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The Establishment of the Permanent International Criminal Court: An International Symposium

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ARTICLE

THE ESTABLISHMENT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT: AN INTERNATIONAL SYMPOSIUM

BETH VAN SCHAACK*

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1. INTRODUCTION

On May 20, 1998, academics, practitioners, and governmental officials from the People's Republic of China (PRC), and representatives from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Committee on the Red Cross (ICRC) and other institutions gathered in

* Attorney, The Center for Justice and Accountability. B.A. Standford University; J.D. Yale Law School. The author, a former law clerk for the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, served as Rapporteur of the Symposium. The author has, to the best of her ability, reflected the positions of the various speakers by transcribing notes from audiotapes of the proceedings. She has interjected citations to elaborate the topics discussed.

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Beijing to discuss the establishment of a permanent international criminal court (ICC). At the time of the symposium, delegates representing the nations of the world had met on several prior occasions to draft a consolidated text that was to serve as the basis for negotiations at a Diplomatic Conference in Rome, Italy in July 1998. The Beijing symposium addressed the most contentious and still unresolved issues facing the Statute's drafters, namely the jurisdiction of the Court (jurisdiction *rationae materiae*), its trigger mechanisms and administration, and the relationship between the Court and both the Security Council and domestic criminal law systems. The symposium was unprecedented in that it brought together for the first time top officials of the PRC and the ICTY to discuss the structure, powers and administration of the future ICC in light of the experience of the ICTY and ICTR and the impact of the ICC on the development of international humanitarian law.

During the symposium, the establishment of the ICC was taken as a foregone conclusion; however, there was significant disagreement about the way this future institution should operate and the powers it should possess. Participants from the two ad hoc criminal tribunals and the ICRC spoke forcibly about the need to establish a politically independent court with coercive powers vis-à-vis States. In particular,
the representatives from the two tribunals recounted their attempts to elicit State cooperation in the face of State intransigence in the hope that this would inform the drafting of the ICC Statute. These individuals also emphasized the importance of ensuring a prosecutor with *proprio motu* powers. In contrast, some participants from the PRC were more cautious, although there was clearly no unified position among the group. Individuals frequently expressed concerns about the Court assuming a position of primacy over national courts and insisted that the institution be founded upon the principle of state consent rather than state coercion. Individuals from the PRC also advocated that the Court be subject to the will of the U.N. Security Council, especially with respect to situations involving claims of aggression.

This Article recounts significant portions of the symposium debate, touching upon areas of the draft Statute that, at the time, remained unresolved. It then provides a brief Epilogue that describes the way in which these debates were resolved and the various interventions made and positions taken by the PRC during the Rome Conference.\(^4\)

II. BACKGROUND TO THE ESTABLISHMENT OF THE PERMANENT INTERNATIONAL CRIMINAL COURT

Professor RAO Geping of Peking University began his opening remarks with the observation that the idea of establishing a permanent international criminal court is not a new one. At the conclusion of World War I, the League of Nations debated the establishment of a high court of international justice to try crimes against international public order and the universal laws of nations, but it was concluded that the time was not "ripe" for such an endeavor.\(^5\) Now, after the world community has been witness to many more conflicts resulting in many millions of victims, the concept of a permanent international criminal court is finally high on the United Nations' agenda. However, it was noted that the road to the ICC is not necessarily a "royal" one; rather, opinions continue to diverge regarding certain key issues that constitute the subject of the present symposium. Participants were reminded that "the future is always bright, but the road to it is always

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4. This latter material is drawn from the author's own notes and analyses from the Conference as supplemented by notes compiled by members of the NGO Coalition for an International Criminal Court.

arduous." Professor Rao urged participants to take unswerving steps toward a future that can guarantee peace all of humankind.

Judge WANG Tieya spoke next in his dual capacity as host—as the founding director of the International Law Institute—and guest—as a judge on the Appeals Chamber of the ICTY and ICTR. Judge Wang described the two ad hoc tribunals as "laboratories for a permanent ICC." He traced the history of the establishment of the ICTY and the ICTR as subsidiary organs of the Security Council and emphasized the way in which the tribunals have preserved their judicial independence by not becoming political instruments subject to the will of the Security Council. At the same time, he stressed the importance of State cooperation in ensuring the effective functioning of the two ad hoc tribunals.

Judge WANG introduced the "Big Three" of the ICTY—the President of the ICTY, Judge Gabrielle Kirk McDonald; the ICTY’s Registrar, Judge Dorothee de Sampayo; and the two tribunals’ Chief Prosecutor, Judge Louise Arbour. The three keynote speakers highlighted some of the challenges facing the establishment of the ICC and the symposium participants. Judge McDonald noted at the outset that it was an honor and a privilege to work with two of China’s sons: the late Judge Li, whose loss was felt dearly and whose daughter attended the symposium, and Judge WANG Tieya, editor of the Chinese Yearbook of International Law since 1982 who joined the Appeals Chamber at its busiest time with three appeals pending.

Judge McDonald stressed the importance of promoting constructive dialogue and debate about the form to be taken by the ICC and noted that the present symposium would provide a major contribution to this effort. She observed that China was a fitting host for this venture given that by virtue of its membership in the Security Council, China played an important part in establishing the ICTY and the ICTR whose success catalyzed efforts toward the establishment of the ICC. She described China’s support for the ad hoc tribunals, the ICC and international justice as characteristic of its history and its rich

philosophical commitment to the concept that right should triumph over might. In particular, she invoked SUN Tzu’s *The Art of War* written in 500 B.C., which could be considered the first humanitarian law handbook and which articulated one of the fundamental pillars of international humanitarian law—the concept of superior responsibility (i.e. the principle that a superior official is responsible for the criminal acts of his or her subordinates).  

Judge McDonald opined that the present conference was occurring at a critical juncture in the development of international law. She noted that today’s international humanitarian law combines the laws of war, a body of law with an ancient pedigree, and the more recent corpus of human rights law, which is partially a product of the perceived failings of the laws of war. She noted that the international community is finally firmly committed to the rule of law over the rule of force, and few seriously challenge the idea of the ICC, although its precise contours are still being debated. Given the success of the two ad hoc tribunals and the impending establishment of the ICC, she predicted that the international community is on the eve of an era in which accountability will become the norm rather than the exception. She concedes the existence of nay-sayers who would question the relevance of the tribunals to their daily lives, but counters with three responses.

First, she noted that we are inextricably bound to each other by our common humanity. Any one’s suffering diminishes us all. Second, the nature of the atrocities over which the ICC will have jurisdiction—genocide, war crimes, crimes against humanity, and acts of persecution perpetrated on the basis of the happenstance of ethnicity—effect us all because they strike at our very humanity. Attempts to annihilate a part of our species indicate a potential to annihilate our entire species. Third, the perpetrators of these atrocities are not members of an aberrant segment of humanity. For various and complex reasons, normal people—cafe owners, civil servants, and the like—became embroiled in the madness that characterized the summary execution of over 8000 men at Srebrenica, the gang rape of young women in Foca camp, and the forcing of a man to eat his own son’s liver. As was noted by Judge Riad of Egypt, a judge on the Trial Chamber who

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7. See, e.g., Sun Tzu, *The Art of War* (Samuel B. Griffith, trans. 1963), at 125 (“Now when troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general.”).


confirmed the second indictment against Radovan Karadzic and Ratko Mladic, events such as these portray "scenes from hell, written on the darkest pages of human history." Judge McDonald emphasized that the international community operates under a moral imperative to bring to an end the type of madness that engulfed the former Yugoslavia and Rwanda.

In her mind, efforts such as the two ad hoc tribunals and the ICC are crucial to such an endeavor. The rule of law is always the first casualty of war and must be the first element of conflict resolution and peace building. The attribution of individual accountability and the creation of an accurate historical record of such conflicts prevents revisionism and provides a catalyst for peace and reconciliation. She concluded by emphasizing that no one can credibly claim that they do not have a stake in this process.

Judge Arbour, the Chief Prosecutor of both the ICTY and ICTR, noted that being involved with the tribunal has been an awesome and humbling experience because it has forced her to confront great human suffering and cruelty. She emphasized that the subject of the symposium is vitally important given that the international community has not heretofore given itself the means to punish and prevent such atrocities. As a result, there is enormous excitement surrounding the concept of a permanent ICC. She noted, however, that the establishment of the ICC will require attention both to great matters of principle and to detailed minutiae. She predicted that no individual view will prevail and it will be necessary to shape a Court acceptable to a broad spectrum of States with the assistance of expert jurists who can contribute both academic and technical skills.

Judge de Sampayo, the Registrar for the ICTY, noted that the international community has advanced beyond the stage in which the establishment of an ICC is mere wishful thinking, but she cautioned that we are still not assured of the success of these efforts. The act of establishment will indeed be a milestone of great symbolic value because it will mark an authoritative expression of the wills of States to enforce international humanitarian law; however, she predicted that subsequent developments will be of greater significance if the Court is to function effectively and fairly. The ICC will need flexibility to adapt to unforeseen situations as they arise. The ICTY has developed a unique set of procedures that are more than the sum of their parts. No one set of national rules predominates in keeping with the practice of international law to seek the most effective solution. Judge de

Sampayo predicted that the ICC too will thrive under these differing perspectives.

III. THE CURRENT STATUS OF ICC NEGOTIATIONS

According to Professor Peter Malanczuk, Chair of International Law at Erasmus University in Rotterdam, the precursors of the contemporary effort to establish a permanent ICC date back as early as 1474 and the trial of Peter von Hagenback for murder and other charges brought by the Archduke of Austria before an international tribunal composed of judges from the allied states of the Holy Roman Empire.11 As this illustrious history was too long to relate, Professor Malanczuk opted to turn immediately to the current status of the ICC negotiation process. He cautioned that from the “outside,” it is difficult to glean the true positions of States and the actual status of negotiations. But, he noted, it is possible to identify the contentious issues. In fact, at the time of the symposium, the current draft Statute still contained approximately 1700 brackets in 116 articles indicating that much of the text remained in flux. In particular, the key political issues—the organization of the Court and its relationship to the Security Council, the role of the prosecutor, the funding of the Court, and the crimes over which the Court will have jurisdiction—remain unresolved, and it may be that these issues can only be solved by consensus under the time pressure of the Rome Conference.

Professor Malanczuk outlined the means that were available to the international community to establish a permanent international Court. The first method available is that which led to the creation of the two ad hoc tribunals,12 namely creation by the Security Council acting under its Chapter VII powers.13 The arguments against this route centered on concerns regarding the legal authority of the Security Council in this regard given that it would have been difficult to argue the existence of a concrete threat to international peace and security as required by Chapter VII. With respect to the Yugoslav and Rwandan tribunals, it was determined that establishment by the Security Council was the only practical solution given that the conflicts were ongoing there and concluding a treaty would take too long. Furthermore, it remains to be resolved to what extent the Security Coun-

13. Chapter VII of the U.N. Charter grants the Security Council the power to take action with respect to “threats to the peace, breaches of the peace and acts of aggression.” U.N. Charter, Chapter VII.
The Permanent International Criminal Court
cil can delegate powers it does not itself possess (e.g. judicial powers). This issue has been addressed in the *Tadic* jurisdictional appeal and with respect to other subsidiary bodies, such as the United Nations Compensation Commission established for claims against Iraq. States have indicated their consent to this practice in these contexts, but this might not be the case with respect to future endeavors. Finally, it was felt that the ICC must have near universal support, and creation by the Security Council under the direction of the so-called "permanent five" alone would not provide the Court with the legitimacy necessary to guarantee universal scope.

The second option was creation by a General Assembly resolution or a joint General Assembly/Security Council resolution. It was noted that having the support of the General Assembly as evidenced by such a resolution would provide significant moral and symbolic legitimacy to a future Court. According to the prevailing view in the literature, however, the General Assembly cannot adopt binding resolutions except with respect to U.N. budgetary and administrative matters; only the Security Council can issue binding resolutions more...
generally. However, there is a contingent of States within the General Assembly, notably from so-called Third World States, who believe that the General Assembly can issue binding resolutions.\textsuperscript{18}

Third, the Court could be established through an amendment to the U.N. Charter.\textsuperscript{19} Professor Malanczuk described this option as impractical because it could amount to the opening of a "Pandora's box." Moreover, this route could take too long, as evidenced by long-standing efforts to reform the membership of the Security Council.\textsuperscript{20}

The fourth and final option was the option ultimately chosen—the promulgation of a multilateral treaty. This option has several obvious drawbacks. For one, a treaty depends upon State consent, and support for the Court may not be universal. Second, without a provision to the contrary, States will undoubtedly attempt to enter reservations in order to effectively opt out of certain undesirable provisions.

Despite these drawbacks, however, the United Nations and other members of the international community determined that this route would best ensure broad-based support for the Court from the nations of the world and, by extension, a considerable measure of legitimacy gained from this universality.

At the time of the symposium, it remained to be determined the number of ratifications that would be necessary to bring the Statute into force.\textsuperscript{21} One option is the model adopted in human rights treaties which generally require a limited number of ratifications.\textsuperscript{22} The result would be a quick treaty but not necessarily a universal one.


\textsuperscript{19} See Article 108, U.N. Charter ("Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.").


\textsuperscript{21} The Rome Statute shall enter into force following the deposit of the 60th instrument of ratification. Rome Statute, Article 126.

The other model would require many more ratifications such that it may take years for the Statute to enter into force. Finally, Professor Malanczuk discussed the prognosis for a proposed merger between the ICTY and the ICC. He noted that the real problem with this proposal is a technical one: the legal basis of the ICTY is a Security Council resolution promulgated under Chapter VII whereas the legal basis for the ICC will be a multilateral treaty. Security Council powers are not unlimited, so it would be difficult for the Council to simply decree such a merger.

During the discussion period, Mr. LIU Daqun of the Department of Treaty and Law for the Foreign Ministry of the PRC suggested that if the international community is serious about wanting to establish a universally acceptable international criminal court, it should amend the U.N. Charter and create such a Court as a principal organ of the United Nations so that it will be on the same footing as the International Court of Justice (ICJ). He observed that no State, except perhaps the United States, challenges the independence or impartiality of the ICJ. He predicted that establishing the Court by amendment would solve all of the outstanding jurisdictional and consent dilemmas presented by the current deliberations. Mr. Payam Akhavan, Legal Advisor to the Office of the Prosecutor of the ICTY, clarified that the establishment of the ICC through treaty provisions or otherwise would not prevent the Security Council from establishing future ad hoc tribunals. Mr. Liu agreed that the Council would retain the power to establish additional ad hoc tribunals, as has been proposed for example for Burundi or Cambodia.

Finally, Professor Malanczuk outlined the primary positions of State delegations. He observed at the outset that all State delegates are verbally in favor of the project, but he emphasized that it is at this stage "politically incorrect" to express opposition to the Court. The

23. See Article 7, U.N. Charter ("There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.").


first position can best be described as one of skepticism. Its leading proponents are India, Nigeria and France and other States concerned with retaining maximum sovereignty and minimizing the proliferation of multilateral bodies with enforcement powers over states. Second, there are cautious state delegates who are generally in favor of the establishment of a Court but one with a restricted scope. States in this camp are four of the five permanent members of the Security Council (minus the United Kingdom), Japan and about 15 other states.

These state delegates are prepared to make limited compromises, but they are unwilling to cede too much state sovereignty to such an international body or to create a body with powers on par with those of the Security Council. They emphasize the importance of state consent and want to retain strong power for the Security Council vis-à-vis the Court. The primary concerns of the United States at present seem to be with issues of national security and the potential exposure of its peacekeepers operating abroad. The U.K., formerly in this camp, had of late joined the so-called “like-minded states” which at the time of the symposium contained over 50 states, including most members of the E.U. and several Asian countries such as Singapore and South Korea. The like-minded states are generally in favor of a strong and independent Court with a broad jurisdictional reach and an independent prosecutor. Finally, the fourth group, which is the majority and includes members of the C.I.S. and so-called Third World states, have not presented a coherent approach due in part to a lack of interest and technical expertise.

IV. CRIMES SUBJECT TO THE JURISDICTION OF THE ICC

Professor LI Zhaojie of the International Law Institute of Peking University opened the panel on crimes subject to the jurisdiction of the ICC. At the outset, Professor Malanczuk explained that, the operation of the principle of *nullum crimen sine lege* (“no crime without law”) is different with respect to the drafting of the ICC Statute. In order to satisfy this principle, the drafters of the Statutes of the ICTY and ICTR had to define the state of international law as it existed at the time of the conflicts. In contrast, the drafters of the ICC can engage in progressive development of international law because the

27. This principle finds expression in the International Covenant on Civil and Political Rights (ICCPR). International Covenant on Civil and Political Rights, Art. 15, G.A. Res. 2200 A (XXI) (16 December 1966) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”).
Court will have jurisdiction over prospective crimes and future potential defendants will be on notice of the illegality of enumerated acts.

Mr. Mohamed Othman, Senior Legal Advisor of the Office of the Prosecutor (OTP) of the ICTR, provided a comprehensive discussion of issues of concern and consensus surrounding the subject matter jurisdiction of the future ICC. He explained that the current Statute contemplates five major categories of crimes: genocide, crimes against humanity, war crimes, the crime of aggression and a basket of other crimes governed by international conventions. The original International Law Commission draft did not envision that the Statute would define the crimes precisely. However, over time, delegates insisted that an enumeration and definition of crimes was necessary from the perspective of notice to an accused and to guide the prosecution of offences. Mr. Othman approved of this decision by noting that notwithstanding fairly detailed definitions of crimes in the ICTR Statute, there have been numerous claims based on alleged defects in the form of the indictment. He observed that it is essential to provide for an enumerative definition of crimes in order to meet the legality requirements of criminal law and to put the accused on notice of the potential scope of his or her liability.

Mr. Othman noted that the most current draft proposal provides that the Court would have inherent jurisdiction over the crime of genocide only and that regrettably all other crimes would be subject to a complex and cumbersome opt in/opt out regime. Professor LING Tan, China University of Political Science and Law, elaborated that according to some state proposals, ratification of the Statute does not necessarily mean that a particular state has accepted jurisdiction over all of the crimes covered by the Statute. These proposals would require the state to "opt in" to jurisdiction over each and every crime

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28. See 1998 Report, Article 8(1), 38 ("The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute") (bracketed). This provision appears at Article 11 in the final text.

29. See Article 5, 1998 Report, at 12-35 (outlining Court's proposed subject matter jurisdiction). So-called "treaty crimes" are those crimes prohibited by specific multilateral treaties, such as the crimes of terrorism, narcotics trafficking and crimes against United Nations personnel.


32. See Article 9, 1998 Report, at 38-40 (outlining options for consent regime).
enumerated by the Statute with the exception of genocide, over which the Court would have inherent jurisdiction.\footnote{See bracketed Article 9 (Options 1 and 2), 1998 Report, at 38-40 (providing inherent jurisdiction over some still unenumerated crimes and requiring states to opt in to jurisdiction over others).}

Mr. Zhu noted further that some proposals require that in order to conduct an investigation, it will be necessary to have the consent of at least three states: (1) the custodial state, i.e. the state with custody over the accused; (2) the territorial state, the state in which the crimes occurred and the state that would unequivocally have jurisdiction over the crimes; and, (3) the state of nationality, i.e., the state of the nationality of the accused.\footnote{See Article 7, 1998 Report, at 36-7 (requiring consent of custodial state, territorial state, requesting state, and the state of which the victim is a national); see also id., Article 11, at 43 (requiring at option 2 similar consent structure for state referrals).} According to this proposal, only when the matter is referred to the Court by the Security Council acting under Chapter VII of the U.N. Charter would the consent of these other states not be required.

Professor Ling observed that, under these terms, the treaty at best would result in a permanent ad hoc tribunal. Furthermore, these consent requirements are inconsistent with a complementary system; rather, they create a system in which the ICC is merely an alternative forum for trials. She opined that in order to reflect the principle of complementarity, the ICC must be able to assume jurisdiction whenever national courts are unable to assume jurisdiction, regardless of whether the state "consented" to such jurisdiction. Mr. Akhavan similarly criticized the ICC Statute's proposed consent regime. He predicted that unilateral assertions of sovereignty facilitated by this regime would render the ICC ineffective.

Ms. Marie-Claude Roberge, Legal Advisor of the International Committee on the Red Cross, noted that the Geneva Conventions of 1949 provide for universal jurisdiction over treaty violations such that all states have the power to prosecute offenders.\footnote{See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 49, Aug. 12, 1949, 75 U.N.T.S. 31, 62; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Article 50, Aug. 12, 1949, 75 U.N.T.S. 85, 116; Convention Relative to the Treatment of Prisoners of War, Article 129, Aug. 12, 1949, 75 U.N.T.S. 135, 236; Convention Relative to the Protection of Civilian Persons in Time of War, Article 146, Aug. 12, 1949, 75 U.N.T.S. 287, 386.} In other words, state Z can prosecute a war criminal from country X for committing a crime in country Y without the consent of either X or Y. In practice, of course, the cooperation of these latter states may be essential in order to stage a credible prosecution, but no formal "consent" is tech-
nically required. Therefore, it is clear that the application of international humanitarian law is restricted by the current consent provisions of the draft Statute. In this way, the consent regime contained in the current ICC Statute represents a contraction of international humanitarian law. Thus, in order to maintain the level of protection already available under the Geneva Conventions, the Court should not need the consent of either the custodial or territorial state in order to prosecute a particular individual.

Mr. Othman noted that while all delegates accept that the Court must have jurisdiction over the crimes of genocide, crimes against humanity and war crimes, the inclusion of the crime of aggression remains controversial. He noted that there is a consensus definition of "aggression" drafted by the General Assembly in 1974, which incorporates various enumerated acts. However, this definition is concerned only with the allocation of state responsibility and does contemplate the assignment of individual criminal responsibility. Proposed provisions governing the jurisdiction of the ICC over the crime of aggression provide that the Security Council must have first declared a situation to involve an act of aggression in order for the Court to rule on the liability of a particular individual. This provision is based on the argument that the U.N. Charter confers upon the Security Council the primary responsibility for the maintenance of international peace and security.

According to Mr. Othman, requiring such a Security Council determination before the ICC would accept jurisdiction raises concerns because the Security Council is fundamentally a political body. There are situations when the Security Council remains "actively seized" of a matter or does not decide definitively on a particular situation for a considerable time, which may delay consideration by the Court. For example, with respect to the situation in Rwanda, the Security Council avoided labeling the situation as "genocide" until June of 1994 even though the Security Council had been effectively seized of the situation since April of that year. The groundwork for a finding of the


37. See Article 10, 1998 Report, at 40 (stating in option 1 that "[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5] may [not] be brought [under the Statute] unless the Security Council has [first] [determined] [formally decided] that the acts of a State that is the subject of the complaint [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].").

38. See S.C. Res. 912 (21 April 1994) ("Appalled at the ensuing largescale violence in Rwanda, which has resulted in the death of thousands of innocent civilians. "); S.C. Res.
individual criminal responsibility of an accused should not be dependent upon a political consensus reached by the Council. The practice of the International Court of Justice demonstrates that it is possible for both the Court and the Security Council to be seized simultaneously of a matter that could amount to a threat to the peace or an act of aggression.\(^3\)

Professor Malanczuk noted that few state delegates wanted to include the crime of aggression in the subject matter jurisdiction of the Court until Germany proposed it in February 1997.\(^4\) He reminded the participants that the IMT Statute included jurisdiction over crimes against the peace.\(^4\) He described the 1974 General Assembly resolution definition of aggression as a “non-definition” and noted the difficulties in articulating precise elements for the crime of aggression. Acts of aggression are highly contentious political issues not amenable to criminal adjudications requiring respect for due process concerns. He agreed with Mr. Othman’s assessment that the ICC is concerned with allocating individual criminal responsibility and that it is contrary to all principles of criminal justice for a political body to establish the basis of liability of an individual without reference to that individual’s own acts.

Furthermore, under the proposed system, a defendant would not be able to invoke a claim of self-defense because the Security Council would have already determined that the individual’s state engaged in

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918 (17 May 1994) ("Strongly condemning the ongoing violence in Rwanda and particularly condemning the very numerous killings of civilians. . ."); S.C. Res. 925 (8 June 1994); S.C. Res. 929 (22 June 1994) ("Deeply concerned by the continuation of systematic and widespread killings of the civilian population in Rwanda. . ."); S.C. Res. 928 (20 June 1994); S.C. Res. 935 (1 July 1994) ("Expressing once again its concern at the continuing reports indicating that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, have been committed in Rwanda.") (emphasis added).


41. Crimes against the peace were defined at Article 6(a) of the IMT Charter as: “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945).
an act of aggression. Professor Malanczuk proposed that it would be preferable for the Statute to allow the Security Council to refer cases to the Court in which it has determined that an act of aggression occurred. The Court then would be fully capable of re-assessing the situation from the perspective of assigning individual criminal responsibility where appropriate.\(^42\)

Mr. Liu observed that the Security Council chooses its words carefully. For example, with respect to the Nicaragua conflict, nowhere did it employ the term "aggression."\(^43\) Rather, it referred only to the existence of an "armed conflict." Including aggression as a "crime" within the Statute is inappropriate, because an act of aggression can only be committed by a state or a group, and it is difficult to envision a situation in which an individual would engage in an act of aggression. Mr. Liu was of the opinion that the compromise proposal outlined above by Professor Malanczuk has the potential to generate illogical results. For example, what if the Security Council determines that a state engaged in an act of aggression, but the ICC determines that the state’s leader is not guilty of the crime of aggression?

Ms. Roberge focused her presentation on one issue—the scope of the prohibition against war crimes—as an example of the difficulties inherent to Preparatory Committee negotiations. She began by outlining the primary documents containing the laws of war. She noted that the 1949 Geneva Conventions, which govern international and to some extent internal armed conflicts, have been ratified by 188 states and as such represent customary international law.\(^44\) The inclusion in the ICC Statute of the prohibitions contained in these Conventions and applicable in international armed conflicts is uncontested, but state delegations are less willing to include reference to the laws of war governing internal armed conflicts. She advocated for the inclusion in the Statute of the violations of the laws of war addressed in the 1977 Protocols I and II to the Geneva Conventions, which have been ratified by 151 and 143 states, respectively.\(^45\)

\(^{42}\) See Article 10(5), 1998 Report, at 41 ("[A referral of a matter to the Court ...]... by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.").


Protocol II in particular is concerned with non-international armed conflicts and its wide ratification indicates that the majority of states have accepted that war crimes committed in internal conflicts generate individual criminal responsibility. This conclusion is also evidenced by various military manuals, statements by states, and international and national jurisprudence. As such, she argued that the ICC should have jurisdiction over war crimes committed in non-international armed conflicts. A Court without such jurisdiction would risk being ineffective because most conflicts in the world today are best characterized as internal ones. Despite this obvious truth, there remains a handful of states that does not want the definition of war crimes to include acts taken in non-international armed conflicts.

In response to a question regarding the United States proposal to include a requirement that war crimes be committed on a “widespread or systematic” basis in order for them to come before the Court, Ms. Roberge noted that this proposal to include a threshold requirement for war crimes has received strong opposition from other states. Such a threshold requirement has never been required in international law and when compared with the general admissibility requirements for the entire Statute, the U.S. proposal is duplicative. A compromise proposal has emerged that would grant jurisdiction over only the most serious crimes, “in particular” when war crimes are taken on widespread or systematic basis.

Finally, Ms. Roberge responded to Mr. Othman’s plea for the inclusion of precise criminal elements in the definitions of crimes in the Statute. She observed that the current ICC draft contains a 16-page definition of war crimes. Ms. Roberge recounted that it has been difficult for state delegates to agree on a list of war crimes, although they have basically agreed on the general elements of the offenses. This difficulty in deciding upon the particular war crimes to be included within the Statute is due in part to the fact that nations have enacted very specific prohibitions of war crimes in their domestic legislation. This has provoked a debate over whether the ICC Statute should adopt the language of the major international instruments out-
lining humanitarian law or whether the Statute and Court should refer instead to the precepts of customary international law. States that have not ratified the Protocols would prefer the latter. The problem is, however, that there is no agreed upon definition of war crimes under customary law. Similarly, it has not been decided if the Court would be empowered to refer to the predicate international humanitarian law instruments to interpret its Statute.

The United States, which has not ratified the Protocols, has proposed that the Statute include not only a recitation of war crimes—a list that has not yet been decided upon—but also an enumeration of the elements of each and every war crime. For example, it has not been decided whether the starvation of a civilian population will constitute a war crime under the Statute. In order to include it in the Statute, the United States would like the Statute to provide an exhaustive discussion of each element of this offense. This approach is well-founded in a domestic legal order in which crimes are generally meticulously defined. International law, however, generally is not characterized by such detailed definitions. Rather, it is left to national and international courts to interpret the full scope of a particular international law norm. Although it is important that the basic elements an offense be enumerated in order to satisfy the principle of legality, to require that each and every war crime be meticulously defined in terms of its constitutive elements creates an undesirable additional burden at this stage in the drafting of the Statute.  

Mr. Akhavan turned to a discussion of another crime within the jurisdiction of the Court: crimes against humanity, and specifically the mental element of the offense. He noted that one of the challenges

49. The U.S. ultimately prevailed in this regard. According to Article 9 of the Rome Statute, the Assembly of States Parties shall adopt elements of crimes to assist the Court in the interpretation and application of the relevant substantive law. At the time of publication, state delegates have convened a series of meetings under the rubric of the Preparatory Commission for the International Criminal Court to draft these elements for adoption. See, e.g., Proposal Submitted by the United States of America (Draft Elements of Crimes), U.N. Doc. No. PCNICC/1999/DP.4 (4 February 1999).

50. See Article 5, 1998 Report, at 30 (defining crimes against humanity as “any of the following acts when committed [as part of a widespread [and] [or] systematic commission of such acts against any population]: [as part of a widespread [and] [or] systematic attack against any [civilian] population [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]: . . . (a) murder); (b) extermination; (c) enslavement; (d) deportation . . .; (e) [detention or] [imprisonment] . . .; (f) torture; (g) rape or other sexual abuse . . . (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds [and in connection with other crimes within the jurisdiction of the Court]; (i) enforced disappearance of persons; (j) other inhumane acts . . .”) (citations removed).
facing the drafters of international penal legislation is determining when international law can justifiably interfere in what would otherwise be a domestic crime within the internal jurisdiction of a state. In other words, it must be determined which crimes are of such magnitude that they merit international concern and intervention. Crimes against humanity do not necessarily involve the violation of the sovereign rights of one state by another. As a result, unlike with the offense of war crimes under the Geneva Conventions, a perpetrator may be guilty of a crime against humanity committed against a victim of the same nationality.

The mental element of crimes against humanity is thus crucial to delimiting crimes against humanity from ordinary crimes. Accordingly, the Trial Chamber in the Tadic case held that the accused must have knowledge that his acts “fit within” a larger attack against a civilian population. 51 In other words, Tadic’s acts constituted crimes against humanity because he was aware of the broader context in which his acts fit. This interpretation of the mental state requirement renders the prohibition against crimes against humanity more relevant to mid-level defendants than policy makers. In the Erdemovic case, the majority, with the late Judge Li dissenting, 52 held that crimes against humanity are more serious than war crimes due to the mental intent element defining the former. 53

The definition of crimes against humanity is not the same in the ICTY and ICTR Statutes. The latter Statute adds two elements not present in the former: (1) the acts must be taken on widespread or systematic grounds and (2) the acts must be taken on discriminatory grounds. 54 With respect to this first element, the International Law Commission has treated these two characteristics as disjunctive rather than conjunctive such that the prosecutor must demonstrate that the

51. The Prosecutor v. Dusko Tadic, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), at 252-4 (holding that the perpetrator must know of the broader context in which his acts occur).

52. The Prosecutor v. Drazen Erdemovic, Separate and Dissenting Opinion of Judge Li, Case No. IT-96-22-A (7 October 1997), at 10-15 (arguing that the intrinsic nature of the underlying act—and not its formal legal classification—determines a crime’s gravity).


54. Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th year, 3400th mtg. at 1, U.N. Doc. S/RES/955, Annex (1994) (defining crimes against humanity at Article 3 as any of the “following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts.”).
attack was either widespread or systematic.\textsuperscript{55} The former implies a large scale attack with numerous victims such as occurred during the execution of 8000 individuals after the fall of Srebrenica. The latter implies the existence of a pattern of repeated acts over time and across a geographic area. The ICTY Statute includes the war nexus,\textsuperscript{56} which is absent from the ICTR Statute.

In the interlocutory appeal on jurisdiction in the \textit{Tadic} case, the Appeals Chamber observed that by including the war nexus in the definition of crimes against humanity in the ICTY Statute, the Security Council chose to define the offense more narrowly than customary international law which has abandoned the war nexus.\textsuperscript{57} In other words, the ICTY’s definition of crimes against humanity deviates from customary international law such that proof that the acts were connected to war is required only for the purposes of prosecutions before the ICTY. In the current draft Statute of the ICC, the war nexus, the discriminatory intent requirement, and the disjunctive nature of the requirement of widespread or systematic action remain in dispute.\textsuperscript{58}

To the definition of crimes against humanity in the ICTY Statute, the \textit{Tadic} Trial Chamber added a second component to the mental state element when it required proof that the defendant acted with discriminatory intent, i.e. he acted against his victim on racial, ethnic, religious, political or national grounds.\textsuperscript{59} The Chamber admitted that this requirements does not exist in customary international law, but it imposed it nonetheless in keeping with the views of the Secretary-General\textsuperscript{60} and three members of the U.N. Security Council’s “Permanent Five”—France, the United States and Russia.\textsuperscript{61} This formulation created some conceptual confusion with respect to the crime of perse-

\begin{footnotesize}
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\item \textsuperscript{56} ICTY Statute, Article 5 (defining crimes against humanity as “the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder . . .”).
\item \textsuperscript{57} \textit{The Prosecutor v. Dusko Tadic}, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (2 October 1995), at 73 (holding that it is a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict and noting that the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law).
\item \textsuperscript{58} See supra note 50.
\item \textsuperscript{59} \textit{The Prosecutor v. Dusko Tadic}, Opinion and Judgment, Case No. IT-94-1-T (7 May 1997), at 348 (holding that in order to qualify as crimes against humanity, acts must be taken on discriminatory grounds).
\item \textsuperscript{60} Report of the Secretary-General, supra note 6, at para. 48.
\item \textsuperscript{61} See Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, U.N. Doc. S/PV.3217 (25 May 1993), at 11, 16 and 45 (including discriminatory grounds as part of the definition of crimes against humanity).
\end{itemize}
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cution, one of the enumerated crimes against humanity, which in the Statute uniquely requires that acts be taken on specified discriminatory grounds. The IMT Charter formulation of the definition of crimes against humanity at Article 6(c) included two categories of crimes—inhumane acts and crimes of persecution. The latter category encompassed acts taken on specified discriminatory grounds.

The OTP of the ICTY had advanced an interpretation of the Statute that would allow for the attribution of liability for inhumane acts in conjunction with liability for acts of persecution when such acts are taken with discriminatory intent. By requiring evidence of a discriminatory intent for all crimes against humanity, the Tadic Trial Chamber collapsed these two categories of crimes and severely limited the scope of the prohibition against the crime of persecution. This formulation also excludes crimes not committed on enumerated grounds, for example the extermination of the handicapped or gay and lesbian persons by the Nazis.

In the ICC draft documents, it has been suggested that the Statute contain an exhaustive rather than illustrative list of acts constituting crimes against humanity. One option within the ICC draft Statute mirrors the Tadic judgment and includes the requirement that the defendant acted on discriminatory grounds. By including this element for all crimes against humanity and not just for acts of persecution alone, the drafters have negated the crime of persecution. Although the ICC draft Statute is preferable to the Trial Chamber’s formulation in that it makes the grounds of commission illustrative, it still unacceptably excludes liability for random acts of mass violence.

In response to a question regarding the status of the inclusion of the so-called treaty crimes—crimes involving narcotics, crimes

62. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945) (defining crimes against humanity as: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”).

63. The Prosecutor v. Dusko Tadic, Brief of Argument of the Prosecutor (Cross-Appellant), Case No. IT-94-1-A (12 January 1998) at 75.

64. Id. at 76.

65. See 1998 Report, at 31 n.17 (requesting further clarification of “(j) other inhumane acts”).

66. See Article 5, 1998 Report, at 30 (defining crimes against humanity in one option as “any of the following acts when committed . . . [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]: (a) murder. . . “).
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against United Nations personnel, 68 and terrorism 69—Mr. Akhavan observed that Trinidad and Tobago first initiated discussions on the ICC in order to address these crimes. Although the nature of these crimes does not involve state elites, Mr. Akhavan was of the opinion that they were still appropriate for inclusion within the Statute. He suggested that the Lockerbie bombing case would represent an excellent case for the ICC given that there was no agreement determining which state should prosecute the crime. Professor Malanczuk observed that these crimes are of a different nature than the other core crimes that possess an *erga omnes* character which is to say that all states may prosecute them. The latter species of crimes allow states to prosecute offenders even if they are not directly affected, as was articulated in the *Barcelona Traction* case before the ICJ. 70

Mr. JIA Bingbing, Legal Officer of the ICTY, discussed the way in which national criminal law concepts can be applied in an international forum as general principles of law. Pursuant to Article 38 of the Statute of the ICJ, the sources of international law include positive law in the form of treaties, customary law, and general principles of law recognized by "civilized" nations. 71 Custom is not the equivalent of general principles of law. For one, customary law contains definitive rules which are distinct from principles. A rule is generally considered a binding precept whereas a principle is a general truth that can serve as a theoretical basis for a rule. In contradistinction to customary law, there is no requirement that general principles of law be accepted by the majority of states.

Even though they are derived from national law, general principles of law form part of general international law. In the *International Status of South West Africa* case, the International Court of Justice considered the duty of an international tribunal when confronted with a new institution. 72 The Court noted that it is impossible to simply import rules from domestic law into international law. Rather, international tribunals must regard features of domestic law as an indica-

68. *Id.* at 33-34.
69. *Id.* at 33.
71. According to Article 38 of the ICJ Statute, "The Court . . . shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59 [providing no precedential value to ICJ Decisions] judicial decision and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, Art. 38, 50 Stat. 1055 (1945).
tion of general principles. General principles have influenced and been applied by international tribunals, but this has generally been in civil as opposed to penal law situations. For example, in the *Nuclear Tests Case*, the ICJ determined that the principle of good faith represented a fundamental principle of the international legal order. It was noted that at the time of the symposium, the role to be played by general principles within the jurisprudence of the future Court had not yet been determined.

Criminal defenses, such as the defense of duress, are unique to municipal law institutions. The ICTY Statute does not address defenses per se. The Report of the Secretary-General noted that "Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defense. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires." The Report also indicates that "The international Tribunal itself will have to decide upon various personal defenses which may relieve a person of individual criminal responsibility, such as minimum age or mental capacity, drawing upon general principles of law recognized by all nations." In the *Erdemovic* case, the ICTY was forced to consider the way in which the defense of duress would operate on the international level.

It became clear in the case that no consistent practice exists with respect to the defense of duress. The only international law precedent was the *Einsatzgruppen* case, decided after World War II. In this case, the tribunal referred to United States, Soviet, and German law in discussing criminal defenses, although the case did not involve murder per se. As a result of this lack of clear international prece-

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74. In the final Statute, general principles of law appear as a subsidiary source of law after the ICC’s Statute, Elements of Crimes, and Rules of Procedure and Evidence; and then applicable treaties and the principles and rules of international law. Rome Statute, Article 21. This proved to be an issue of great debate as delegates split over whether the Statute should allow the Court to apply general principles of law derived from national laws of the legal systems of the world or whether the Court would be limited to applying national laws directly pursuant to a hierarchy of sources. According to the latter position, the Court would apply first the law of the state where the crime was committed, second, the law of the state of nationality of the accused, and finally, the law of the custodial state. See 1998 Report, Article 20, at 55-56.

75. Report of the Secretary General, *supra* note 6, at para. 57.

76. *Id.* at para. 58.


dent, it was necessary for the ICTY to consult national law. Two tentative propositions emerged in a necessarily representative sampling of states: first, common law systems generally do not allow the defense of duress for murder; and second, civil law states generally do. However, the number of cases in which the defendant is successful in the latter systems is limited. The conclusion to be drawn from this survey is that the defense of duress can be applied in cases other than murder, which was the decision of the Appeals Chamber. This question has not yet been resolved with respect to the ICC Statute, but certain proposals dealing with the grounds for excluding criminal responsibility would provide similarly.

Colonel ZHANG Jingen of the People's Liberation Army Academy of Military Sciences discussed the way in which the principle of according individual criminal responsibility for war crimes and crimes against the peace articulated at the Nuremberg and Tokyo trials was incorporated into the Chinese domestic legal system. In the Chinese system, almost all rules relating to humanitarian law form part of the PRC's domestic and military legislation, such as the Law of National Defense. The Chinese People's Court has jurisdiction over crimes against the peace, crimes against humanity and war crimes. The People's Liberation Army is a revolutionary army whose task is to defend China. It is subject to strict rules of discipline that require soldiers to follow orders, refrain from damaging civilian property or mistreating captives, speak politely, pay fairly for what is purchased, etc. These rules are substantially in conformity with international humanitarian law. Furthermore, international treaties to which China is a party form part of China's domestic law pursuant to legislation enacted by

80. Id. at 41-48.
81. *The Prosecutor v. Drazen Erdemovic*, Judgement, Case No. IT-96-22-A (7 October 1997), at 75 (concluding that duress does not afford a complete defense to a soldier charged with the killing of innocent civilians).
82. See Article 31(d), 1998 Report, at 68-69 ([the person reasonably believes that] there is a threat of [immanent] death or serious bodily harm against the person or another person . . . and the person acts reasonably to avoid this threat, provided that the person's action [causes] [was not intended to cause] [n]either death [n]or a greater harm than the one sought to be avoided") (citations removed). The final Statute recognizes variations of the following grounds for excluding criminal responsibility: mental disease or defect, intoxication, self-defense, duress, and other grounds derived from the applicable law. Rome Statute, Art. 31.
84. See, e.g., People's Republic of China, Criminal Code (March 14, 1997), Article 446 (addressing crimes committed by soldiers in war time).
the National People’s Congress, China’s supreme legislative body. As such, treaties possess a higher status than domestic law.

Colonel Zhang recounted China’s long history of enforcing international humanitarian law. In 1956, after the founding of the PRC, the Supreme People’s Court established two special military courts to try Japanese war criminals for their crimes committed from 1931-1949. Individuals were convicted of war crimes, crimes against the peace, and espionage centering on the following acts: seizing power in China, violating international humanitarian law, enslaving and mistreating the Chinese people, plundering property, engaging in rape and enforced prostitution, and launching germ warfare.

In these trials, the tribunals followed the principles established by the Nuremberg and Tokyo trials in trying and punishing Japanese war criminals. For example, it was determined that the most severe punishment must be accorded to the “core” culprits, but secondary criminals who showed repentance would be treated leniently or exempted from prosecution. Forty-five Japanese defendants were convicted as “core” criminals for their participation in implementing Japan’s imperialist aggression against China. Furthermore, war crimes committed under orders did not relieve the perpetrators of responsibility, but this claim could mitigate punishment in certain circumstances. In particular, it was determined that individuals with high ranks who committed atrocities could not claim the defense of superior orders because they knew of the prohibitions of the laws of war and had the authority to refuse to execute illegal orders.

V. STATE COOPERATION AND JURISDICTIONAL PRIMACY IN THE ICC STATUTE

Mr. Akhavan stressed the importance of state cooperation and noted that the distinguishing feature of the Nuremberg and Tokyo tribunals vis-à-vis the ICTY and the ICTR is that the former tribunals were established after the unconditional surrender of the states involved. This enabled those tribunals to operate effectively in Germany and Japan in terms of collecting evidence and capturing the accused. In contrast, the two ad hoc tribunals are not based on this model of “victor’s justice.” Their alternative genesis necessitates the coopera-

86. These trials are discussed in various volumes of the Yearbook of the People’s Court (Dang Dai Zhong Guo Gongan Gongzuo); the Contemporary Public Security Works of the PRC; and Contemporary Judicial Works (Dang Dai Zhong Guo Shangpan Gongzuo).
tion of states, especially successor states of the former Yugoslavia, in order to arrest the accused, investigate alleged crimes, conduct trials, and punish the perpetrators. In effect, the two tribunals could not operate without the cooperation of states.

State cooperation with the ad hoc tribunals is statutorily based. According to Articles 29 and 28 of the ICTY and ICTR Statutes, respectively:

(1) States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. (2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.

The obligations contained in these Articles originate from the U.N. Charter given that the tribunals were established under Chapter VII.87

These obligations were challenged in the case against General Tihomir Blaskic, which involved charges of war crimes and crimes against humanity in connection with the killing, deportation and inhumane treatment of civilians in the Lasva Valley region in Bosnia and Herzegovina.88 Croatia failed to cooperate with requests from the Office of the Prosecutor to obtain evidence that had the potential to be both inculpatory and exculpatory. As a result, the OTP requested the Court to issue to Croatia a binding order in the form of a subpoena in order to obtain these documents.89 Croatia argued that under international law, sovereign states are not bound to cooperate given that the Statute referenced only “voluntary cooperation.”90 On appeal, numerous states, such as Norway, the Netherlands, New Zealand, Canada and China, submitted briefs amicus curiae on this question.91 The Ap-

87. See supra note 6.
89. The Prosecutor v. Tihomir Blaskic, Ex Parte Request by the Prosecutor For the Issuance of a Subpoena Duces Tecum, Case No. IT-95-14-T (10 January 1997).
90. The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, Brief of the Republic of Croatia on Subpoenae Duces Tecum (1 April 1997).
91. The Chinese submission argued that the ICTY is constrained by its Security Council mandate, which does not expressly empower it to issue legally binding orders to states or to assume jurisdiction over states. The Prosecutor v. Tihomir Blaskic, Brief Amicus Curiae of the Government of the People’s Republic of China in Response to the Invitation of the Appeals Chamber Dated 29 July 1997, Case No. IT-95-14-AR108bis (15 September 1997).
peals Chamber ultimately ruled that it was in fact empowered to issue
binding orders to states.\textsuperscript{92}

According to the most recent draft of the ICC Statute, states are
directed to fully cooperate with the Court in the investigation and
prosecution of crimes without delay.\textsuperscript{93} This text echoes the ICTY and
ICTR Statutes.\textsuperscript{94} However, subsequent provisions weaken this obliga-
tion. For example, draft Article 87 provides that the national law of a
requested state may govern requests for transfers.\textsuperscript{95} This gives the na-
tional law of states a monopoly over when the Court will exercise ju-
risdiction. That Article also contemplates allowing states to deny a
request for transfer on, \textit{inter alia}, the following grounds: (1) when a
person is the national of a requested state and (2) when the informa-
tion submitted by the office of the prosecutor does not meet the mini-
um evidentiary requirements of the requested state.\textsuperscript{96} Mr. Akhavan
was of the opinion that there should be no grounds for refusal given a
duly confirmed order from the Court. Mr. HUANG Feng, Division
Head of the Bureau of Judicial Assistance of the Ministry of Justice,
noted that in the draft Statute, cooperation between state parties and
the ICC is mandatory, but the precise procedural aspects of this coop-
eration remain unacceptably vague.

In Judge McDonald's eyes, the issue that will make or break the
ICC is the issue of state compliance. Prior drafts of the ICC Statute
have required only that states "cooperate" with the Court. She noted
that "cooperating" is very different from "complying." She stressed
that the Court's Statute must contain a component of compulsion be-
cause at the heart of any judicial machine is the power to compel.
Notwithstanding the charisma and reputations of Judge Antonio
Cassesse and former Chief Prosecutor Richard Goldstone, in the first
few years of the tribunal's existence, the tribunal remained unable to
execute arrest warrants. The experience of the ad hoc tribunals dem-

\textsuperscript{92} \textit{The Prosecutor v. Tihomir Blaskic}, Judgment on the Request of the Republic of
Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-

\textsuperscript{93} See Article 85, 1998 Report, at 156 ("States Parties shall . . . fully cooperate with
the Court in its investigation and prosecution of crimes under this Statute. States Parties
shall so cooperate without [undue delay."]) (citations removed).

\textsuperscript{94} See ICTY Statute, Article 29(2) ("States shall comply without delay with any re-
quest for assistance or an order issued by a Trial Chamber . . .").

\textsuperscript{95} See Article 87(1), 1998 Report, at 159 ("[2. The national law of a requested state
shall govern the [conditions] [procedure] for granting or denying a request for [surrender]
[transfer] [extradition] [except as otherwise provided in this Part];]]; see also Article 91
("Requests for assistance shall be executed in accordance with the law of the requested
state. . .").

\textsuperscript{96} See \textit{id.}, at 159-160 (outlining grounds for refusal).
onstrates that even in the face of mandatory language as is found in Article 29, the tribunals have encountered non-compliance. The current draft affords the ICC less power than the ad hoc tribunals possess and thus represents a step backwards in terms of guaranteeing accountability for international crimes.

Judge de Sampayo agreed that it will be vital for states to cooperate in the discharge of the Court’s mandate. She noted that the ICTY, for example, is entirely dependent on states to enforce its prison sentences. To date, however, only a handful of states have concluded the necessary legislation in this regard. The record is similar with respect to witness protection efforts. Witnesses of fact have lived through terrible experiences, and the act of testifying often revives these experiences and victimizes witnesses for a second time. Relocating victims and witnesses can result in victimization for a third time. The international community must accept the responsibility for protecting vulnerable witnesses. In particular, states must offer relocation services and fund the victims and witnesses program. Finally, state cooperation is also required in order to enable the ICTY to gain access to evidentiary material. The ICC will be a “high maintenance” judicial body and states will retain a high degree of responsibility for its effective functioning.

Judge Arbour was in agreement that for one, nothing is possible without state cooperation, but at the same time some things cannot be done without some form of compulsion or coercion. She noted that there is a difference in reality between formal cooperation and de facto cooperation. The ad hoc tribunals have received quite a bit of de facto cooperation from states that have yet to enact a formal legal framework to govern the provision of assistance to the tribunals. Other states have enacted legislation permitting cooperation, but in reality their cooperation has been disappointing in that is has been unresponsive and slow.

In response to a question from Ms. LI Xiaohong, Officer of the Bureau of Judicial Assistance of the Ministry of Foreign Affairs, Mr. Akhavan noted that numerous states have in fact cooperated both formally and informally with the ad hoc tribunals. States have, among other things, drafted implementing legislation, assisted the tribunal in locating and interviewing witnesses, and participated in the arrest and apprehension of the accused. Assistance of this kind has come from such states as Australia, Pakistan, Turkey, Norway, Germany, Malaysia, Cameroon, Kenya and Tanzania. However there have been failures, most notably on the part of the Federal Republic of Yugoslavia. As a result, the tribunal has been forced to utilize its Rule 61 proce-
dures on numerous occasions. In contrast, in Rwanda, the former
government is no longer in power, which has made investigations easi-

er there.

At this point, Judge McDonald intervened and observed that an
assessment of the scope of judicial cooperation depends upon one’s
definition of “cooperation.” All states are required to pass imple-
menting legislation, but to date only 24 states have done so which is a
dismal record. Moreover, according to Article 27 of the ICTY Statute,

Imprisonment shall be served in a State designated by the Interna-
tional Tribunal from a list of States which have indicated to the Se-
curity Council their willingness to accept convicted persons. Such
imprisonment shall be in accordance with the applicable law of the
State concerned, subject to the supervision of the International
Tribunal.

To date, only three states—Italy, Finland and Norway—have passed
such legislation (and Italy’s legislation has not been officially ratified).

Judge de Sampayo intervened to emphasize that there are many
forms of cooperation. Many states, while not concluding blanket legis-
lation to that effect, have in fact provided assistance on a case-by-case
basis. For example, some states have informally offered to relocate
witnesses, although she is reluctant to discuss the content specific
agreements with states because to do so could jeopardize relocated
witnesses. Many other states have offered financial assistance and gra-
tis personnel, including some of the poorest countries of the world like
Namibia.

Ms. Roberge turned to the issue of complementarity, i.e. the rela-
tionship between the Court and national jurisdictions. She noted that
it is not envisioned that the Court will operate as an appeals court for
national court judgments; rather, the goal is that the ICC will comple-
ment national jurisdictions. Only when it is demonstrated that the state is unwilling

97. Rule 61 is activated in cases in which there has been a failure to execute an arrest
warrant. It allows the Prosecution to submit the indictment with supporting documentary
and testimonial evidence to the Trial Chamber. If the Prosecutor satisfies the Trial Cham-
ber that the failure to execute personal service was due to a failure or refusal of a state to
cooperate with the tribunal, the President of the Tribunal can so notify the Security Coun-
cil. See Rule 61(D), ICTY Rules of Procedure and Evidence, IT/32/Rev.13 (9 and 10 July
1998).

98. The Preamble of the Rome Statute emphasizes that the Court “established under
this Statutes shall be complementary to national criminal jurisdictions”

99. See, e.g., Article 5(2), the Convention Against Torture and Other Cruel, Inhuman
or Degrading Treatment or Punishment, (“Each party shall likewise take such measures as
may be necessary to establish its jurisdiction over such offenses in cases where the alleged

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or unable to prosecute will the ICC intervene to seize jurisdiction. It will be for the ICC to determine when these conditions are satisfied, although these standards are obviously difficult to define. The notion of "unable" relates to states that have experienced a total or partial collapse of their national justice system. More difficult, the notion of "unwilling" can encompass states that are trying to shield an accused or that are engaging in undue delays in commencing prosecutions. Ms. Roberge explained that if a person has been satisfactorily tried by a national court, the case would be inadmissible under the principle of non-bis-in-idem and the Court would have no jurisdiction. 100

According to Mr. Daqun of the PRC's Department of Treaty and Law, state consent should be a precondition to the exercise of jurisdiction by the Court. The international system is composed of sovereign states and the criminal law in particular is perhaps the supreme expression of state sovereignty. Only if a state is patently unwilling or unable to exercise jurisdiction over a particular crime should the ICC accept jurisdiction. This is a fundamental principle behind the entire endeavor. Mr. Daqun suggested that the issue of the acceptance of jurisdiction could be based upon the structure of the ICJ. According to Article 36(2) of the ICJ Statute, a state that has become a contracting party does not automatically accept the jurisdiction of the ICJ over a particular matter; rather, a separate declaration to this effect is required to seize the Court of jurisdiction. 101 Certain proposals for the ICC Statute allow states to cede jurisdiction over some or all crimes in an opt in/opt out regime. He preferred this model to the model that would provide that when a state becomes a party to the ICC Statute, it

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100. According to the principle of non bis in idem, no one can be tried twice for the same crime. See, e.g., Article 10, ICTY Statute ("1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he has already been tried by the International Tribunal. 2. A person who has been tried by a national court . . . may be subsequently tried by the International Tribunal only if the act was characterized as an ordinary crime or the national court proceedings were not impartial or independent").

101. See Statute of the International Court of Justice, Art. 36, 59 Stat. 1055 (1945) ("2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature of extent of the reparation to be made for the breach of an international obligation. 3. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.").
would automatically accept the jurisdiction of the Court over all core crimes through the notion of inherent jurisdiction.

Professor Malanczuk reiterated that the text of the preamble indicates that the ICC will operate as a “fall back” jurisdiction. The propriety of ICC jurisdiction will be determined by the Court itself, but in this regard, it will be necessary for the office of the prosecutor to sufficiently prove the failings of the national court. The United States proposed a “double lock” system in the form of Article 11bis.102 According to this proposal, before investigating a crime or prosecuting an accused, the ICC office of the prosecutor would have to publicly indicate its intention to do so. Any state would then be able to inform the prosecutor that it is investigating or prosecuting the case or defendant in question. The ICC’s prosecutor would then have to defer to the national proceedings unless a Pre-Trial Chamber ruled otherwise. It is clear that such a proposal is meant to address the fears of some states, in particular the United States, that their troops may be brought before the ICC on charges of violations of international criminal law.

However, Professor Malanczuk responded that given the overarching principle of complementarity, if an effective military or criminal justice system is in place in these states, there would be no occasion for the ICC to intervene. The proposed 11bis has generated considerable opposition that turns primarily on the negative effect such a proposal has on the integrity and efficiency of the Court.

Mr. Wenqi ZHU, Legal Advisor to the ICTY, observed that the relationship between the international and domestic realms are reversed with respect to the ICC Statute vis-à-vis the ICTY Statute. The ICTY is characterized by a vertical relationship between the international tribunal and national jurisdictions with the former having primacy over the latter. For example, if a national court is prosecuting an individual who has been indicted by the ICTY or the ICTR, then the latter institutions can request the national court to “defer” prosecution and transfer the accused to the international tribunal.103 This rela-

102. Proposal Submitted by the United States of America, Article 11bis: Preliminary Rulings Regarding Admissibility, U.N. Doc. A/AC.249/1998/WG.3/DP.2 (25 March 1998) (“At the request of that State [which has informed the Court that it is investigating a defendant within its jurisdiction] the prosecutor shall defer to the State’s investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State’s national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor’s determination.”).

103. See ICTY Statute, Art. 9.
relationship is inverted in the current draft of the ICC Statute, which establishes the primacy of national court jurisdictions.

It was noted by a speaker from the audience that it would be difficult to contemplate how a judge would determine admissibility without descending into unacceptable realms of subjectivity. Judge Arbour responded that she shares these concerns and noted that the provisions governing the relationship of complementarity are controversial. Under these provisions, if a state has declined to prosecute an individual for an international crime within the jurisdiction of the ICC, the office of the prosecutor in order to gain jurisdiction would essentially have to put a state and its criminal justice system on trial in order to prove that the state is unable or unwilling to engage in prosecutions.

This prospect raises several concerns. First, there is the risk of severe embarrassment to the state. Second, international institutions are expected to work in partnership with states. If an institution demolishes a state’s credibility, this partnership between the Court and the states would dissolve. Third, the determination of the condition of “inability” is perhaps easier to adjudicate than that of “unwillingness.” Judge Arbour predicted that the complementarity provision will probably operate to the detriment of developing countries who will be vulnerable to findings of “inability.” For example, in Rwanda, there are 130,000 accused awaiting trial. In order to assume jurisdiction over a particular defendant, the international Court would have to prove that Rwanda was unwilling or unable to prosecute that individual. Once this determination is made, what happens to the other 100,000 individuals? The international Court would not be in a position to assume jurisdiction over all of them and yet they would be left to be prosecuted by a state that was “unable” to prosecute them. Other countries may face “unwillingness” challenges.

For example, if a particular case was not being tried at the national level but the state could demonstrate the ability to prosecute, then the ICC prosecutor would have to either withdraw her pursuit of jurisdiction or decide to prove “unwillingness” on the part of the state, i.e. that the state is discharging its judicial function improperly or subject to political manipulation. This offer of proof would inevitably involve contentious and politically charged proceedings that would require, in essence, that the Court try the state itself. This may prove to be more difficult than trying the underlying criminal case. Pitting the state against the prosecutor in such a contentious debate before the case is even tried is extremely problematic.
A compromise has been suggested. Under this proposal, the prosecution would refer a dispute under the complementarity provisions to a special chamber composed of an ad hoc panel with broad representation to ensure political credibility.\textsuperscript{104} This body could operate in parallel with the criminal investigation because criminal investigations are time sensitive. This arrangement would free the ICC judges to engage in criminal prosecutions, rather than evaluate the judicial system of sovereign states.

Professor ZHANG Yong invoked the fear of some states that the Court will assume a supervisory function over national courts. It is clear that in determining a state’s "unwillingness" to prosecute, it will be necessary for the ICC to examine the state's entire legal system and practice. This could lead to perverse results and an aura of disrespect for the judgment of national courts. For example, in the \textit{Erdemovic} case, the defendant was sentenced on appeal to only five years imprisonment for participating in the summary execution of potentially more than 1000 people in the aftermath of the fall of Srebrenica.\textsuperscript{105} The tribunal justified this result on the grounds that the accused had admitted liability, demonstrated genuine contrition, and co-operated with the prosecution by providing testimony against other accused; and on the basis of other personal circumstances of the accused.\textsuperscript{106}

Many commentators have criticized this sentence as too lenient given the heinous nature of the crime. A situation can be imagined in which a similar result were reached by a national court for similar reasons. Given such a lenient sentence, the ICC could determine that the national court did not prosecute the individual in good faith, despite the fact that the national court based its judgment upon a host of balancing factors. Would it be appropriate for the international Court to intervene in such a situation? Judge McDonald emphasized that judges are always criticized for the lengths of their sentences, but she explained that she believes in sentencing the person and not the crime. The ICTY must also refer to the sentencing practice of the for-

\textsuperscript{104} Bracketed Article 16 reads: “Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor’s determination [of whether there has been a total or partial collapse of the State’s judicial system or if the State is unwilling or unable to carry out the investigation and prosecutions].” 1998 Report, at 51.

\textsuperscript{105} \textit{The Prosecutor v. Drazan Erdemovic}, Indictment, Case No. IT-96-22-I (29 May 1996).

longer Yugoslavia, although the judges are not bound by this.\textsuperscript{107} The result, however, may be the appearance of inconsistent justice. She hoped that in such a case, the future ICC would examine the national court record closely before ruling on the credibility of the national court prosecution.

Professor Malanczuk noted that it is widely believed that it will be impossible for delegates to obtain primacy for the international Court over national courts. The consensus is that the Court should operate as a safety net. Mr. Akhavan countered that there is a distinction between what is realistic politically and what is realistic with respect to establishing an effective Court. The parties to the former Yugoslavia would not voluntarily submit to the jurisdiction of the ad hoc tribunal, therefore this condition of primacy is essential to the effective functioning of the ICTY. Professor Malanczuk observed that the complementarity provisions of the ICC Statute may actually generate the beneficial side effect that national courts more frequently undertake their obligations to prosecute offenders. He noted that states can exercise jurisdiction over a crime on the basis of four bases of jurisdiction: (1) the territorial principle; (2) the nationality principle; (3) the passive personality principle; and (4) the universality principle.\textsuperscript{108} He predicted that the ICC will strengthen the movement toward the exercise of universal jurisdiction in national courts and thus obviate the need to rely on the ICC.

Mr. Akhavan reminded participants that since the establishment of the two ad hoc tribunals, Austria, Denmark, Germany, France, The Netherlands, Switzerland and other states have initiated prosecutions against violators of international criminal law.\textsuperscript{109} This was undoub-

\begin{itemize}
\item \textsuperscript{107} ICTY Statute, Article 24(1) ("In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.").
\item \textsuperscript{108} See generally Ian Brownlie, \textit{Principles of Public International Law} 299-305 (3rd ed. 1979).
\end{itemize}
edly due in part to a fear of embarrassment for having granted entrance to individuals later accused of committing war crimes in the former Yugoslavia or Rwanda. Ms. Roberge agreed that the creation of the ICTY and the ICTR has heralded an increase in domestic prosecutions of war crimes and other international law violations. There has also been movement toward the adoption of national legislation providing for universal jurisdiction over violations of the Geneva Conventions.

Professor LING Tan discussed the proposed relationship between the ICC and the national courts in light of the experience of the two ad hoc tribunals. She observed that national jurisdiction over crimes committed in the former Yugoslavia and in Rwanda could have been premised on any of the four bases of jurisdiction. There are situations in which it will be preferable for the national court to assume jurisdiction over a particular international crime. The rules of procedure of national courts are better developed than those of the international system, and domestic courts have the instrumentalities of the state at their disposal to conduct investigations and trials. The national authorities of successor states have an obligation to try violations perpetrated under a prior regime; however, to date, those states have failed to fulfill these obligations. The ad hoc tribunal for the former Yugoslavia would not have been constituted had the national authorities assumed their international law obligations.

According to Professor Ling, the ICC must be endowed with primacy. Without this, there will be the perennial fear that international crimes will be improperly characterized as ordinary crimes or that cases will not be diligently prosecuted. Such stratagems may defeat the real purpose of the creation of international criminal jurisdiction—the prosecution of violations of international criminal law—and operate to the detriment of those the ICC is designed to protect. Primacy does not mean that the ICC would supersede domestic courts; rather, the Court would operate only where domestic jurisdiction failed. If a state can truly discharge its international obligations, the ICC should and would not assume jurisdiction. This is guaranteed by the preamble of the Statute, which sets out the main purposes of the Court. The Court is to exercise jurisdiction only over serious crimes of international concern such that it complements national courts and intervenes only when domestic jurisdictions are unwilling or unable to prosecute.

(charging defendant with having committed various serious crimes in concentration camps in Bosnia).
Mr. HUANG Feng, Division Head of the Bureau of Judicial Assistance of the Ministry of Justice, suggested that the relationship between the ICC and judicial organs of U.N. member states must be clarified. In his opinion, this relationship should be based on the principle of equality rather than on a vertical relationship as would exist between an appeals and a lower court. At the same time, it is clear that the ICC will have great legal and moral authority because of its experience adjudicating the crimes of international concern, so its decisions should be highly respected. Further, the relationship the Court must respect the independence of national judicial organs. Successful judicial cooperation between domestic and international fora must not be influenced by the bias inherent to political relations. The concerns of legal scholars often differ from those of diplomats. This potential for divergent views can become particularly acute in situations in which a judicial organ refuses to extradite an individual indicted by a foreign judiciary. This move may be viewed by diplomats as an exercise of state's sovereignty. In contrast, academics may consider it inappropriate in light of the new international legal order (or vice versa).

Professor ZHANG Yong of the Nankai University Law faculty asked whether the ICC could assume jurisdiction when a national court tries and convicts (or acquits) an individual for an ordinary crime that could have been characterized as an international crime under the ICC Statute. Judge Arbour explained that this situation raises non-bis-in-idem concerns and that the ICC will undoubtedly not be in the business of repeating work. However, she explained that in theory, the ICC could revisit a completed case in certain situations. For example, where the domestic jurisdiction has underplayed the seriousness of an offense, e.g. where it has tried a massive war crime as a mere breach of military discipline, the ICC office of the prosecution may seek to intervene and re-try the individual in order to re-cast the offense in its proper light.110

The more complex case is one in which a state prosecutes an individual for murder and accords a heavy penalty for an act that is perhaps better characterized as a crime against humanity. If a realistic and credible result were obtained domestically, it is unlikely that the ICC prosecution would re-visit the case for the sheer symbolic value of the proper international legal characterization. It is likely that a domestic forum would choose the easier route to conviction and try an

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110. See, e.g., The Prosecutor v. Goran Jelesic, Indictment, Case No. IT-95-10-PT (20 October 1998) (the accused pled guilty to the predicate acts of genocide (31 counts out of a 32 count indictment), but not to the genocide charge itself; the Prosecution continued the prosecution on that count alone).
individual for murder rather than undertake the more complex task of proving that the crime constituted a crime against humanity given the additional elements involved in such a prosecution.\textsuperscript{111}

Mr. Zhu intervened with the observation that, according to the principle of \textit{non-bis-in-idem}, no one can be tried twice for the same facts.\textsuperscript{112} However, this principle does not operate between jurisdictions. For example, if someone has been convicted by a national court for a "common crime," the future ICC could still legally assume jurisdiction over the same act if the act could be characterized as a war crime or a crime against humanity.

He observed that many states have not integrated international criminal law concepts into their domestic systems so it would in effect be impossible to characterize acts as crimes against humanity or war crimes; rather, the state would have to prosecute such acts as ordinary murder, assault, kidnapping and the like. In such situations, the Court should be guided by its object and purpose, which is to enhance international justice and deter future crimes. If this can be accomplished through the exercise of national jurisdiction under analogous national laws, then there is no role to be played by the Court in such an instance.

VI. NATIONAL SECURITY CONCERNS BEFORE THE ICC

The question of state national security concerns was raised in the \textit{Blaskic} case and the Appeals Chamber addressed at length how the tribunal should address such concerns when they are raised by states in the context of investigations or other discovery by the international tribunal.\textsuperscript{113} Professor Malanczuk explained that the key question surrounding this issue is how to test states' claims that a particular piece of evidence will implicate their national security concerns. There have been three proposals in this regard. The first, from France, would leave it to the states to claim that a particular inquiry implicated their national security interests. In this way, such a claim would act as a trump card and prevent the discovery of a particular piece of evidence. The second proposal, by the United States, is that the state can

\begin{itemize}
\item \textsuperscript{111} See \textit{supra} note 50.
\item \textsuperscript{112} See \textit{The Prosecutor v. Dusko Tadic}, Decision on the Defense Motion on the Principle of \textit{Non Bis In Idem}, Case No. IT-94-1-T (14 November 1995), at 8 (observing that the \textit{non bis in idem} principle as it appears in the ICCPR prohibits double jeopardy only with regard to an adjudication within a single state and it has not been recognized as a norm with transnational application).
\item \textsuperscript{113} \textit{The Prosecutor v. Tihomir Blaskic}, Judgment on the Request of the Republic of Croatia For Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108bis, at 48-56.
\end{itemize}
refuse to abide by an order of the Court on national security grounds, but the state must first make a formal and detailed declaration to this effect. The third and most constructive proposal was advanced by the United Kingdom and would allow the Court to override the states' claims in certain exceptional circumstances in which the Court deemed that the state was not acting in good faith. This proposal provides that the resolution of the issue of national security should be included within the text of the Statute and not left to the rules of procedure and evidence. This proposal is more in keeping with the Appeals Chamber decision in the Blaskic case.

Mr. Akhavan observed that requests for state cooperation by the Court will have the potential to implicate states' national security concerns. In the fact-finding process, the Court will need access to a broad spectrum of testimonial and documentary evidence. At the same time, provision must be made for legitimate national security concerns of relevant states, as was noted in the Blaskic decision. It is necessary to develop a mechanism for balancing these competing concerns when documents and information are relevant to ensuring a fair trial, but where the state claims the release of such information will raise serious national security concerns. This conflict is particularly acute in the international system. In a national system, these competing interests exist in the same jurisdiction; however, this is not the case in the international system. In principle, it should be the Court that makes the final determination of the propriety of articulated national security concerns.

In Mr. Akhavan's opinion, the U.K. proposal outlined above presents the most appropriate and balanced approach. According to this proposal, only where a state is not acting in good faith would the

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114. Proposal Submitted by the United States of America, Sensitive National Security Information, U.N. Doc. A/AC.249/1998/WG.4/DP.26 (20 March 1998) (providing that "A State Party may deny a request for assistance, in whole or in part, only if . . . (c) . . . it determines that there are no conditions under which it can comply with the request without seriously prejudicing its national security interests" after complying with certain procedures involving notification, consultation with the Prosecutor or Court, and disclosure).

115. Proposal submitted by the United Kingdom of Great Britain and Northern Ireland, Protection of Sensitive Information the Disclosure of Which Would Prejudice the National Security Interests of States, U.N. Doc. A/AC.249/1998/WG.4/DP.20 (19 March 1998) (noting that there "should be a procedure in place to ensure that national security claims are mounted only as a last resort after all appropriate steps, using cooperative means, have been taken to disclose information or documents in ways that do not involve an unacceptable risk to the State's national security interest. If nevertheless a State is able to demonstrate that it has cooperated fully with the Court and, acting in good faith, claims that its sensitive information or documents ought not to be disclosed . . . the Court should have the power to set aside such a claim only in exceptional circumstances.").

116. See supra note 92.
Court exercise its discretion to overrule the state’s claim to national security. In other words, states acting in good faith vis-à-vis the Court need not fear that issues of national security will be made public. To be sure, this will be a difficult system to implement, in particular because the Court is removed from the political realities of the state. If a state can demonstrate that it co-operated and acted in good faith when it argued that certain documents should not be disclosed, the Court should set aside the state’s claim in only exceptional circumstances.

**VII. THE PROPOSED ICC TRIGGER MECHANISMS**

Mr. Daqun opined that the issue of the available trigger mechanisms represents one of the most complex and important questions in the Statute. “Trigger mechanisms” refer to the way in which proceedings are initiated before the Court. The original ILC draft envisioned only two trigger mechanisms—state complaints and referrals by the Security Council. In subsequent deliberations, an ex officio role for the prosecutor was proposed. This latter option raises five issues: (1) the acceptance of the jurisdiction of the Court; (2) the relationship between the Security Council and the ICC; (3) the ex officio power of the prosecutor; (4) complaint procedures; and (5) temporal issues.

Judge Arbour proposed to examine serious proposals regarding trigger mechanisms with respect to: (1) the principle of reality, i.e. against what has been learned through the work of the ad hoc international tribunals; and (2) the language of the ICC Statute’s preamble, which receives wide support from states. She noted that the preamble contains fundamental principles that are to guide the implementation of the Statute.117 First, the ICC is being established because states desire to enhance the effective prosecution and suppression of international crimes. In other words, the international community desires to enforce international law more effectively and more universally than it has done in the past. The conclusion to be drawn from this statement is that the provisions governing the ad hoc tribunals provide the minimum standard for the ICC. Second, the ICC is to prosecute only the most serious crimes against international law. And third, the Court is to complement national systems and operate only when the

117. The full Preamble reads: “Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court; Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole; Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial processes may not be available or may be ineffective; Have agreed as follows . . .” 1998 Report, at 10.
latter are either unwilling or unable to prosecute violations. These principles raise the question of whether it is possible to respect the first principle in light of the second and third propositions.

The current negotiations concern three different trigger mechanisms. The first, Security Council referrals, is uncontroversial, but it remains to be considered if this provision is in fact deceptively simple.\textsuperscript{118} According to the U.N. Charter, the ICC treaty cannot legally restrict the powers of the Security Council.\textsuperscript{119} This mechanism raises the question of whether the Security Council in a referral could detract from the treaty structure or whether it is bound to accept the structure as implemented. For example, it appears that the Security Council could add the duty to comply with the work of the Court with respect to a particular prosecution even if the Statute does not so provide. A Security Council referral would also apparently override issues of primacy, prospectivity and state consent. If this is not the case, then the ICC will not enhance the prosecution of war crimes; rather, it will represent a major step backwards and result in a weaker juridical environment than what the Security Council could create in an ad hoc tribunal. Given that only the Security Council can impose universal enforcement of international humanitarian law, Council referrals represent the most promising route to jurisdiction before the ICC.

Other trigger mechanisms suffer from a lack of universality in application. Under the state complaint referral process, the prosecutor could only commence an investigation if a state party refers a matter to it.\textsuperscript{120} Under the current proposals, the prosecutor would have to gain the consent of all relevant states—i.e., the territorial state, the state of the nationality of the accused, the state where the crime occurred—before prosecuting.\textsuperscript{121} This represents an enormous constraint on the functioning of the Court and threatens to create bizarre and intractable jurisdictional disputes. This referral option also suffers from an air of unreality. Judge Arbour emphasized that she knows from experience that states are reluctant to implicate other states in violations of international law. To be sure, a state referral will generally implicate an individual rather than a state; however, international crimes are often highly charged political events and states will un-

\textsuperscript{118} See Article 10, 1998 Report, at 40.

\textsuperscript{119} U.N. Charter, Article 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

\textsuperscript{120} 1998 Report, Article 11 (A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed. . .").

\textsuperscript{121} 1998 Report, Article 7.
doubtedly remain reluctant to refer a matter to the Court that could generate diplomatic or political repercussions.

*Ex officio* powers for the prosecution have not yet been provided for in the Statute of the ICC. The fear of some states is that the prosecutor will assume the role of "Master of the Universe" and commence unjustified or politically-motivated prosecutions. In Judge Arbour's opinion, these fears are unfounded. First, it is clear that any investigation initiated by the ICC prosecution would be limited by the consent regime contained within the Statute. Second, the experience of the ad hoc tribunals demonstrates that the tribunals can do nothing without state cooperation at all levels: financial, practical, symbolic and others.

Even with vast prosecutorial discretion, the prosecution would be severely hampered if she acted without a broad international consensus in support of a particular investigation. The criminal law is inherently coercive, but it is also based on consensus. If the ICC's prosecutor were to act otherwise he or she would risk the self-destruction of the Court. Third, the prosecution in exercising *ex officio* powers would still be bound by the other terms of the Statute dealing with complementarity and admissibility. Once there has been an assumption of jurisdiction, numerous other forces could come into play and prevent the prosecution from going forward even with the consent of the states involved. For example, certain proposals envision a role to be played by a Security Council veto. A prosecution may also be stopped by the admissibility provisions, i.e. if another state has commenced a prosecution acting under one of the four bases of jurisdiction.

Mr. Zhu noted that "*ex officio* powers" mean that such powers are natural or inherent to the position. To satisfy concerns of states, it will be necessary to construct a mechanism to prevent abuses of power by the prosecution. It is clear from the draft Statute that states have some doubts about the possibility that the prosecutor may have freedom to initiate investigations and prosecutions. He is of the view that while the prosecution must be entitled to initiate proceedings, there must be some checks and balances on this power, as was proposed by Mr. Liu.

On a final note, Judge Arbour noted with approval that proposals have begun to envision the referral to the Court of a "matter" or "sit-

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122. 1998 Report, Article 15 (providing that a case is inadmissible where "(a) the case is being investigated or prosecuted by a State which has jurisdiction over it...").
uation" rather than a "case" or a "defendant." The employment of the latter terms in prior proposals demonstrated a misunderstanding of the way in which an investigation and prosecution proceeds in that they assume that the prosecution has identified a suspect when it commences an investigation. In the experience of the ad hoc tribunals, the investigations are crime, rather than suspect, driven. In other words, the investigation commences with the perpetration of an international crime and the identification of a perpetrator occurs later in the process. Mr. Zhu agreed that it is preferable that situations and not cases be referred to the Court.

In Yugoslavia and Rwanda, it was not clear at the beginning how many "cases" there would be. For example, at the Vukovar Hospital massacre, it was known that at least 400 individuals were killed, but it was unknown for some time who was responsible. Likewise, in Rwanda, it was known that a nation-wide genocide had occurred, but again it was unclear how many individuals would ultimately be found responsible. Only in the process of investigating would it become clear how many "cases" exist. If the Court is based on a system in which "cases" rather than "situations" are referred to it, the prosecutor in undertaking an investigation may come across related cases that were not officially referred to her. If she is bound to ignore these other cases, this would contravene the preamble of the Statute for the ICC, which indicates that the goal is to prosecute serious violations of international criminal law.

Professor Malanczuk discussed the role of the Security Council to refer "situations" to the ICC. All states agree on the importance of having a Security Council referral mechanism; however, there is disagreement over the full scope of the role to be played by the Council. The following positions vis-à-vis the role of the Security Council have been articulated. First, there are those states that would like to deny the Council a role apart from its referral competence. This position is held by India, several African countries and some of the so-called "like-minded states." The second position as advanced by the United States, China and two other Security Council members is that the

123. See, e.g., Article 11, 1998 Report, at 42 ("[[A State Party . . . ]] may lodge a complaint [referring to a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor. . .").

124. See The Prosecutor v. Mile Msksic et al., Indictment, Case No. IT-95-13a-1 (2 December 1997).

125. According to the final Statute at Article 13, states and the Security Council will refer "situations" rather than individuals or cases. Once a situation has been referred to the Prosecutor, he or she may proceed to investigate any particular case within that broader situation.
prosecution should not be able to proceed without receiving express authorization from the Council.\textsuperscript{126}

Under this system, each member of the permanent five could exercise its veto and prevent a particular situation from being addressed by the Court. In other words, all members of the permanent five would have to agree in order for a particular prosecution to proceed, and a single veto could impede prosecution. The third position, the so-called "Singapore Compromise" because it was proposed by delegates of that state, would allow the Council with the requisite votes to block a prosecution for a limited period. In other words, all members of the permanent five would have to agree to thwart a particular prosecution, and without this consensus, the prosecution would go forward.\textsuperscript{127}

This is the position supported by the like-minded states and most recently the United Kingdom. The United States has indicated that it may accept this provision in connection with changes in certain other related provisions.

With respect to the relationship between the Security Council and the Court, Mr. Daqun noted that the Council is uniquely responsible for maintaining international peace and security.\textsuperscript{128} Under Article 103 of the UN Charter, all states are bound by decisions of the Council acting under Chapter VII.\textsuperscript{129} This applies equally to non-state parties to the ICC Statute. Certain state proposals provide that no prosecution could be commenced with respect to situations "being dealt with" by the Security Council under Chapter VII unless the Council specifically authorizes such prosecutions.\textsuperscript{130} Critiques of this proposal have noted that the Court will be a judicial body and the

\begin{footnotes}
\item[126] See Article 10, 1998 Report, at 40-42.
\item[127] See Article 10(7) (Option 2), 1998 Report, at 42 ("no prosecution may be commenced [or proceeded with] under this Statute [for the period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.").
\item[128] U.N. Charter, Article 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.").
\item[129] See supra note 119.
\item[130] See Article 10(7) (Option 1), 1998 Report, at 41-2 ("No prosecution may be commenced under this Statute arising from a [dispute or] situation [pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without prior consent of the Security Council]."
\end{footnotes}
Council is a political one, so the latter should not be able to block the former from responding to a violation of international criminal law.

The so-called “Singapore Compromise” would reverse the role of the veto power in determining whether a prosecution goes forward. According to this proposal, no investigation may be commenced where the Council acting under Chapter VII decides to block an investigation. This slight language change makes a world of difference. Under the original system, the Council would have to decide to authorize a prosecution; under the Singapore proposal, the Council would have to decide to block a prosecution. According to Mr. Da-qun, this proposal still runs counter to the principle of an independent Court. It risks that a decision of the Court will contradict a decision by the Council, for example as might occur with respect to a determination of aggression. The question is, will the permanent five go along with this scheme? The Court’s effectiveness requires the support of powerful states. Without this, it will be impossible to generate adequate political and economic support for the Court to operate effectively. Mr. Liu was doubtful as to whether the members of the permanent five would be willing to cede this much authority over the operation of the Court.

With respect to ex officio powers proposed for the prosecutor, Mr. Liu noted that this issue continues to be contentiously debated. This proposal would allow the prosecution to commence an investigation on the basis of information obtained from “any” reliable source, including individuals, victims, non-governmental organizations (NGOs), governments and U.N. bodies. The putative rationale for this option is two-fold: (1) it is argued that this proposal guarantees the independence of the prosecutor; and, (2) the proposal is modeled on the structure of the ICTY and ICTR. The first rationale confuses different stages of the process. After an investigation is commenced under either a State Party or a Security Council referral, the prosecution will engage in an independent investigation. It is at that stage in the process that prosecutorial independence is appropriate rather than at the case initiation stage.

Allowing individuals and groups the power to commence a prosecution provides a possibility of abuse. It creates too much discretion in the hands of the prosecutor, who will become a “Master of the Universe” accountable to no one. With respect to the second rationale,

131. See bracketed Article 12, 1998 Report, at 44 (“The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations].”).

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the structures of the ICTY and ICTR are inherently different from that of the proposed ICC. The former were established by the Security Council and all member states must comply with resolutions of the Security Council. The latter will be based on a state consent regime and not all states will be Parties to the Statute. Without the consent of the relevant state (i.e. the custodial, territorial, nationality state), it is impossible for the prosecutor to conduct its investigation without infringing on the sovereignty of the state.

An alternative proposal has been suggested to temper the *ex officio* powers of the prosecution. According to this proposal, if the prosecutor concludes that there is a reasonable basis to commence a prosecution, he or she would refer the matter to a Pre-Trial Chamber that could operate as a check on abuses of prosecutorial discretion and ensure collective decision making.\(^{132}\) It would have to be determined how such a body would be composed, especially since such judges would have more power than the permanent five with respect to sovereignty. If all judges are from a single area or from like-minded states, the Chamber will not operate as a real check.

According to Mr. Zhu, the Security Council referral, although uncontroversial, remains a sensitive issue. He observed that the Council is a political body. It is widely believed that as a general principle of justice, the judiciary should remain separate from politics. The Council has the specific responsibility for maintaining peace and security pursuant to Articles 39, 40 and 41 of the Charter. By establishing the two ad hoc tribunals, the international community has unequivocally accepted that justice and peace are linked. The Charter is explicit in stating that if there is a conflict between the Charter and other international obligations, the former prevails. Thus, if there is a conflict between the treaty establishing the ICC and the Council acting under Chapter VII, the Council’s decision will be paramount.

Compared with the Statutes of the two ad hoc tribunals, the Statute of the ICC is more strict. The ICTY’s Statute at Rule 47(A)(1) provides that it is for the Prosecution to initiate prosecutions:

> If in the course of an investigation the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction

\(^{132}\) See also bracketed Article 13(1), 1998 Report, at 44 ("Upon receipt of information relating to the commission of a crime under article 5, submitted by victims, associations upon their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyze the seriousness of the information... If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-trial Chamber a request for authorization of an investigation, together with any supporting material collected.").
of the Tribunal, he [or she] shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.

If the confirming judge is satisfied that there are reasonable grounds for concluding that the suspect committed the crime, he or she shall confirm the indictment. The corresponding provision in the draft ICC Statute is the bracketed Article 13. According to this provision, after a matter has been referred to the Court, if the prosecution has grounds for believing a suspect committed a crime within the jurisdiction of the Court, the prosecutor shall prepare a request for authorization of an investigation, i.e. not an indictment, and submit it to a Pre-Trial Chamber. The Chamber will conduct a hearing that is unlike a confirmation hearing before one of the ad hoc tribunals because the accused is present and can present arguments. This procedure is odd because it is impossible to arrest an accused before the issuance of a formal indictment.

Judge Arbour clarified that the establishment of the ICC does not preclude the Security Council from establishing other ad hoc tribunals. But the reality is that there is only so much money available for the enforcement of international humanitarian law. The multiplicity of fora is troubling from the perspective of the consistent development of the law. If the ICC does not receive enough work—i.e. if there are no ex officio powers accorded to the prosecutor, or if the Court is limited by state consent requirements, or if the Security Council cannot depart from the terms of the Statute in its referrals—the capacity of the international community to enforce international humanitarian law will be diminished. The result would be the transformation of the ICC from a progressive to a regressive initiative.

Mr. Akhavan noted that states seem obsessed with the fear of “abuse” of the ICC by either the Prosecutor or other entities trying to provoke the exercise of jurisdiction. Rather, we should think in terms of the principle of “good faith,” which is a fundamental building block of the international order. No institution can operate without good faith. The best way to avoid manipulation is to have an independent prosecutor who does not take orders from governments. Where states are making the key decisions, they will operate on the basis of na-

133. See Rule 47(B), ICTY Rules of Procedure and Evidence, IT/32/Rev.13 (9 and 10 July 1998) (“The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.”).

134. See supra Article 13(1), 1998 Report, at 44.
tional self-interest. At the ad hoc tribunal, the prosecutor has been scrupulous in ensuring impartiality and lack of bias.

VIII. THE IMPACT OF THE ICC ON THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

Ms. Roberge noted that despite clear enforcement provisions within the Geneva Conventions, it is clear that this mechanism does not function in practice. States have failed to enact implementing legislation and engage in prosecutions where necessary in part because such prosecutions are difficult both politically and practically. In this way, the ICC would provide a benefit to states because it offers a forum for the enforcement of international humanitarian law. Thus, it would not necessarily fall to states to enforce the law and engage in what may be politically awkward or practically difficult prosecutions. The ICC also allows for a more consistent interpretation of international humanitarian law.

She emphasized that the biggest impact of the ICC will be on individuals who are potential victims of international crimes. The complex issues facing delegates at Rome should be considered in light of the protection of victims—the fundamental aim of the ICC. At the last PrepCom session, there were even more political considerations on the table. States are forgetting that the ICC will impact only a few states. The aim of the ICC is to deal with the Rwandas and the former Yugoslavias of the world. She stressed that advocates for an ICC need to better frame the discussion about the ICC to dispel what are clearly unfounded fears that the ICC will be an appeals chamber rather than an institution complementary to national systems. In particular, she noted that the fear concerning peacekeepers is unfounded. Most states sending peacekeepers into the field have a functional judicial system so that these states will prosecute violations effectively. As such, a case against a peacekeeper from one of these states would undoubtedly be inadmissible. The complementarity provisions ensure that the ICC would not be triggered when to do so would bring the Court beyond where it was designed to go.

She concluded by noting that missing from many of the debates surrounding the form to be taken by the ICC is the humanitarian—as opposed to legal or political—perspective. We must not forget that humanitarian goals are behind the effort to establish a Court. The hope is that the Court will guarantee better respect for international humanitarian law. The Court would provide a deterrent in addition to a retributive function. ICRC delegates in the field are already hearing military people discussing the ICC.
Mr. Jia expressed skepticism regarding the usefulness of the Court. The complementarity provisions reverse the ICTY and ICTR models, which are based on primacy for the ad hoc tribunals. In fact, the ICC model is more accurately described as primacy for the national courts. He questioned whether there will be any role for the ICC if the national courts assume jurisdiction over a case. He also observed that these atrocities are uncommon in human history and that international criminal jurisdiction has been exercised on only rare occasions: Nuremberg and Tokyo and the ad hoc tribunals.

Ms. Beth Van Schaack, law clerk of the OTP, noted that the ICC may encourage states to enforce international humanitarian law themselves because they do not want to be seen as reneging upon their responsibilities under international law. The idea behind the ICC is the enforcement of humanitarian law. Therefore, if the national jurisdiction is engaging in an effective and satisfactory prosecution, there is rightfully no role to be played by the ICC. It is only where the national jurisdiction fails that the ICC would step in. The speaker opined that Mr. Jia was perhaps too optimistic about the rarity of such large-scale events and referenced the genocide committed by the Dergue in Ethiopia, the genocide against the Armenians under Ottoman rule, the genocide in Cambodia during the Khmer Rouge era, the systemic deportation of ethnic minorities in Uganda under Idi Amin, and the systemic disappearances and torture in Latin America.

Professor SHAO Lin concluded that it is the hope that the ICC will provide the world community with a useful forum to prosecute war criminals and perpetrators of other international crimes of grave international concern. The future treaty should retain flexible jurisdictional provisions so that jurisdiction is consensual and there is a balance between national sovereignty and international control. Nonetheless, he noted that in a conflict of law situation, international law normally will prevail. He assured participants that the concerns of states can be accommodated in a well-drafted treaty. Professor James LI closed the proceedings with the observations that for a 1000 mile journey, the first step is important, so make sure it is in the right direction.

IX. EPILOGUE: THE RESULTS OF THE ROME CONFERENCE

1. The 1998 Negotiations in Rome and the Promulgation of a Consensus Statute

The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened from 15 June to 17
July 1998 (Diplomatic Conference) and was attended by delegations from almost 200 states, over 30 observers and intergovernmental organizations, and hundreds of non-governmental organizations (NGOs) representing all segments of international civil society. 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” attended only by states. 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.

A Final Proposal was released piecemeal late July 16th and was presented to delegations as a “take it or leave it” document. On July 17th, a packed and expectant Committee of the Whole “took it” and adopted the Rome Statute of the International Criminal Court after the Committee soundly rejected eleventh hour amendments by India and the United States. 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. This was an unrecorded vote and only three of the delegations took the opportunity to explain their vote (Israel, the United States and China). As a result, the identity of the other “no” votes remains a bit of a mystery, but it is widely believed that they were Iraq, Iran, Qatar and Indonesia. After the vote, China took an opportunity to explain its position:

135. 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).


138. 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.
We have made many positive efforts to establish a fair and effective International Criminal Court. We have always held the view that the Court should be an effective system, playing a supplementary role in international cooperation in judicial affairs. State consent should be the legal basis for the Court’s jurisdiction. China cannot accept the universal jurisdiction accorded to the Court over core crimes. Granting the Prosecutor the right to initiate prosecutions places State sovereignty on the subjective decisions of an individual. The pre-trial chamber provisions to check those powers fall short. The adoption of the Statute should have been on consensus, and not by vote. China voted against the draft Statute.  

State delegations must now bring the Statute home for consideration and ratification by their national governments. The Statute shall remain open for signature until 31 December 2000 and will enter into force upon the deposit of the 60th instrument of ratification.

2. Crimes Subject to the Jurisdiction of the ICC in the Rome Statute

The final Statute limits itself to the four core crimes—genocide, crimes against humanity, war crimes and aggression, although a definition of aggression is still lacking. 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. In contrast, the definitions of the other three core crimes proved to be quite contentious. With respect to so-called “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 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). As discussed during the Beijing Conference, an earlier draft of the Statute had provided one option at Article 7bis for an “opt in” regime governing one or more core crimes. In the Committee of the Whole discussions, the majority of states insisted on automatic or inherent

141. See text accompanying supra notes 32, 101.
jurisdiction for all core crimes. In contrast, China—joined by Algeria, Brazil, 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. Further, states that are not Parties to the Statute can “opt in” for the purpose of satisfying the preconditions to the exercise of jurisdiction.\textsuperscript{142}

Prior to the Rome Conference, the draft Statute 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 \textit{or} systematic attack or part of a widespread \textit{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. China and a number of other states (Syria, United Arab Emirates, Bahrain, Lebanon, Saudi Arabia, Tunisia, Morocco, Kuwait and Iraq, India, the Russian Federation and Ukraine) insisted that the Statute include the war nexus requirement. 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 definitions of the offense. 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 \textit{or} systematic—as opposed to a conjunctive formula—requiring that the attack be widespread \textit{and} systematic. The drafters adopted the \textit{Tadić} formula for \textit{mens rea}, requiring that the defendant act with knowledge of the existence of this attack.\textsuperscript{143}

With respect to the war crimes provisions, controversy emerged over the so-called threshold provision that was originally proposed by the United States. In the final Statute, Article 8(1) provides for a threshold requirement for all war crimes: the Court has jurisdiction over war crimes “\textit{in particular} when committed as a part of a plan or policy or as a part of a large-scale commission of such crimes” (emphasis added). In the Diplomatic Conference, China (along with Algeria, Ghana, India, Iran, Israel, Nepal, Nigeria, Pakistan, the Russian

\textsuperscript{142} Rome Statute, Article 12(3) (“If the acceptance of a State which is not a Party to the Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”).

\textsuperscript{143} See Payam Akhavan’s discussion during the Beijing Conference at text accompanying \textit{supra} note 50.
Federation, Sri Lanka, Thailand, Turkey, the United States and Uruguay) supported the original U.S. 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" (emphasis added). Given that the vast majority of states argued for no threshold requirement, the "in particular" formulation emerged as a compromise position.

Article 8 of the Statute governs war crimes committed in both international and internal 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 disparity limits the scope of the Statute. There was general consensus from the outset that the Statute should cover "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 and the taking of hostages) when committed against persons or property "in the hands of" a party to an international armed conflict.

Until almost the end of the Conference, the inclusion in the Statute of war crimes committed in internal armed conflict remained uncertain. China in particular (joined by Algeria, Bahrain, 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 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 Vietnam 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 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.144

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

144. See Marie-Claude Roberge's discussion during the Beijing Conference at text accompanying supra note 45.
when there is protracted armed conflict between governmental armed authorities and organized armed groups or between such groups.” 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. 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 contains a separate “Transitional Provision” that limits the jurisdiction of the Court specifically with respect to war crimes:

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 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 proposal emerged as an alternative to the “opt in” regime that appeared as an option in the final draft Statute and that would have required states to specifically accept the jurisdiction of the Court with respect to certain crimes.145

In the 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 General Assembly Resolution 3314.146 Despite broad support for the inclusion of aggression generally, even by the end of the Conference, states were unable to devise a satisfac-

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145. See text accompanying supra notes 32, 101.
146. See discussion of Mohamed Othman during the Beijing Conference at supra note 36.
tory definition of the crime. In the Statute, aggression 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."\textsuperscript{147}

The inclusion of aggression in the Statute gives rise to special concerns about the role of the Security Council vis-à-vis the Court. As was discussed in the Beijing Conference, the draft Statute provided two options for this role.\textsuperscript{148} 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, China—along with Bangladesh, 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. Other states 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."\textsuperscript{149}

Finally, the draft Statute 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. A group of vocal states argued that all three crimes should be included. By the end of the conference, however, China along with the vast majority of states (including Australia, Austria, Bahrain, Botswana, Brazil, Chile, 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,

\textsuperscript{147} Rome Statute, Article 5(2).
\textsuperscript{148} See discussion at supra notes 37-43.
\textsuperscript{149} Rome Statute, Article 5(2).
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. 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.”

3. State Cooperation and Jurisdictional Primacy in the Rome Statute

The principle of complementarity represents a bedrock principle of the Court that first finds expression throughout the Statute. Article 17 governing admissibility 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. Article 17 was debated intensely at prior negotiation sessions, but was subject only to slight drafting changes at the Rome Conference. It is notable that the phrase “unwilling or unable” is only vaguely defined, and appears to allow the Court considerable discretion in asserting its jurisdiction. 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, or states from whom acceptance of jurisdiction is required under Article 12.

The Statute contains several provisions governing state cooperation. States are under a general obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” The Court is empowered to make requests for cooperation, and it has recourse to the Security Council when a

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151. Rome Statute, Article 17(1). This article outlines a series of factors to be taken into account to make this determination: if, for example, there is unjustified delay, the proceedings were not conducted impartially, or there is a complete collapse of the judicial system. See Rome Statute, Article 17(2) and (3).

152. Rome Statute, Article 19(2).

153. See, e.g., Rome Statute, Articles 59, 87, 89, 93 and 98.

154. Rome Statute, Article 86.
state fails to comply with such a request as was discussed during the Beijing Conference.\(^{155}\)

4. National Security Concerns Before the ICC

The provisions concerned with national security within the Statute were intensively debated during the Rome Conference.\(^{156}\) Under the Rome Statute, states are entitled to deny a request for assistance, in whole or in part, but only if the request concerns the production of materials that relate to national security.\(^{157}\) Article 72 addresses those cases “where the disclosure of information or documents of a state would, in the opinion of that state, prejudice its national security interests.” The Article obliges states and the Court to attempt to resolve this dispute by cooperative means by, \textit{inter alia}, providing summaries or redactions, limiting disclosures, using \textit{in camera} or \textit{ex parte} proceedings or other protective measures. Once such cooperative means are exhausted, the Court is then empowered to undertake a number of actions. Most importantly, the Court may conclude that the requested state is not acting in accordance with its obligations under the Statute.\(^{158}\) This determination invokes the remedies contained within Article 87(7), which provide that

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties.\(^{159}\)

There is no recourse to the Security Council unless the Security Council referred the matter to the Court.\(^{160}\) However, the Statute warns that the non-cooperation of a state may impact the trial of the accused in question as the Court may “make such inference in the trial of the accused as to the existence of non-existence of a fact, as may be appropriate.”\(^{161}\) The Court may also order disclosure, but there is no mechanism created to enforce this order.\(^{162}\)

\(^{155}\) Rome Statute, Article 87; see discussion at the Beijing Conference at text accompanying \textit{supra} notes 87-98.

\(^{156}\) See discussion at the Beijing Conference at text accompanying \textit{supra} notes 113-116.

\(^{157}\) Rome Statute, Article 93(4).

\(^{158}\) Rome Statute, Article 93(7)(a)(ii)

\(^{159}\) Rome Statute, Article 87(7).

\(^{160}\) \textit{Id.}

\(^{161}\) Rome Statute, Article 93(7)(a)(iii)

\(^{162}\) Rome Statute, Article 93(7)(b)(i).
5. The Rome Statute’s Trigger Mechanisms

Not surprisingly, 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. 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.

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. 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 take retaliatory measures. 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. Other state referral options would have restricted the right to refer situations to states that 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. This proposal may have restricted the possibility of state referrals, but it also may have reduced the possibility of politically-motivated referrals and may also have provided an incentive to accept the jurisdiction over crimes.

The ability of the Security Council to refer situations 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 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. Other delegations advocated inclusion of
Chapter VI referral power by the Security Council or of referrals by the General Assembly and/or the United Nations Human Rights Commission in addition to or instead of the Security Council, but these proposals expired in the face of opposition by the permanent members of the Security Council and others. 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.  

Going into the Rome Conference, there was some concern that states on 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. 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. A version of the “Singapore Compromise” appears in the Statute at Article 16, giving the Security Council the renewable right to defer investigations and prosecutions for a period of 12 months.

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

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163. Rome Statute, Article 13(b).
164. Rome Statute, Article 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”). See discussion at the Beijing Conference at text accompanying supra notes 127-130.
165. See discussions at the Beijing Conference at text accompanying supra notes 117-122 and 131-132.
166. Rome Statute, Article 15.
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.167 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.

As has been discussed, the concept of the Pre-Trial Chamber emerged as a response to concerns that a Prosecutor with proprio motu powers would be too powerful unless he or she were embedded within an effective system of checks and balances. The inclusion of the Pre-Trial Chamber did little, however, to squelch the 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, including China, the United States and the Russian Federation.

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.

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 are 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 stood by their positions and ultimately carried the day.

Determining the preconditions to the exercise of jurisdiction emerged as the most important aspect of the deliberations.168 Early on in the deliberations surrounding the Court, Germany and the United States established themselves as the most vocal supporters of the two extreme positions in the jurisdictional debate. Germany advocated

167. Id.; see also Article 38.
168. See discussions at the Beijing Conference at text accompanying supra notes 33-35.
granting the Court "universal jurisdiction" over all core crimes, following the precedent set by some human rights conventions that indicate that these crimes may be prosecuted by all states. This proposal would have created a true supranational criminal court with worldwide jurisdiction over the citizens of any state, not just State Parties. This proposal was quickly branded as too "extreme" and premature by its opponents. The United States, among others, argued that extending universal jurisdiction to a supranational court was in contravention of established international law and would 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). Proponents of this position felt the exercise of jurisdiction should be based on state consent.

Prior to the Rome Conference, the United Kingdom introduced a compromise proposal between these two extremes that 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. Sometime advocates of the U.K. proposals included China and others. Later, 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.

The final Statute's provisions are a compromise between the United States and South Korean proposals. Accordingly, 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). The compromise solution creates a Court with jurisdiction over the crimes committed by citizens or on the territory of a Party to the Statute, unless a situation is referred by the Security Council. This solution severely limits the range

169. Rome Statute, Article 12(2).
of cases that can be brought before the Court, given that a considera-
ble number of states are likely not to ratify the Statute, and given that
citizens of many of these non-party states are likely to perpetrate
crimes within the jurisdiction of the Court.