, or persons acting as military commanders, are responsible for crimes committed by their subordinates so long as the commander knew or should have known that the crimes were being or were about to be committed. According to Article 28(2)(a) non-military superiors are liable only if they “knew, or consciously disregarded information which clearly indicated,” that subordinates were committing or were about to commit crimes. Thus, non-military leaders will escape liability where the circumstances are such that they should have known of crimes being committed.

## E. Superior Orders

The inclusion of the defense of superior orders in Article 33 was also quite controversial. Many states argued that since the Nuremberg and Tokyo proceedings (and even earlier), the fact that an individual was acting pursuant to superior orders does not provide a defense to criminal activity under international law. Nonetheless, certain state delegates proposed to allow the defense with respect to certain crimes within the jurisdiction of the Court other than the crime of genocide. For example, China and Egypt argued that defendants charged with either crimes against humanity or war crimes should be able to invoke the defense, whereas the United States and some other delegations proposed to confine the defense to war crimes.

The final Statute provides that superior orders do not provide a defense unless three conditions are met. First, the defendant must have been under a legal obligation to obey the orders of the superior in question. Second, the defendant must not know that the order was unlawful. And third, the order must not be manifestly unlawful. For example, suppose an individual is ordered by her lawful superior to open fire on a building. If there was no way to know that the building was full of civilians, who are protected by the laws of war, that individual would be able to invoke the superior orders defense under the Statute if civilians were killed as a result of compliance with the order. In that situation, the order was not manifestly unlawful because the building was apparently a proper military objective. In contrast, if the individual was ordered to open fire on a civilian dwelling or to kill prisoners of war, that individual would not be entitled to invoke the superior orders defense because that order would be considered manifestly unlawful. The Article clarifies at sub-paragraph (2) that “orders to commit genocide or crimes against humanity are manifestly unlawful.” In other words, if an individual is ordered to commit either of these crimes, this defense is per se unavailable.

## V. The Conduct of Trials Before the ICC

Part Five of the Statute specifies the process by which the Prosecutor can initiate and carry out investigations of alleged crimes. Article 53 outlines specific factors the Prosecutor must consider before deciding to investigate or to prosecute. For example, the Prosecutor must consider whether there is “sufficient legal or factual basis” to conclude that crimes were committed, and the Prosecutor must conclude it is in the “interests of justice” to pursue an investigation. Article 54 enumerates both the powers (for example, to collect and examine evidence) and the duties (for example, to respect the interests and personal circumstances of victims and witnesses) of the Prosecutor. The rights of persons being investigated (for example, the right to be free from arbitrary arrest or detention and the right to legal counsel) are enumerated in Article 55. Articles 56 and 57 address, respectively, the role of the Pre-Trial Chamber in relation to unique investigative opportunities and the other functions and powers of the Pre-Trial Chamber. The remaining provisions outline the procedures governing the issuance of an arrest warrant or summons by the Pre-Trial Chamber (Article 58), arrest (Article 59), initial proceedings (Article 60), and the confirmation hearing (Article 61).

Part Six of the Statute concerns trial proceedings, such as the place of the trial, the right of the accused to be present during the trial, the functions and powers of the Trial

Chamber, the proceedings on the admission of guilt, the presentation of evidence and the rights of the accused including the right of the accused to be presumed innocent. This Part also addresses the protection of victims and witnesses and their participation in the proceedings and offences against the administration of justice and sanctions for misconduct before the Court. Finally, this Part details the requirements for the decisions rendered by the judges.

Several issues related to the initiation of an investigation and prosecution were of particular importance to the NGO community. Those issues are as follows:

#### A. On-Site Investigations

One of the key issues addressed at the conference concerned the Prosecutor's power to conduct investigations in the territorial state (that is, the state in which the crime was allegedly committed). Prior to the Diplomatic Conference, it was unclear whether the Prosecutor would require the consent of the territorial state to conduct such an investigation. NGOs have argued strongly against the need for such consent because it could enable states to obstruct the proper investigation of crimes. The Statute at Article 57 establishes a bifurcated regime concerning the Prosecutor's authority to conduct on-site investigations without the consent of the territorial state. The Pre-Trial Chamber may authorize the Prosecutor to investigate within the territory of a state if the Chamber determines that the state is "unable to execute a request for cooperation due to the partial collapse or unavailability of its judicial system." Therefore, in "collapsed state" situations, the Prosecutor will possess broad on-site investigatory powers. If, however, the territorial state has a functioning judicial system, the Prosecutor's investigatory powers are severely restricted. In such instances, the Prosecutor may only gather evidence directly in situations that do not require compulsory measures. That is, only evidence offered voluntarily to the Prosecutor can be collected without state consent. Conversely, any aspect of an investigation requiring compulsory measures will be conducted by the territorial state in cooperation with the Prosecutor.

#### B. Preservation of Evidence

The ICC Statute at Article 56 empowers the Prosecutor via the Pre-Trial Chamber to take "necessary measures for the preservation of evidence." Many NGOs regard this power as necessary to ensure that reliable and sufficient evidence will be available for future ICC prosecutions. According to the Statute, the Prosecutor shall inform the Pre-Trial Chamber whenever he or she is presented with a unique opportunity to collect or test evidence or take testimony or statements from witnesses which may not subsequently be available for trial. The Pre-Trial Chamber may then authorize the Prosecutor to take any measures necessary to gather and to preserve this evidence. In instances where the Pre-Trial Chamber finds that such measures should have been taken by the Prosecutor, the Pre-Trial Chamber may take such measures on its own initiative. Many delegations, including the Netherlands, the United States, and Italy, opposed granting the Pre-Trial Chamber such *ex-officio* powers.

During the Conference, there was also disagreement regarding which authority should be able to request that the Pre-Trial Chamber issue an order for the preservation of

evidence. Japan, for example, suggested that the suspect as well as the Prosecutor should have the power to trigger the Pre-Trial Chamber. Other delegations favored extending these powers to other parties. For example, Kenya argued that other interested bodies such as NGOs or victims should possess the power to preserve evidence as well. Many delegations opposed these proposals. For example, Israel, the Philippines and the United Republic of Tanzania opposed the involvement of the suspect.

### C. Pre-trial Detention

Another contentious issue concerned the period of pre-trial detention. NGOs lobbied for restrictions on the application of pre-trial detention and in particular the establishment of a maximum period of detention. NGOs argue that pre-trial detention in many instances violates the accused's right to liberty as well as his or her presumption of innocence. However, under the final ICC Statute, a person subject to an arrest warrant could be detained for an unspecified period of time subject to periodic review by the Pre-Trial Chamber. The Pre-Trial Chamber is responsible for ensuring that the accused is not detained for an unreasonable period due to an inexcusable delay by the Prosecutor. During negotiations, Israel and Spain proposed to replace the obligation of "periodic review" with a review within specific time limits. However, Argentina and France countered that it would be practically impossible to reach agreement on more specific time limits. Argentina added that the "periodic review" provision is not inconsistent with international human rights standards. Israel, Spain, and a number of other states also favored a more precise definition of "inexcusable delay of the Prosecutor." Again, other delegations argued that it would be impossible to agree on the text.

### D. Confirmation Hearings

Another issue resolved at the Rome Conference involves the proceedings of the confirmation hearing. The Statute at Article 61 provides that the Pre-Trial Chamber shall, within a reasonable time, hold a hearing to confirm the charges. The confirmation hearing shall be held in the presence of the Prosecutor and the person charged as well as his or her counsel. However, the confirmation hearing may be held in the absence of the person charged when the person has either waived his or her rights or has fled and cannot be found and all reasonable steps have been taken to secure his or her appearance in court. During the conference, delegations were divided on this issue. Many delegations, including China and the United Arab Emirates, took the position that no proceedings *in absentia* should be allowed. Other states (including Austria, Israel, Japan, Libya, Malawi, Oman, Slovenia and the United States) contended that under certain limited conditions, it should be possible to hold a confirmation hearing without the presence of the suspect.

### E. Trials *in Absentia*

Delegations were deeply divided on the question of trials in the absence of the accused. Generally, NGOs have lobbied for the prohibition of trials *in absentia* on the grounds that such trials violate the rights of the accused. Finland, New Zealand and the Russian Federation argued against any trials *in absentia* whatsoever. Other states took a

more moderate position by arguing that the accused should be present at the beginning of the trial, but could be subsequently tried *in absentia* if the accused either (1) has escaped from legal custody or broken bail or (2) continues to disrupt the trial. China, the Democratic Republic of Congo, Germany, the Holy See, Israel, Oman, Norway, the United Kingdom and the United States supported both these exceptions. Argentina, Australia, Austria, Botswana, Denmark, Greece and Viet Nam supported trials *in absentia* only if the accused escapes custody or breaks bail. Other delegations, notably Kenya, supported trials *in absentia* only when the accused continues to disrupt the trial. Another group of states (including the Algeria, Cote d'Ivoire, France, Italy, Iran, the Netherlands, Nepal, Republic of Korea, Senegal, Togo and Trinidad and Tobago) maintained that the accused should not be required to appear at the commencement of the trial and allowed for a broad variety of exceptions.

Ultimately, the Statute prohibits trials in the absence of the accused. In a situation where the accused continues to disrupt the trial, the accused may be removed from the courtroom but provisions shall be made for him or her to observe the trial and to communicate with counsel outside the courtroom.

#### F. Rights of the Accused

The International Covenant on Civil and Political Rights (ICCPR) (specifically Article 14 on the rights of the accused) served as a baseline for much of the language in Article 67 concerning the rights of the accused. In several respects, the rights of the accused have been extended. Under the ICC Statute:

- The accused shall be informed in a language which he or she “fully understands and speaks.” This text was a compromise between countries such as Austria, Kenya, the Netherlands, Trinidad and Tobago and the United States, who favored the ICCPR language (Article 14(3)(a))—“in a language which he understands”—and states such as Canada, Egypt, Germany, Mexico and Syria, who favored reference to the “own” language of the accused.
- The accused has the right to be informed about the “content” as well as the nature and cause of the charges (another extension of the ICCPR (Article 14(3)(a))).
- The accused has been afforded the right to “communicate freely with counsel” and “in confidence.” This was supported by Austria, Canada and Germany. Only the Netherlands spoke in favor of the ICCPR text at Article 14(3)(b) which guarantees simply the right to communicate with counsel.
- The accused has the right “to be tried without undue delay.” Most of the delegations—such as Canada, Germany, Mexico, the Netherlands, the United Kingdom and the United States—preferred this formulation which mirrors the ICCPR text at Article 14(3)(c). Austria, Senegal and Trinidad and Tobago argued against the accused’s right “to enjoy a speedy trial.” Syria proposed to delete the accused’s right to be tried without an “unreasonable” delay on the grounds that the accused’s right to be tried without delay should not be restricted at all.
- The accused has the right “to be present at trial, to conduct the defense in person or through the legal assistance of the accused’s choosing, to be informed, if the

accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.” This text does not provide for the provision of counsel “including where the person is unable to secure counsel” which was favored by Austria, Canada, Germany, Iran and the Netherlands.

- The accused has been afforded the right to examine, or have examined, witnesses against him or her, as well as the right to raise defenses and to present “other” admissible evidence. Canada, Egypt, Mexico, Chile, and Austria wished to allow the accused to present “any other” evidence. The United States preferred to delete “any.” Kenya and Senegal favored denying the accused the latter right altogether.
- The accused’s rights have been expanded from the ICCPR (Article 14(3)(f)) to include the right to have a free interpreter for any proceedings or documents not in a language which the accused fully understands and speaks.
- The accused’s rights have been extended to include the right to “remain silent, without such silence being a consideration in the determination of guilt or innocence.” This provision was favored by Canada, Germany, and Senegal. The Netherlands preferred the text of the ICCPR at Article 14(3)(g) which protects the accused against being “compelled to testify against himself or to confess guilt.”
- The accused has the right “to make an unsworn oral or written statement in his or her defense.” This is a new concept not expressed in the ICCPR. Most delegations felt this provision was unnecessary and supported its deletion. France and the United States stressed the importance of this provision and argued for its inclusion.
- The accused has been afforded the right “not to have imposed on him or her any reversal of the burden of proof or any onus or rebuttal.” Several countries, including Austria, Canada, Germany, South Africa, Syria, the United Kingdom and the United States, were in favor of deleting this provision. Furthermore, the United States pointed out that this was already reflected in Article 66 concerning the presumption of innocence.
- The Prosecutor shall, as soon as practicable, disclose to the Defense any and all exculpatory evidence.

## VI. Penalties

The debate of the Working Group on Penalties (Part 7) proved to be more difficult and contentious than expected. Some delegations and NGOs underestimated the value of the death penalty issue as a bargaining chip for other unrelated and difficult matters such as those arising with respect to the jurisdictional provisions. In addition, domestic political considerations played a major role in the reluctance of states to accept a Court without recourse to the death penalty.

The Chairman of the Working Group on Part 7, Rolf Einar Fife, finished the discussion on all other related issues before returning to the death penalty. Although issues such as life imprisonment, fines and the applicability of national legal standards were discussed first, it remained difficult to reach consensus. Delegations were waiting to

see whether or not the death penalty was included to decide on whether to insist on life imprisonment or a reference to applicable legal standards.

At the beginning of the discussion in the Working Group, a few provisions were deleted immediately from the Draft Statute. The issue of imprisonment for minors (Draft Article 75(a)) became obsolete because the Committee of the Whole decided that the Court would not have jurisdiction over persons under the age of 18. Countries did not feel strongly about the penalty of disqualification from public office (Draft Article 75(c)(i)) and decided not to insist on it when a few states objected to its inclusion. Furthermore, the forfeiture of instrumentalities (Draft Article 75(c)(ii)) was seen as too broad because it potentially included everything from the machete to the aircraft carrier. The reference to reparations that was included in Article 75(d) in the Draft Statute was also deleted. Delegations, such as the Russian Federation, felt that reparations are not an appropriate penalty. The reparations article can be found separately in Article 75. The Russian Federation, aware of the difficulties of reaching any agreement on draft Article 78 entitled “Applicable Legal Standards,” convinced the Working Group to delete the provision.

The Working Group added the Mexican proposal that the penalty dimension of the principle of legality, *nulla poena sine lege*, should be explicitly stated in the Statute, a proposal that was met with general agreement. It was placed under Article 23 in the Statute and reads: “A person convicted by the Court may be punished only in accordance with this Statute.”

From the beginning of the discussion it was clear that the main penalty of the Court would be imprisonment. The discussions on applicable penalties resulted in Article 77 of the Statute which allows for imprisonment for a specified number of years, which may not exceed a maximum of thirty years, or alternatively, life imprisonment “when justified by the extreme gravity of the crime.” As additional penalties, the Article allows for fines and forfeiture of proceeds, property and assets derived directly or indirectly from the crime in question.

Many states, mostly European and Latin American, had great difficulty accepting life imprisonment. Several European states were opposed to it being included but indicated they were flexible and could accept life imprisonment providing that a scheme of mandatory parole existed. However, many Latin American states maintained their opposition, citing provisions in their Constitutions that forbid life imprisonment and, in the cases of Venezuela and Nicaragua, sentences of thirty years or more. The compromise that emerged provided for the option of life imprisonment in the Statute while at the same time requiring a mandatory review mechanism (see Article 110 under Part 10).

The compromise wording of Article 77(b) was based on a Mexican proposal. It provides for the application of life imprisonment only when “justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” Sierra Leone and Syria were two prominent members of a group of states insisting on the inclusion of life imprisonment to ensure what they considered a complete justice. Syria and Sierra Leone felt that the emphasis should be on harsh sentences and criticized the compromise proposal as being too lenient. Sierra Leone, in particular, insisted on the removal of the word “only” from the phrase “only when justified by the extreme gravity

of the crime” on the grounds that the delegation had compromised to such an extent that he could not weaken the application of life imprisonment anymore.

In the course of the debate, the Working Group rejected the notion of minimum terms of imprisonment. The group agreed that there should be an upper limit and eventually agreed on 30 years, although many delegations indicated that this was harsher than what their own domestic systems provided for. To meet the concerns of a number of delegations regarding the severity of long sentences, a note was sent to the Working Group on Enforcement stating that it would be necessary to provide for a mandatory mechanism in Part 10 by which the prisoner’s sentence would be re-examined by the Court after a certain period of time. In this way, the Court should be able to ensure the uniform treatment of prisoners regardless of the state in which they serve their sentences. The Working Group on Part 10 included this parole mechanism in Article 110. With regard to the periods of imprisonment to be served before a review may take place, it was determined that they be set at not less than two thirds of the term of imprisonment, and, in any event, not more than 25 years. In case of life imprisonment the period to be served before a review may take place is not less than twenty-five years (Article 110(3)).

The discussion on fines resulted in the determination that fines should be included but only as an additional penalty. The principle problems discussed were the establishment of the amount of the fines and the techniques to enforce payment as well as the legitimacy of imposing fines on indigent criminals. The general view, that the setting of precise amounts is probably impracticable because it would be time consuming and require frequent reevaluation, prevailed at the end. The Chair reminded delegates that most—if not all—of the accused in the two international tribunals are without visible means of support, thereby implicitly questioning the entire value of a fines provision. The Working Group recommended the establishment of a trust fund for the benefit of the victims which could store money and property collected through fines or forfeiture (Article 79).

At the official final meeting of the Working Group, the Chairman finally allowed a discussion of the death penalty. Many informals and additional Working Group sessions followed. In the Draft Statute, the death penalty had remained an option in the Statute. It was clear from the beginning that a vast majority of states would not be able to sign the Statute unless the death penalty was removed as an option. Nevertheless, the issue became so contentious that it remained open until the very last day of the debate. Pro-death penalty states—such as Egypt, Iran, Kuwait, Oman, the Sudan, Syria and Trinidad and Tobago—brought up religious and cultural concerns, the heightened deterrent effect of the death penalty, the rights of victims, the need to appease domestic public opinion, and the fact that God the Almighty orders us to be just. States in favor of the death penalty were concerned about the effect the absence of such a penalty would have on their domestic systems. Abolitionist states, such as Norway, Greece and Venezuela, cited their international human rights treaty obligations as well as difficulties with international judicial cooperation. Several said that they could not ratify the Statute if it included the death penalty.

Early on, Trinidad and Tobago suggested a compromise proposal which allowed for an exchange of the death penalty provision in the Statute for a statement by the Chair to the effect that national penalty standards remain unaffected. This proposal was immediately accepted by Portugal and Norway. It took one more week of discussions for

this proposal to be adopted. During that week, Trinidad and Tobago retreated and insisted again on the inclusion of the death penalty, in concert with Barbados, Dominica, Jamaica and Singapore. The Arab states and Iran introduced a proposal that did not mention the death penalty but provided for the imposition of the penalty in force in the state in which the crime was committed. The United States made an important statement explaining that pursuant to the principle of complementarity, states themselves bear the principle responsibility for the punishment of international crimes and that in this context they may employ capital punishment. Many states were persuaded by this and other arguments. But the delegation of Trinidad and Tobago did not yield until their Attorney General arrived at the conference and was convinced that the inclusion of the death penalty was impossible. The presence of the Minister of Justice from the Sudan and the Attorney General from Trinidad and Tobago highlighted the importance of the issue to these states.

Finally, a modified version of the original Trinidad and Tobago compromise was adopted and reference to the death penalty was deleted. In exchange, an additional article (Article 80) was included which stresses that the penalties in the Statute are without prejudice to national law. The Sudanese Minister in particular emphasized that the absence of the death penalty from the Statute must not be interpreted as evidence of a universal trend towards abolition. Barbados, Dominica, Egypt, Ethiopia, Jamaica, Singapore and Trinidad and Tobago all made statements supporting the compromise, but reminded the Working Group of their attachments to capital punishment. The following day, in the Committee of the Whole, Ethiopia, Jamaica, Rwanda, Saudi Arabia, Singapore and the Sudan made similar declarations.

As part of the compromise package, the President of the Conference made the following Statement in the final plenary session of the Conference:

with regard to the fact that the death penalty is not included in the Statute, I should like to make the following statement: The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes.

## VII. Gender Issues

The Statute codifies several important legal developments concerning sexual and gender violence and the rights of women before the Court.

## A. Definition of Crimes

Under the ICC Statute, the Court has jurisdiction over war crimes involving sexual violence committed in both internal and international armed conflicts. The Court's jurisdiction encompasses the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization. Particularly contentious debates revolved around the inclusion of the crime of "forced" or "enforced" pregnancy. Several countries (such as Saudi Arabia) objected to the inclusion of "enforced pregnancy" on the grounds that it could have implications for states that prohibit abortion. Other countries including Bosnia and Herzegovina, France, the Republic of Korea and Sweden favored its inclusion. Cuba, Egypt, Iran, Kuwait, Lebanon and Saudi Arabia maintained that the meaning of "enforced pregnancy" was unclear and sought clarification. Negotiations resulted in a restrictive definition of "forced pregnancy" meaning "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."

Under crimes against humanity, the Court's jurisdiction also encompasses the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity. Crimes against humanity also encompasses persecution based on gender. The inclusion of gender remained despite the fact that a number of states felt that it was too broad a term. The Holy See particularly objected to the inclusion of gender unless its meaning was clarified. The Holy See wanted to guarantee that separate religious schools and facilities for men and women could not be construed as a crime against humanity.

## B. Composition of the Court

The provisions on the composition of the Court have been designed to better enable the Court to address issues of gender. In the selection of judges, state parties shall take into account the need for both a fair representation of males and females and the need for judges with legal expertise on violence against women or children. Most states (including Australia, Burundi, Canada, Chile, Costa Rica, the Czech Republic, Finland, Malawi, the Netherlands, New Zealand, Senegal, Slovenia, Thailand and the United States) favored the inclusion of both of these criteria. Egypt, France, Ghana, Iraq, Libya, Nigeria and Oman supported the inclusion of gender balance only. Afghanistan, Brunei and Cameroon supported the inclusion of legal expertise on violence against women and children only. Other states (Burkina Faso, Iran, Madagascar, Syria and the Russian Federation) rejected both criteria. Egypt, Libya, Oman, Qatar and Tunisia objected to the inclusion of legal expertise on violence against women and children. Other countries (Algeria, China, Greece, Pakistan and Sweden) were flexible. In addition to these measures, the Office of the Prosecutor shall appoint advisers with legal expertise on the issue of sexual and gender violence and violence against children.

## VIII. Protection of Victims and Witnesses

The Statute contains several important provisions concerned with the rights and roles of witnesses and victims. In particular, (1) the Statute allows for witnesses and victims to initiate cases; (2) they will be vital in terms of the collection of evidence against the accused; (3) they have available to them a variety of protection measures; and (4) they have a right to reparations.

#### A. The Provision of Information

Article 15(2) allows for the Prosecutor to exercise *proprio motu* powers on the basis of information received about crimes within the jurisdiction of the Court. He or she can depend on “other reliable sources which he/she may deem appropriate.” The Article emphasizes that “victims may make such a representation.” Witness and victim statements can be used by the Prosecutor to withstand challenges to the jurisdiction of the court (Article 19).

#### B. The Protection of Victims and Witnesses

Witness testimony is regulated by Article 69. That provision requires the witness to be truthful and to give in-person testimony during the trial unless protective measures are necessary. Generally, witnesses shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court (Article 48). During the investigation stage, the Prosecutor is required to respect the interests and personal circumstances of victims and witnesses and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children (Article 54). The Prosecutor is not allowed to disclose documents or information that he or she obtains on the condition of confidentiality (Article 54).

During the trial, the Trial Chamber has the responsibility of protecting the confidentiality of the information (Article 64). For this purpose, it can hold certain proceedings in closed session according to Article 64. When the Prosecutor has a unique opportunity to obtain a witness’ testimony, she or he can ask the Pre-Trial Chamber for consent (Article 56). The Pre-Trial Chamber must provide for the protection and privacy of victims and witnesses according to Article 57. In addition, after the arrest warrant has been issued, the Chamber is obliged to “take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims”(Article 57).

Article 43(6) calls for the establishment of a Victims and Witnesses Unit within the Registry. The Unit’s purpose is to provide, in consultation with the Office of the Prosecutor, protective measures, security arrangements, counseling and other assistance to those who are at risk on account of the testimony given or to be given. The Victims and Witnesses Unit (VWU) shall be staffed with experts on trauma related to crimes of sexual violence. During the Conference, there was a debate as to whether the VWU would be set up in the Office of the Prosecutor (OTP) or the Registry. With the exception of the United States, most states ultimately recognized that location within the OTP would be inappropriate, because the goals of the Prosecutor could conflict with the needs of the victims and witnesses.

Article 68 is specially concerned with victim and witness protection. Some like-minded delegations underlined that the provisions in Article 68 were inspired and elaborated by the “hard work of NGOs.” The Article provides that in determining protective measures, the Court shall consider all relevant factors—such as gender, age, and health, and the nature of the crime, in particular where the crime involves sexual or gender violence or violence against children. These measures includes *in camera* proceedings and the presentation of evidence by electronic or other special means. These measures shall be used particularly in cases of sexual violence or cases that involve children either as victims or witnesses.

During the discussion of this Article, Syria suggested the deletion of all references to sex or gender in this provision. This proposal was supported by Iraq, Libya, Qatar and Saudi Arabia. Saudi Arabia added that its national legal system does not allow public hearings on cases involving sexual or gender crimes. A number of other countries (including Australia, Barbados, Chile, Colombia, Congo, Costa Rica, Denmark, France, Guinea, Italy, Kenya, Mexico, New Zealand, Norway, Portugal, the Russian Federation, Sweden, Switzerland and the United States) opposed this suggestion. The language was retained except for a reference to the definition of “gender” in Article 2. As an additional means of protection, victims have the right to present their views and concerns for consideration at appropriate stages of the proceedings when their personal interests are affected.

### C. Reparations

Article 75 of the Statute empowers the Court to make orders for reparations against convicted persons in favor of victims. Before making the order, the Court can invite representations from the convicted person, the victims and other interested persons. This wording resulted from a joint United Kingdom/France proposal. Notably, the Court lacks the authority to make such an order against a state. The Court was denied this power despite objections from Bosnia and Herzegovina, Samoa, Spain and Syria that the convicted person’s assets might not be sufficient to cover all reparations. France replied that most states were opposed to such an order. Argentina and Germany argued that other mechanisms were available under national and international law, so the omission of awards against states did not involve a waiver of state responsibility. Under the Statute, reparations are defined to include restitution, compensation, and rehabilitation.

The Court has the option to make awards of reparations through a trust fund set up for victims in Article 79. Countries, such as Argentina, Egypt, Germany and the United States supported the existence of such a trust fund in order to cover awards where the convicted person’s assets are insufficient. Korea, and initially Japan, objected to such a trust fund (eventually Japan was willing to reconsider its position). Once the Court has ordered the payment of reparations, states assume the responsibility to give effect to fines and forfeitures.

### IX. Next Steps

The conclusion of the Diplomatic Conference does not mark the end of the effort to establish an effective and fair permanent international criminal court. Several

outstanding tasks remain to be completed. Accordingly, the Final Act of the Statute established the Preparatory Commission for the International Criminal Court consisting of representatives of signatories of the Final Act and other invited states.<sup>37</sup> The Preparatory Commission is tasked with the following:

1. Drafting the Rules of Procedure and Evidence pursuant to Article 51(1).
2. Drafting the Elements of Crimes pursuant to Article 9.
3. According to Article 2, the Court “shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties” and concluded by the President of the Court.
4. According to Article 3, the Court must enter into a headquarters agreement with the host state, the Netherlands, to be approved by the Assembly of States Parties and concluded by the President.
5. Establishing budgetary and legal matters with respect to the Court and the Assembly of States Parties.
6. According to Article 5(2), the Commission shall prepare proposals for a Review Conference for the inclusion of the crime of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime.
7. According to Resolution E of the Final Act, it is recommended that the Review Conference consider the crimes of terrorism and narcotics with a view toward their inclusion in the Statute.

## IX. Opportunities for Continued NGO Action

In the immediate future, the focus of NGO action now shifts to two fronts. First, at the national level, NGOs must ensure the full ratification of the Statute by as many national governments as possible.<sup>38</sup> This effort must be a priority. NGOs must lobby their home governments to ratify the Statute in accordance with Article 125 of the Statute and their national law. It is vital that NGOs resist efforts of national governments (particularly where such governments are under pressure from national militaries) to activate the “opt out” regime of the Transitional Provision (Article 124) with respect to

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<sup>37</sup> Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf.183/C.1/L.76/Add.14 (16 July 1998) at p. 9.

<sup>38</sup> The World Federalist Movement ([wfm@igc.apc.org](mailto:wfm@igc.apc.org)) has drafted a report detailing the ratification procedures of international treaties in African, Asian and European states. The Report will be completed in the upcoming weeks with a section on Latin American and other European states. The report can be found at the following website: [gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/ratify.rpt](http://gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/ratify.rpt). So far, the Report covers the ratification procedures of the following states: (1) African States—Algeria, Angola, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Gambia, Madagascar, Malawi, Mauritania, Morocco, Mozambique, Namibia, Nigeria, Rwanda, South Africa, the Sudan, the United Republic of Tanzania, Tunisia, Zambia; (2) Asian and Island States—Afghanistan, Antigua & Barbuda, Bahamas, Barbados, Belize, Brazil, Cambodia, Dominica, Haiti, Indonesia, Japan, the Republic of Korea, Mongolia, Nepal, St. Kitts, St. Lucia, St. Vincent, Sri Lanka, Thailand, Trinidad and Tobago; (3) European States—Austria, Belgium, Denmark, France, Germany, Greece, Italy, Ireland, Luxembourg, Netherlands, Norway, Portugal, Sweden, Spain, Switzerland, Turkey, United Kingdom.

the jurisdiction of the Court over war crimes. Furthermore, NGOs involved in democracy-building and -mobilization can pressure political parties to include the ratification of the Statute within their platforms. National NGOs are particularly well-suited to take the lead on this ratification drive because they can pressure home governments who often turn a deaf ear to the lobbying of international NGOs on the grounds that these latter NGOs do not represent their constituencies.

Second, at the intergovernmental level, NGOs must gain effective access to the Preparatory Commission for the International Criminal Court so that they can monitor and influence the drafting of outstanding provisions of the Statute, such as the Rules of Procedure and Evidence, the Elements of Crimes, the proposals for the inclusion of the crime of aggression and the conditions under which the Court shall exercise its jurisdiction with regard to this crime, and proposals for the inclusion of the crimes of terrorism and narcotics trafficking. If the subsequent negotiations produce provisions that are unsatisfactory, NGOs must lobby members of the Assembly of States Parties to block the adoption of such provisions and return to the drafting tables.

Once the Statute enters into force and the Court is established, there are many important ways NGOs can stay involved in the Court and use it to advance human rights in their countries. For example, the Statute specifically provides at Article 15(2) that NGOs can provide the Prosecutor with information concerning crimes within the jurisdiction of the Court. Where it is clear that such crimes have been committed, NGOs should prepare credible and well-documented materials for submission to the Prosecutor. This sort of international scrutiny could itself inspire national organs to take up an investigation in order to demonstrate they are willing and able to attend to human rights issues at home. Additionally, NGOs can encourage States Parties to refer appropriate cases to the Prosecutor according to Article 14. If the Prosecutor decides to forgo the investigation or prosecution of a matter on grounds of inadmissibility, national NGOs should monitor national proceedings to guarantee that they are prompt, genuine and impartial. NGOs can work with victims and witnesses to ensure them effective access to the Court and that their rights are protected before the Court. NGOs can lobby states (both Parties and non-Parties) to enact national laws to cooperate with the Court in accordance with Part Nine of the Statute. NGOs can lobby their governments to volunteer to enforce the sentences of convicted individuals pursuant to Article 103. And, NGOs can ensure that the Court receives adequate funding by lobbying the Assembly of States Parties and the General Assembly and by encouraging voluntary donations by organizations and individuals in accordance with Article 116.

#### Annex: Part 2 of the Statute