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THE INTERNATIONAL CRIMINAL COURT AND ITS EFFECTIVENESS

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Table of content

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ABSTRACT

The formation of the International Criminal Court (ICC) has been hailed as one of the most significant developments and achievements toward the goal of achieving peace and justice for humanity. The birth of this permanent international court has been very tedious and difficult, not to mention controversial. It is yet to be seen how the ICC will function and carry out its duties under the existing climate of political, security and legal apprehension.

The objectives of my thesis are first to present a historical background made to establish the different International Criminal Courts with an evaluation of previous successes and failures ; second to highlight the process that eventually led to the formation of the ICC through the Rome Statute that was initiated in 1998 ; third to describe the organization of the ICC and its structure; to discuss the potentials of the court, its jurisdiction, and its objectives in detail; and fourth to discuss and analyze the future outlooks under current controversies and dilemmas, specifically the objections of the United States to the operation of the court, the various approaches used by States to deal with the legal and constitutional demands of the court, and the expected role that the ICC will play in the evolution of human history.

Evidently, the ICC has barely started functioning and it will be fairly impossible to assess its performance, but the fact that the International community has finally come to agree on the formation of such a court is reason enough to believe that international law will play a more significant role in attaining world order, peace and justice than any previous time in history .

CHAPTER I: HISTORICAL BACKGROUND

Introduction

When on July 1, 2002, the United Nations proudly announced the birth of the International Criminal Court, ICC, the announcement came along with a mixture of excitement about the creation of a precedent in human legal history, and yet of concern about the future of the ICC itself as it lacked support from a number of significant heavy-weight States such as the United States and Japan among others.[1]

To a certain extent, the ICC may seem to be one of the most controversial entities created under the auspices of the United Nations, especially considering the intensity of negotiations and the scope of compromise that were witnessed along the way before the ICC final draft was presented for the member States to sign and ratify. All drawbacks and controversies aside, the formation of the ICC have been considered as a hallmark in the history of mankind and as an answer to the saddening and ironical comment made by José Ayala Lasso, former United Nations High Commissioner for Human Rights, "A person stands

1 Barnaby Mason. "International Criminal Court." BBC online, 13 July 2002.

a better chance of being tried and judged for killing one human being than for killing 100,000."[2]

Indeed, the twentieth century has been the bloodiest period in human history by all standards and despite the unprecedented efforts undertaken by various States and international organizations to bring justice and peace to the world during this period. The atrocities committed by States, organizations and individuals against humanity surpass those committed throughout the entire history of mankind.

The establishment of the ICC evidently comes under the vision that individuals committing crimes against humanity should be brought to face legal consequences for their actions. Historically, revenge against States or even civil populations was often the punitive form of action brought by those seeking justice for atrocities committed against their own people. By contrast, the concept of holding individuals responsible for such acts has only been a recent one with the earliest known precedent dating back to 1815 when the victors in the Napoleonic wars decided to send the French emperor to exile. This, however, was nothing more than the justice of the victors, and at the same time, limited in the sense that it did not hold Napoleon responsible for any crimes in as much as it found a political solution to public rage in

[2] United Nations. "Rome Statute of the International Criminal Court," 1999.

Europe and for the discontent of the European States with Napoleon's ambitions.[3]

A) The Leipzig Tribunal

The outbreak of World War I brought to the human mind one of the most horrible and outrageous experiences in history. Millions were dead, and other millions were injured, maimed or left homeless. The technological war machine, the tactics of warlords, and the extent to which States were willing to go in war had apparently witnessed unprecedented leaps; nevertheless, no similar developments took place with respect to the willingness of nations to impose justice.

Whatever success had been achieved prior to World War it was limited to the Geneva Agreements which basically established the legality to punish war criminals by implementing the new concept of individual responsibility for war crimes. The First Geneva Convention specifically noted the "illegality of aggressive force" in 1899 whereas the Second Geneva Convention focused on regulating naval warfare in 1907.

The realities of World War I, however, were impossible to ignore, a fact that is echoed in the words of British Prime Minister Lloyd George, "The Prussian people must know that if their rulers outrage the laws of humanity, Prussian military strength cannot protect them from

[3] Gary Jonathan Bass. Stay the Hand of Vengeance: The Politics of War Crimes Tribunals. Princeton: Princeton University Press, 2000: p.37.

punishment. There is no right you can establish, national or international, unless you establish the fact hat the man who breaks the law will meet inevitable punishment. Unless this is accomplished, the loss, the suffering, and the burdens of this war will have been in vain."[4]

Ironically, and as history eventually showed, the loss, suffering and burdens of the war that Lloyd George spoke of, all went in vain because none of the German leaders was brought to justice. This failure was particularly attributed to a number of failures. First of all, Lloyd George spoke with the tongue of the victor and whatever justice he had in mind, was the justice of the victor whose intention was to achieve revenge. The British forces and their allies, for example, had committed atrocities that were no less outrageous than those committed by the German armies, and yet, neither Lloyd George nor any other European or American leader at the time spoke of bringing individuals on the victorious side to any form of justice to stand up and face individual responsibility for criminal acts during the war.

By all accounts, an international criminal court with the intent to prosecute German war criminals was established following the Versailles Peace Treaty. Both Articles 227 and 228 of the Treaty clearly expressed the intent to prosecute the German emperor and other

[4] David Lloyd George. War Memoirs of David Lloyd George: 1918. Boston, 1937: p.229.

German leaders for crimes against "international morality and the sanctity of treaties."[5]

The prosecutions according to this international court were to be held in the German city of Leipzig but none of the commitments were eventually honored. Firstly, the Allied forces were victorious but never occupied Germany, and hence, had no agents of enforcement to capture the accused German leaders and hand them over to the tribunal to face justice. Secondly, Germany's unwillingness to cooperate by turning in its own leaders after the humiliation of Versailles simply meant that either the Allies were going to accept this rejection or simply go to another war to capture the German leaders they believed were responsible for crimes against humanity. Yet, perhaps the more significant factor that played into the failure of the Leipzig Tribunal was the complete lack of cooperation from both the European countries and the United States. For example, several German leaders accused of war crimes eventually fled to a number of European states where they were granted full protection away from the crippled arms of the Leipzig Tribunal. Furthermore, the United States itself expressed an almost obvious level of indifference and unwillingness to support the court and its intentions. Accordingly, the Leipzig Tribunal, the first true attempt to establish an international court of justice for criminals accused of crimes

[5] Versaille peace treaty articles 227 and 228.

against humanity was nipped in the bud amidst silence from the international community.

B) The Constantinople Tribunal

Another horrendous reality of World War I was the genocide committed by the Ottoman forces against the Armenian minority in 1915. Like their German allies in the war, the Ottomans were a defeated party and subject to the justice of the victor. Nevertheless, whereas the German responsibility for the atrocities of war committed during warfare could be arguable and controversial, the Armenian genocide came under a different light. To start with, the Armenians were not involved in a war against the Ottoman Empire when the genocidal crimes were committed against them. Secondly, unlike the Allies who had committed atrocities similar to those committed by the German side, the Armenians were plain victims who had to endure atrocities at the hands of the Ottoman Empire for ethnic, religious, political and cultural purposes.

Because of the less controversial nature of the Armenian case, and also given the lack of sympathy from the European nations toward the Ottoman Empire for historical enmity, obstacles to justice were almost nonexistent in Europe and eventually, the Constantinople Tribunal was to be established to bring the Ottoman criminals of war to justice, an effort that was supported even by the Russians.

The opposition, however, came from the United States and put in the wording of Robert Lansing, US Secretary of State, the American opposition to the military tribunal was unacceptable because the US did not feel concerned about atrocities committed outside its borders or against non-American subjects, "The United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed by or upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the military or civil authorities of Bulgaria or Turkey."[6]

With the absence of American support, the Constantinople Tribunal was eventually defeated and forgotten, especially as the Ottoman Empire was abolished and replaced by a republic whose political leaders adopted a position of denial and refusal of responsibility for the crimes committed against the Armenian minority.

C) The International Military Tribunals

If the absence of American support played in instrumentally to the failure of the Leipzig and Constantinople tribunals, the case was significantly different after World War II. This time, and unlike World War I, the United States had made a very substantial commitment to the war

[6] Bass, p.110.

effort, and along the way, suffered heavy losses in life and property. Only three decades earlier, Woodrow Wilson had clearly stated that "America had not suffered enough to make war crimes trials a political necessity"[7] but ultimately, this was in sharp contrast with the reality of the heavy losses the Americans had suffered in World War II. In 1945, the London Agreement sponsored the establishment of the International Military Tribunal (IMT) to prosecute and punish the leaders of the European Axis for their individual responsibilities in the crimes against humanity committed during the war.[8] The charter of the London Agreement included in its list of crimes against peace the acts of aggression, war crimes, and crimes against humanity.

The London Charter, signed by the US, Britain, France and Russia, paved the path for the establishment of the International Military Tribunal of Nuremberg. Consequently, twenty-four German leaders were indicted by the tribunal and nineteen were eventually convicted.

The Nuremberg Tribunal was by all means an evident sign of success and also a promising prospect regarding the emergence of a new system based on international law and justice. Nevertheless, this precedent was marred by a number of serious weaknesses. Firstly, it was none but another example of the justice brought by the victors upon the defeated side. Whatever crimes and atrocities were committed by the Allies were never mentioned, prosecuted or even considered for

[7] David Lloyd George, p.93.
[8] Kuznetsova, p.19.

prosecution in the first place. The intentions of the allies, as a matter of fact, were also questionable, "Once the Nuremberg tribunal was up and running, critics could shake their heads at the show of victor's justice, but at least the victors took an interest in justice. The problem of the Hague and Arusha is that the world is not much interested in pursuing war criminals; the problem of Nuremberg was that Morgenthau and Stalin, in their own ways, were *too* interested in punishing war criminals"[9]

Secondly, the tribunal also suffered a number of legal deficiencies. For example, it did not provide adequate protection to the rights of the defendants to the point that it did not even have an appellate chamber, thus preventing the defendants of a legal recourse to justice once the verdicts were passed in their final form. In addition to this, the tribunal itself was created to prosecute individuals for criminal liabilities that were recognized after the acts were committed, theoretically a violation of the spirit of the legal maxims that recognize that there is no crime without a law.

Whatever successes were accomplished by establishing the Nuremberg Tribunal as a legal precedent was almost lost in the International Military Tribunal for the Far East (IMTFE). This tribunal, created in Tokyo in September 1945 was primarily aimed at quenching American thirst for revenge against the Japanese leaders, and hence, it

[9] Bass, p.204.

was a far more obvious manifestation of the punitive justice by the victor against the defeated side. After all, while American officials spoke of a tribunal against the atrocities committed by Japanese leaders, no mentioning was made of the atrocities committed by the dropping of two nuclear bombs on the cities of Hiroshima and Nagasaki that resulted in the death of hundreds of thousands of innocent civilians.

More serious weaknesses marred the IMTFE, however. To start with, while the Nuremberg prosecutors had enormous numbers of documents and evidences that make tracing the responsibility of individuals for atrocities and crimes possible, such a situation clearly did not exist in the Japanese case. Many of the documents and records were simply destroyed or even forged. Secondly, more than 1,000 senior political and military officials in the Japanese State simply chose to commit suicide rather than face the humiliation at the tribunal. As a result, many of the individuals that the tribunal was meant to prosecute were no longer alive by the time the tribunal was created, not to mention that many potential material witnesses had taken their lives away.

For purely practical reasons related to the need of a stable environment to its occupation of Japan, the United States decided to reconsider its position on the tribunal. As a result, the Japanese Emperor Hirohito was found innocent of war crimes, and subsequently, the tribunal at Tokyo withered away as a memory of a failed opportunity to support the legacy and precedence at Nuremberg.

Irrespective of the criticism that was directed at the Nuremberg and the Tokyo tribunals, it is evident from these two important developments that an international legal system was undergoing a new stage of evolution. Another evident fact, needless to add, is that the need for such an international legal system that can bring to justice and hold accountable individuals responsible for crimes against humanity and atrocities of war had become a serious necessity at last, a fact pointed to by Justice Jackson who was among the chief prosecutors of the Nuremberg Tribunal, "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[10]

Ironically, and as history has shown over and again after World War II and during the Cold War, such crimes have been repeated and perpetrators have often gone unpunished with no justice served.

D) The London Charter

The formation of the Nuremberg and Tokyo tribunals was essentially based on the London Charter that was signed by the US, Britain, France and Russia immediately following World War II. Although the London Charter was important in the sense that it allowed for the

[10] G. M. Gilbert. Nuremberg Diary. New York, DaCapo Press, p.148.

establishment of the two tribunals, its real significance lies in the fact that it led to the establishment of the principle of individual responsibility, basically the most important principle of international law in relation to prosecuting atrocities, crimes of war and crimes against humanity. As a matter of fact, it is these principles that were recognized in the London Charter for the first time that have after so many years finally led to the establishment of the International Criminal Court. These seven principles, furthermore, were incorporated in international law by a resolution passed by the United Nations General Assembly:

- Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.
- Principle II: The fact that the internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
- Principle III: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
- Principle IV: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from

responsibility under international law, provided a moral choice was in fact possible to him.

- Principle V: Any person charged with a crime under international law has the right to a fair trial on the facts and law.
- Principle VI: The crimes hereinafter set out are punishable as crimes under international law:
- The Crimes against peace include:
    - Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances and;
    - Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
- War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population in occupied territory; murder or ill-treatment of prisoners of war, of persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
- Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are

carried on in execution of or in connection with any crime against peace or any war crime.

- Principle VII: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law. [11]

E) The Cold War Period

As argued earlier, one of the factors that contributed to the limited success achieved by the Nuremberg Tribunal and the eventual incorporation of the principles of the London Charter was the agreement among the various major powers, specifically the victorious powers, to carry the matter forward. Eventually, however, the evolution of a bipolar international political system and the subsequent outbreak of the Cold War between the US and the USSR brought to an end any possibility of further progress in the concept of international justice against individuals responsible for crimes and atrocities committed against humanity. As a matter of fact, the Cold War and the rivalry-based bipolar system provided a secure umbrella and a haven for individuals responsible for numerous atrocities committed in the Third World between the end of World War II and the early 1990s. Such individuals included political and military leaders acting for their own interests and being allied with either the United States or the Soviet Union, or, as the

[11] "Principles of International Law Recognized in the Charger of the Nuremberg Tribunal and in the Judgment of the Tribunal" http://www.derechos.org.

case was also common, acting to further the interests of either major power. Cold War politics, therefore, not only encouraged the outbreak of such crimes against peace and humanity, but also prevented any significant development in the concept of international justice in this respect.

F) Post-Cold War Tribunals

The collapse of the Soviet Union in 1989 and the subsequent emergence of a new world order in which the United States acted as the only superpower created a more encouraging platform for developments to take place in the realm of international law, specifically in relation to the formation of criminal tribunals. Between 1991 and 1992, thousands of civilians were murdered in an organized, systematic and intended manner that resembled genocide in the Former Republic of Yugoslavia.

On February 22, 1993, the Security Council created the International Criminal Tribunal for the Former Yugoslavia (ICTY). Located at the Hague, this tribunal was responsible to prosecute individuals for their criminal responsibilities dating back to 1991. This was, by all standards, the first and major breakthrough in bringing crimes against humanity to international justice since Nuremberg. Nonetheless, effective as this step was, flaws and criticism were not absent.

To start with, the tribunal was formed in 1993, that is, two years after the crimes started and despite the fact that for more than two years, the international community watched with patience as the number of victims grew by the thousands. Even the claim that the tribunal could not have been formed until sufficient evidence was available could not be used since the evidence was aired on TV into the living rooms of millions of viewers worldwide.[12]

Another criticism brought against the ICTY was that it was impartial, a criticism brought about by Serb politicians and many Russian leaders. The critics argued that the international community, led by the United States had an interest in forming the ICTY as a means of asserting the victory of the United States over the Soviet Union and its former allies. Such a criticism, however, was never taken seriously, at least not as seriously as the similar criticisms that were brought against the justice of victors that was served in the Nuremberg tribunal. On ICTY, the then UN Secretary General Boutros Boutros Ghali commented that this tribunal was successful in the sense that it was the first tribunal initiated and backed by the international community, not by a country that had won a war and sought to punish its defeated opponents.[13]

Another equally important factor that differentiated ICTY from the Nuremberg tribunal was the fact that ICTY acted with the existence of a

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[12] Bass, p.210.

[13] Stanley Meisler. "UN names South African Judge as Balkans War Crimes Prosecutor." Los Angeles Times, 25 December 1993, p.5.

precedence as well as a clear set of legal principles in international laws that define, classify, and punish the crimes in question, aspects whose lack was a basis for serious criticisms brought against the Nuremberg tribunal in the past.

Only one year after the establishment of ICTY, the International Criminal Tribunal for Rwanda (ICTR) was created by Security Council Resolution 955. The objective of ICTR, located in Arusha, Tanzania, was to prosecute "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994."[14]

Although formed within a much shorter span of time than ICTY, the international community had had to wait for several months before even considering the possibility of creating a tribunal, a period during which almost two million innocent people were bloodily butchered as the international community contemplated the next step of action.

For all its shortcomings, the Nuremberg tribunal was empowered by the strong motivation of nations such as the US and the Soviet Union to avenge their defeated enemies. Lacking such a dubious motivation has ironically been responsible for the slow, inefficient, and unmotivated performance of ICTY and ICTR. In effect, the serious threat to the legal

[14] "International Criminal Tribunal for Rwanda." University of Minnesota, http://wwwl.umn.edu/humanrts/africa/RWANDA1.htm, 1995.

concepts behind ICTY and ICTR was not whether the two tribunals could deliver justice or not , but rather, the fact that the international community was sufficiently relieved and satisfied by the formation of the two tribunals, without necessarily having actual justice served.

In addition to this, the revengeful intentions behind the Nuremberg tribunal resulted in the absence of a number of serious limitations that ICTY and ICTR faced, namely in the fields funding, the sharing of intelligence information, availability of qualified staff, and the facilities necessary to conduct proper investigations.[15] Yet, like the Nuremberg tribunal, ICTY and ITCR were both intended to be ad hoc tribunals with specific objectives limited to crimes committed in specified locations and within a specified period of time.

Another interesting aspect worth noting is the significant difference in performance witnessed between ICTY and ICTR. The international community, evidently, seems to have had a stronger interest in the crimes committed in the Former Republic of Yugoslavia than in those committed in Rwanda, mainly because of the political entanglement and the level of instability caused by the events in Yugoslavia. Hence , the tribunal at Arusha suffered serious deficiencies that were not seen in ICTY, including the complete lack of qualified staff and facilities, even to the point that unqualified individuals were eventually appointed as judges and prosecutors.

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[15] Richard Gladstone & Garry Bass. "Lessons from the International Criminal Tribunals." Eds. S. Sewall & Carl Kaysen. p.53

The record of success of these two ad hoc tribunals, is also open to debate. ICTY, for example, placed 48 individuals in custody, the most prominent of which remains former president Slobodan Milosevic who was finally indicted in 1999 for the crimes he is personally charged with being responsible for in Kosovo as well as for crimes dating back to 1991 and 1992 in Croatia. An additional 31 warrants have also been issued by the tribunal, many of which are still standing and waiting to be served.[16]

With respect to ICTR, on the other hand, the record has been very troubling with very few perpetrators being brought to justice, and with many cases handled with extreme failure to meet the standards of professionalism. The only prominent success for ICTR has been the capture and prosecution of pastor Ntakirutimana and his extradition from the US over to ICTR in 2001.[17]

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[16] "Fact Sheet on ICTY Proceedings." International Criminal Tribunal for the Former Yugoslavia. http://www.un.org/icty/ 2003.

[17] "Judgment for Ntakirutimana for next week." http://www.rwanda.net/english/News/news022003/news02172003.htm, February 2003.

CHAPTER II

THE ICC: FORMATION & ORGANIZATION

Introduction

The war crimes committed in the 1990s, mainly in Yugoslavia and Rwanda seriously shocked the international conscience. War crimes had been committed throughout the twentieth century, but the 1990s had witnessed a revolution in media technology. The media, hence, conveyed live images of atrocities and crimes to politicians and publics in virtually every nation, creating a psychological mindset that encouraged the formation of an international criminal court of justice, especially as it became evident that ad hoc tribunals were greatly limited territorially and by jurisdiction. The ultimate objective of such a court would be to prevent impunity and to bring those responsible for crimes against humanity anywhere to justice at any time.

The Rome convention

In 1989, Trinidad and Tobago proposed to the international community the formation of an international criminal court to prosecute drug traffickers to support efforts in its war against drugs. Although this proposal was never fruitful, it represented a precedent and soon after

that the General Assembly instructed the International Legal Committee to start drafting a statue for the International Criminal Court, ICC.

It was not until 1992, however, that the General Assembly called upon the International Legal Committee to complete the ICC draft, at a time when war crimes were overtly committed in Yugoslavia. In 1994, the ILC presented its proposal and an ad hoc committee was assigned by the General Assembly to review it.

As numerous disagreements surfaced among the member nations over the jurisdiction of the proposed court and its possible implications for sovereignty, the General Assembly created the Preparatory Committee with the objective of involving all UN members in preparing the final draft for the court. As Italy accepted to hold the UN conference on the proposed project, the convention for the court was held in Rome in June 1998. The Rome Convention eventually successfully declared the Rome Statute, hence announcing the birth of the International Criminal Court with 120 UN members approving, 21 abstaining, and 7 rejecting; 46 were absent. Interestingly enough, the rejecting members included the US, Israel, Libya, Yemen, Qatar, and Algeria.

A) Establishment of the Court

[18]According to Article (3) of the Rome Statute, the Netherlands is to be the host country of the ICC, with the seat of the Court to be permanently established in the Hague. However, the Court may also sit anywhere and at any time as it considers desirable. Article (4), furthermore, defines the legal nature of the Court, considering it to have "international legal personality" with "such legal capacity as it may be necessary for the exercise of its functions and the fulfillment of its purposes" (Rome Statute).

The Principles

The formation and functioning of the International Criminal Court is based upon twelve legal principles derived from the general principles of criminal law:

1-Nullum Crimen Sine Lege

According to this principle, persons can only be brought in front of the court and charged for and be accused of acts that they had committed and that constitute crimes at the time when the Court takes place. Furthermore, the acts have to be within the jurisdiction of the

[18] Articles 3 and 4 of the Rome Statute

Court. In the cases of any ambiguity over the nature of the acts for which the person is charged and whether or not they constitute a crime within the jurisdiction of the Court, the Court will consider the interpretations that are in favor of the accused.

2-Nulla Poena Sine Lege

According to this principle, a person convicted by the Court may be punished only in accordance with the Statute of the Court, hence preventing the imposing of the death penalty by other legal systems that may not be in accordance with the Statute which prohibits such penalty.

3-Non-Retroactivity Ratione Personae

Under this principle, no person shall be held criminally by the Court if the acts the person is charged of were committed by the person before the Statute entered into force. Furthermore, in the event of a change in the laws during a trial, the person held on trial shall enjoy the more favorable of the laws.

4 -Individual Criminal Responsibility

[19]According to Article (25-1), and perhaps one of the most important principles in the Statute, "The Court shall have jurisdiction over natural persons pursuant to this Statute." At the same time, provision (4) of the same article specifies that "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."

[19] Article 25-1 of the Rome Statute

According to this principle, the ICC holds criminally responsible all persons who had committed crimes within the jurisdiction of the Court, whether directly or indirectly. Indirect commission of crime relates to the ordering, soliciting, facilitating, or inducing acts conceived as criminal and within the jurisdiction of the Court. In addition to this, the principle also covers any contribution, whether international or otherwise to a crime within the jurisdiction of the court.

5-Exclusion of Jurisdiction over Persons under Eighteen

[20] According to Article (26), if the person accused or charged of criminal acts was under the age of 18 at the time the crime was committed, the Court shall enjoy no jurisdiction over this person.

Irrelevance of Official Capacity

Article (27) bears one of the most important yet controversial principles of the Court. According to this article, the official capacity of any person accused or charged of crimes within the jurisdiction of the Court shall not be immune from justice, even if the acts in question were committed by the person while he fulfilled his capacity as a head of state or an elected or appointed official of government . In addition to this, the principle considers as irrelevant the official capacity of such persons during the process of sentencing, thus depriving the convicted

[20] Articles 26 and 27 of the Rome Statute

of any privilege for a lighter sentence based on official capacity. Even more importantly, provision (2) of the article stipulates that " Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

6-Responsibility of Commanders and other Superiors

The principles of the ICC consider it the responsibility of military commanders to bring their subordinates under control and to prevent them from committing acts that are considered as criminal by the Court. In specific, the Court considers military commanders or persons effectively acting as thus, to be criminally responsible for criminal acts committed by their forces whether "The military commander or person either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes" and "The military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

7-Non-Applicability of Statute of Limitations

[21] According to Article (29) of the Statute, "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." This principle specifically points out the independence of the court in

[21] Articles 29 and 31 of the Rome Statute

terms of jurisdiction and discretion over the nature of investigations and procedures that it seeks to initiate.

8-Grounds for Excluding Criminal Responsibility

According to Article (31) of the Statute, four grounds exclude a person from criminal responsibility; first, if the person suffers mental incapacity or a mental disease that leads to such incapacity; secondly, if the person was intoxicated to the point of failing to realize the unlawfulness of his actions or if he deliberately became intoxicated while aware of the risk that his conduct under intoxication could lead to the commission of acts considered as criminal within the jurisdiction of the Court ; thirdly , if the acts in question were committed when the person was acting reasonably in self-defense but at the same time, emphasizing the fact that if the person was "involved in a defensive operation conducted by forces " this does not constitute a ground for exclusion of criminal responsibility; and fourthly, if the acts were committed under the influence of duress or the threat imminent death caused by other persons or prevailing under circumstances beyond the person's control.

However, it must be noted that the Court has also reserved its right to exercise discretion and to determine the grounds for the applicability of excluding criminal responsibility, and also to consider grounds of exclusion of criminal responsibility other than those mentioned in the Statute during the actual process of trial.

Mistake of Fact or Mistake of Law

"[22] According to Article (32) of the Statute, the Court shall not consider a mistake of fact or a mistake of law as a ground for excluding criminal responsibility unless it negates with the mental element required by the crime.

9-Superior Orders and Prescription of Law

According to Article (33) of the Statute, the Court shall consider a civilian or a military person criminally responsible for acts committed and considered by the Court to be criminal, even if the person was following orders from government or superiors. However, four grounds of exclusion exist; first, if the person was under a legal obligation to obey orders; the person did not know the order was unlawful; and the order was not manifestly unlawful. In this respect, however, the Article also considers manifestly unlawful all orders to commit suicide or crimes against humanity, thus depriving the accused any excuse or ground for exclusion.

This principle specifically and strongly reiterates the spirit of the guiding principles of the Nuremberg Tribunal which held that simply following orders was not an acceptable excuse or justification to vindicate persons acting as official or effective military commanders or

[22] Articles 32 and 33 of the Rome Statute

subordinates from their criminal responsibility in the commission of acts that constitute genocide or crimes against humanity.

Mental Element

"[23] *Another ground for exclusion of criminal responsibility is invoked in Article (30) of the Statute, covering the mental element. This article stipulates that intent and knowledge are necessary to hold a person liable for a crime within the jurisdiction of the Court. The element of intent is satisfied if the person meant to engage in the conduct leading to liability, and if the person meant to cause the action leading to the liability or was aware of its consequences.*

B) Organization of the Court

The Court is organized into five major organs: the Presidency, the Chambers (including the Appeals Division, Trial Division and Pre-trial Division), the Office of the Prosecutor, and the Registry. The Court, furthermore, is to be served by 18 judges.

1-The Presidency

[24]" The Presidency according to the organization of the Court constitute of the President and the First and Second Vice-Presidents, all of whom are to be elected by an absolute majority of the judges, and

[23] Article 30 of the Rome Statute

[24] Articles 38 (38-3) and (42-1) (42-4) of the Rome Statute

each of which will serve for a term of three years or until the end of his or her respective terms of office as judge. These officers are eligible for re-election only once according to Article (38). Article (38-3) outlines the responsibilities of the presidency as "the proper administration of the Court, with the exception of the Office of the Prosecutor."

2-The Office of the Prosecutor

The Office of the Prosecutor is a separate and independent body of the Court, and according to Article (42-1), it "shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court." The Prosecutor, assisted by one or more Deputy Prosecutors, "shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties" (Article 42-4). The Deputy Prosecutors are also elected in the same way, but are chosen from a list of candidates presented by the Prosecutor. Furthermore, given the absence of reasons requiring a shorter term, the Prosecutor shall hold office for a term of nine years without the possibility of re-election.

3-Chambers

The Chambers constitute three divisions, the Appeals Division, the Trial Division and the Pre-Trial Division. The Appeals Division is composed of the President and Four other judges. The Trial Division is composed of no less than six judges, and similarly, the Pre-Trial

Division is composed of no less than six judges. The judges in the Appeals Division serve in that division for their entire term of office whereas the judges in the Trial and Pre-Trial divisions serve for a period of three years but will continue service to complete hearing any cases that may have commenced before the expiry of their terms.

"[25] Although Article (39-4) specifically bars judges in the Appeals Division from serving in other divisions, the Statute allows for judges in the Trial Division to serve in the Pre-Trial Division and the other way round depending on how the Court sees fit for the use of its resources efficiently and effectively.

Furthermore, the independence of the judges is considered of great importance for the Court and hence, according to Article (40), the judges shall refrain from any activity that may interfere with their functions or affect their independence, not to mention that they are barred from taking any other professional occupations.

4-The Registry

"[26] The Office of the Registry is organized by the provisions of Article (43) of the Statute and its main responsibility is for "the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor" (Article 43-1). The Office of the Registry is headed by the Registrar who is elected by

[25] Articles 39-4 and 40 of the Rome Statute

[26] Articles 43 and 43-1 of the Rome Statute

an absolute majority by secret ballot, but also taking into consideration the recommendations of the Assembly of State Parties. The Office of the Registrar is held for a term of five years with the possibility of a re-election once.

"[27] In addition to the other functions and responsibilities of the Registrar, he or she will be responsible for setting up a Victims and Witnesses unit within the Registry with the objective of providing, in consultation with the Office of the Prosecutor "protective measures and security arrangements , counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses" (Article 43-6).

C)Funding of the Court

The sources of funding for the Court are specified in Articles (114) and (115) of the Statute. Article (114) specifies two main sources of funding for the Court, namely "Assessed contributions made by States Parties" and "Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council." In addition to this, Article (116) recognizes voluntary contributions as a source of funds for the Court, stipulating that "the Court may receive and utilize,

[27] Articles 43-6 and 114 and 115 and 116 and 6 of the Rome Statute

as additional funds, voluntary contributions from Governments, international organizations, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties."

D)Jurisdiction of the Court

The issue of the ICC jurisdiction has been one of the most controversial issues relevant to the establishment of the Court. Basically, the jurisdiction of the ICC is limited to very specific and serious crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression. Whereas the definitions for the first three crimes are clear beyond ambiguity, the definition of the crime of aggression is yet expected to undergo various modifications and changes in the future.

1-Genocide

According to the Article (6) of the Statute, the definition of genocide includes five sets of acts and commissions with the objective of destroying a national, ethnical, racial or religious groups. These actions include killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in while or in part; imposing measures intended to prevent births within

the group; and forcibly transferring children of the group to another group.

2-Crimes against Humanity

Crimes against humanity as defined by the Court include any those acts committed as part of a systematic or widespread attack against a civilian population with knowledge of the attack. These acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, the crime of apartheid, and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. In addition to this, the acts also include persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impressible under international law.

3-War Crimes

The jurisdiction of the Court over acts of war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes covers all the major breaches of the Geneva Convention of 1949. Thus, this jurisdiction includes willful killing; torture or inhuman

treatment, including biological experiments; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; and taking of hostages.In addition to this, the jurisdiction of the Court in relation to war crimes covers all serious violations of the [28] laws and customs applicable in international armed conflicts as well as in non-international armed conflicts, specifically those violations stated in Article (3) in the four Geneva Conventions of 1949 , namely violence to life and person including murder, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; and the passing of sentences and carrying out of executions without due legal process.

4 -Jurisdiction Ratione Temporis

According to Article (11) of the Statute, "The Court has jurisdiction only with respect to crimes committed after the entry into force" of the Statute. Furthermore, if a State becomes Party to the Statute after its entry into force, "the Court may exercise its jurisdiction only with respect

[28] Articles 3 and 11 and 12-3 of the Rome Statute

to crimes committed after the entry into force of the Statute for that State." The exception to this limitation, however occurs if the State prior to its becoming Party to the Statute had accepted the exercise by the Court with respect to the crime in question, as stipulated in Article (12-3). In other words, the jurisdiction of a State does not limit the jurisdiction of the Court if the State had accepted the jurisdiction of the Court, even if this State is not a party to the Statute of the Court .

[29]- Furthermore, if a State is a Party to the Statute or has accepted the Statute, the Court's jurisdiction is automatically exercised if "The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft, " or if the person accused of the crime is a national of a State that is a Party member (Article 12, provisions 1-2).

[29] Articles 12 and 1-2 of the Rome Statute

CHAPTER III

FUNCTIONS & PROCEDURES

A)Initiation of Investigations

"[30] Cases may be initiated by the ICC in two main ways, either through initiation by the Office of the Prosecutor, or by referral from the Security Council. According to Article (53-1) the Prosecutor enjoys the discretion to decide whether or not there exists reasonable basis to proceed with the initiation of an investigation under the Statute. The initiation of an investigation by the Office of the Prosecutor, however, should be based on three considerations; first that the information provided to the Prosecutor provides a reasonable basis "to believe that a crime within the jurisdiction of the Court has been or is being committed;" secondly, considering that the case is admissible according to the Statute, especially article (17), and taking into consideration the gravity of the crime and the interests of the victims.

[30] Articles 53-1 and 17 and 1 of the Rome Statute

1- Inadmissibility of Investigations

Article (17) of the Statute lists the grounds for which the Court will consider a case to be inadmissible. Four such grounds are stipulated by Provision (1), namely if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; if the case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness of inability of the State genuinely to prosecute; if the person concerned has already been tried for conduct which i s the subject of the complaint, and a trial by the Court is not permitted; or if the case is not of sufficient gravity to justify further action by the Court.

"[31] Two specific issues relevant to inadmissibility of cases have warranted further consideration by Article (17), namely the issues of unwillingness and inability of States to prosecute persons or investigate cases. Unwillingness, according to Provision (2) of the Article requires the existence of one or two conditions: if the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; if there has been an unjustified delay

[31] Articles 17 and 2 and 3 of the Rome Statute

in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and/or if the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Provision (3) of the Article, on the other hand, considers inability to prosecute a person or initiate an investigation by the State if there is a total or substantial collapse or unavailability of the national judicial system, resulting in the inability of the State to detain the accused or to obtain evidence or testimonies and other aspects necessary for the proceedings of the case.

"[32] It must also be noted that if the Prosecutor had initiated a case based on available information but eventually realized that there was insufficient evidence to continue the prosecution, the Prosecutor may choose to dismiss the case. Such a decision, however, has to meet one of three criteria; either there is no sufficient legal or factual basis for the case or to summon warrants; or the case is inadmissible; or the Prosecutor upon evaluating the circumstances of the case decided that aspects such as the gravity of the crime, the interests of victims, the role of the perpetrator and his or her age did not serve the interests of

[32] Articles 53-2 and 55-3 of the Rome Statute

justice, decides to dismiss and discontinue the prosecution of the case (Article 53-2).

2- Role of Prosecutor in Investigations

Once the Prosecutor has initiated a case, his or her role will compose of a variety of functions that include the collection and examining of evidence; requesting the presence of and questioning persons being investigated, victims and witnesses; seeking the cooperation of any State or inter-governmental organization or arrangement in accordance with its respective competence and mandate; entering into such arrangements and agreements, not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a State, inter-governmental organization or person; agreeing not to disclose documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and taking necessary measures or requesting that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence (Article 55 –3).

3- Role of the Pre-Trial Chamber

"[33] During the proceedings, the Pre-Trial Chamber has to implement a number of functions to assist in the investigative process . To start with, and according to Article (57-3), it may issue orders and warrants for the purposes of an investigation at the request of the Prosecutor; it may also issue orders or seek cooperation as necessary to assist the accused in the preparation of defense at the request of this person; it may provide for the protection and privacy of victims and witnesses, preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information; it may authorize the Prosecutor to take specific investigative steps within the territory of a State party, without having secured the cooperation of that State if the State is for one reason or another unable to provide the required level of cooperation; and, when a warrant of arrest or a summons has been issued, and given the strength of the evidence and the rights of the persons concerned, it may seek the cooperation of States to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims (Article 57-3).

[33] Article 57-3 of the Rome Statute

4 - Summons & Warrants of Arrest

Summons to appear and warrant of arrest are issued by the Pre-Trial Chamber at the request of the Prosecutor and based on the satisfaction that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court. In addition to this, warrants are also issued if the judge perceives the arrest of the person to be necessary to ensure the person's appearance in court, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or to prevent the person from continuing the commission of the crime or a related crime which is within the jurisdiction of the Court.

[34] The Prosecutor's request to the Pre-Trial Chamber is presented in the form of an application that has to contain specific information relevant to the investigation. This information has to include the name of the person and other relevant identification; a specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; a concise statement of the facts which are alleged to constitute those crimes; a summary of the evidence and any other information which establish reasonable grounds to believe that the

[34] Articles 58-2 and 58-7 of the Rome Statute

person committed those crimes; and the reason why the Prosecutor believes that the arrest of the person is necessary (Article 58-2).

Once a warrant of arrest has been issued for a person, it remains in effect until the Court orders otherwise. Furthermore, once a warrant has been issued, the Court may request a provisional arrest or the arrest and surrender of the person. Warrants of arrest, moreover, may be subjected to modification such as the addition of crimes at the request of the Prosecutor. Article (58-7) also recognizes the right of the Prosecutor to issue a summons of appearance instead of a warrant of arrest when necessary, and with or without conditions restricting liberty if provided for by the national law of the government under whose jurisdiction the person is found.

5- Arrest Procedures

"[35] Upon issuing a warrant of arrest, the Court then requests the arrest or provisional arrest of the person in question, and the State has to take immediate steps to arrest the person and in accordance with laws and procedures. Upon serving the warrant of arrest, the custodial State has to determine whether the warrant applies to the person , whether the person has been arrested in accordance with the proper process, and whether the person's rights have been respected (Article 59-2). The person may, however, apply for interim release

[35] Articles 59-2 and 59-7 and 60 of the Rome Statute

pending surrender, but in such a case, the Pre-Trial Chamber has to be notified of such a possibility by the authorities of the custodial State which should give full considerations to whatever recommendations are made on the matter by the Court. Furthermore, the Pre-Trial Chamber may also request periodic reports on the status of the interim release in case it is granted to the person in question, and whenever the Pre-Trial Chamber requests the surrender of the person, the custodial State has to initiate the delivery process as soon as possible (Article 59-7).

6- Proceedings Before the Court

Once the person in question has been delivered to the Pre-Trial Chamber by virtue of a summons, an arrest warrant, or by voluntary appearance, initial proceedings are initiated. The person is then notified of the crimes of which he or she is allegedly charged along with his or her rights (Article 60). The Pre-Trial Chamber then holds hearings within a reasonable time of the voluntary or involuntary appearance of the person in question during which the charges on which the prosecutor wishes to seek trial are confirmed. However, within a reasonable time before the hearing, the person has to be provided with a copy of the document containing the charges, and be informed of the evidence against him or her. It must be noted, however, that in case the person waives his or her right to be presence during the hearings, or has fled or

cannot be found, then he or she shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

In addition to this, the Prosecutor may also continue the investigative process after the person has appeared at the hearing and may consequentially add more charges and evidence in accordance with procedures, and inversely, the Prosecutor may also eliminate charges or discard evidence or simply withdraw charges altogether after notifying the Pre-Trial Chamber along with the causes for withdrawal.

[36]" During the hearing process, the Prosecutor has to support each charge with evidence that lead to the belief that the person in question has actually committed the crimes alleged, relying on documentary or summary evidence and with or without calling witnesses who are expected to testify later at the trial. The accused, on the other hand, may object to the charges, challenge the presented evidence, or provide evidence. If upon the hearing process the Pre-Trial Chamber determines that there is not sufficient evidence to confirm charges, the Prosecutor shall not be precluded from subsequently requesting the confirmation of charges if additional evidence is presented. The Pre-Trial Chamber may also adjourn the hearing and request the Prosecutor to consider providing further evidence or conducting further investigation with respect to a particular charge or amend a charge

[36] Article 61-7 of the Rome Statute

because the evidence submitted appears to establish a different crime within the jurisdiction of the Court (Article 61-7).

"[37] Furthermore, if the Pre-Trial Chamber believes that there is sufficient evidence to confirm charges, it will then commit the person to a Trial Chamber for trial on the confirmed charges. However, warrants for any charges that have not been confirmed by the Pre-Trial Chamber will no longer have an effect, and the same applies for any warrants that have been withdrawn by the Prosecutor. At this point , the Presidency constitutes a Trial Chamber that will then be responsible for the conduct of all proceedings (Article 61-11).

7- Rights of Persons under Investigation

When a person is under investigation by the Court, this person may not be compelled to incriminate himself or herself or to confess guilt; may not be subjected to any form of coercion, duress or threat, torture or any form of cruelty, inhuman treatment, punishment or degradation; shall not be subjected to arbitrary arrest or detention and shall not be deprived of his or her liberty except on such grounds and based on procedures established in the Statute; and shall be provided with the assistance of a competent interpreter at any cost if questioned in a language other than the one that he or she fully understands and speaks (Article 55-1).

[37] Articles 61-11 and 55-1 and 62 of the Rome Statute

Prior to the initiation of questioning, the Statute stipulates that the person be informed that there are grounds to believe he or she has committed a crime within the jurisdiction of the Court; that he has the right to remain silent without implying that his or her silence is a determination of guilt or innocence; that he or she has the right to have legal assistance of their choosing or to have legal assistance assigned to them at no payment by him or her if the person cannot afford such assistance.

B) The Trial Procedures

Although the Court is seated at the Hague, the Statute stipulates in Article (62) the possibility to hold trials in other locations if necessary. One of the major objectives of the Court is to ensure a fair and expeditious trial for and with full respect to the rights of the accused, but also in regards with to the protection of victims and witnesses. Once a trial has been assigned for a case, the first three steps are to confer with the parties involved to adopt the necessary procedures to guarantee a fair trial , to determine the language or languages to be used during the trial, and to observe all relevant provisions of the Statute and complete the disclosure of all relevant documents ahead of the commencement of trial to enable parties involved to make proper preparations.

[38] Article (64-7), moreover, stipulates that the trial shall be held in public, except under circumstances when certain proceedings may be in closed session, with the objective of protecting confidential or sensitive information provided in evidence. Once the trial commences, the accused is given the opportunity to make an admission of guilt or to plead not guilty. Throughout the entire process, the Trial Chamber has to maintain a complete and accurate record of the trial to reflect the proceedings and to have the record preserved by the Registrar.

In case when the accused admits to guilt, several conditions have to exist. First of all, the Trial Chamber has to determine that the accused understands the nature and consequences of the admission of guilt and to assure that the admission is made voluntarily after sufficient consultation with the defense counsel. Furthermore, the admission of guilt has to be supported by facts and evidences presented by the Prosecutor, admitted by the accused, and supported by the testimonies of witnesses. If the Trial Chamber is not convinced with the admission of guilt for reasons such as the contradiction between the evidence, testimonies and the admission made by the accused, the Trial Chamber will not consider the admission of guilt, and the trial will be continued or may be transferred to another Trial Chamber. Furthermore , and also according to the stipulations in Article (65), the Trial Chamber may find it in the interest of the victim to seek the presentation of additional

[38] Articles 64-7 and 65 of the Rome Statute

evidence and testimonies by the Prosecutor.

"[39] It must also be noted that one of the most important principles guiding the trials at the Court is the presumption of the innocence of the accused until proven otherwise. Hence, it is the responsibility of the Office of the Prosecutor to prove that the accused is guilty, and for this to happen, the Court has to be completely convinced of the guilt of the accused beyond any reasonable doubt (Article 66).

Because of the nature of the crimes prosecuted at the Court and their consequences on the accused as well as on the victims and witnesses, the Statute has included a number of clauses and provisions that aim at protecting the rights and interests of the various parties in any trial.

"[40] With respect to the accused, and in addition to the presumption of innocence until proven otherwise and the fact that the rights of the accused have to be observed and respected throughout all the pre-trial procedures, there are additional rights to the accused that have to be preserved during the trial stage. These include informing the accused accurately, promptly and in detail of the nature, cause and content of the charge, in a language that he or she fully understands and speaks. In addition to this, the Court has to make available for the accused the time and facilities necessary for the preparation of the defense as well as the free and unrestricted communication with the counsel chosen by

[39] Article 66 of the Rome Statute
[40] Article 68 of the Rome Statute

the accused. Furthermore, the accused has to be tried without undue delay and has to be offered the right to legal representation if he or she cannot afford it during the trial, and to have the right to examine the witnesses against him or her and to enjoy the right to call upon witnesses that may support his or her case. In addition to this, the other provisions of Article (68) also require that the accused not be compelled to testify or confess guilt, or to suffer the imposition any reversal of the burden of proof or any responsibility of rebuttal. The Prosecutor, furthermore, is obliged to disclose to the defense side, and within practical time, all evidence in the Prosecutor's possession or control that may show the innocence of the accused or lead to it, even if it undermines the credibility of evidence presented by the Prosecutor.

Article (68) and its various provisions, on the other hand, provide protection of the victims and witnesses as well as their rights and interests as a result of participation in the proceedings. Hence, the Court is required to take all measures necessary to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, with such protection necessitated both during the investigation and the prosecution of the crimes. Furthermore, the Court is required to provide for exceptions to the requirement of public hearings during Trial by providing for keeping the identities of victims and witnesses confidential through all means necessary and without

prejudicing the rights of the accused, particularly in trials that involve crimes involving sexual or gender violence or violence against children.

1- Evidence during Trial

[41] The Trial Chambers maintains discretion as to accepting and admitting evidences and testimonies, requiring them to be in line with the procedures of the Statute and with the objective of conducting a fair, expeditious and an unprejudiced trial. Evidence and testimonies , however, will be considered as inadmissible by the Court if obtained by means of a violation of the Statute or internationally recognized human rights if the violation casts substantial doubt on the reliability of the evidence or if the admission of the evidence would seriously damage the integrity of the proceedings. It must be noted, however, that the Court does not consider as relevant the applications of the national laws of the State when deciding on the relevance or admissibility of evidence collected by that State (Article 69).

2- Administrative Offenses

Although the Court's jurisdiction is limited to specific and defined crimes as stipulated in the Statute, Article (70) stipulates that the Court shall also have jurisdiction over offenses against its administration of justice when these are committed intentionally. These administrative

[41] Articles 69 and 70 and 71 of the Rome Statute

offenses include giving false testimony under the obligation to tell the truth; presenting evidence that the party knows is false or forged; corruptly influencing a witness; impeding intimidating or corruptly influencing an official of the Court; retaliating against an official of the Court on account of duties performed by that or another official; and soliciting or accepting a bribe as an official of the Court in connection with official duties. The Court, however, may impose in the case of a conviction for such administrative offenses, a maximum imprisonment term of five years, a fine, or both.

In addition to this, Article (71) also provides the Court with the authority the legal prerogative to sanction persons before it who commit misconduct such as disruption of proceedings or deliberate refusal to comply with its directions.

3- Protection of National Security

42- In those cases where the Court has requested information from a person but the person has refused to comply with the request on the basis of the protection of information considered sensitive to the national security of a State, or when a State argues that the disclosure of information presented in evidence may endanger its national security interests, the State has the right to intervene and seek cooperation with the various parties involved in the case at Court. Cooperative steps

offered for States to intervene through include the modification or clarification of the request presented by the State; determination of the relevance of information or evidence by the Court and whether such evidence can be obtained from a source other than the requested State; obtaining the information from a different source or in a different form; and the agreement on conditions such limiting the disclosures, providing summaries, and using other protective measures that are permissible by the Court and the rules of Procedures and Evidence. It must be noted, however, that the Court maintains discretion after making all consultations and cooperation necessary to determine whether or not it will order the full or partial disclosure of evidence or the non-disclosure of the evidence in question (Article 72).

Furthermore, if a State Party has in its custody documents or evidence deemed as evidence by the Court, but which was disclosed to it in confidence, the custodian State has to seek the consent of the originator of the document or information, be that a State Party, an inter-governmental organization or an international organization. In case of refusal by the originator, the custodian State has to inform the Court that it is unable to disclose the information because of its commitment to confidentiality, but if the third party is a State Party, then the matter is resolved between the originator and the Court , with the right of the

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[42] Article 72 of the Rome Statute

Court to exercise discretion on the matter in accordance with Article (72).

4- Decision, Reparations & Sentencing

"[43] Upon weighing all evidences submitted and discussed during trial, the judges have to attempt to achieve unanimity in their decision, but will resort to a decision by majority if unanimity is not possible. While all deliberations of the Trial Chamber remain secret, the final decision has to be fully written along with reasoned statements based on the evidence and conclusions. In case of a majority-based decision, views of both the majority and minority judges shall be contained in the decision text with a summary delivered in open court (Article 74).

If the Court decides on reparations for victims, the Court may invite and listen to the presentations of the representatives of the convicted person, the victims, other interested persons and interested States prior to the sentence. The scope and extent of reparations, compensation, restitution or rehabilitation, moreover, may be determined by the Court based on request or through the Court's own motion, with the requirement that the Court will state the principles on which it is acting. The Court may also choose to make an order directly against a convicted person specifying the compensation and reparation

[43] Articles 74 and 75 and 76 of the Rome Statute

to victims or may order that the award for reparations be made through the Trust Fund (Article 75).

With respect to convictions, the Trial Chamber has to base its decision by taking into account the evidence presented and the relevant submissions made during the trial. Furthermore, the Trial Chamber may hold further hearings to accept additional evidence or relevant submissions prior to the sentence, either by its own motion or at the request of the accused or the Prosecutor. Once the decision has been reached, the sentence has to be pronounced publicly (Article 76).

Chapter VI

The dilemma and the effectiveness of the Icc

Introduction :

This chapter will examine the controversial issues that surrounded the international criminal court starting from its creation on July 17,1998 under the Rome Statute , up Until the present day , and then we will analyze the future effectiveness of the court .

Although there exists a variety of issues that can be discussed , we will focus on the two major ones which I think hold the key to the future of the I.C.C.

These issues are :

- The I.C.C jurisdiction over non-signatory nationals .
- The U.S.A. and the I.C.C.

A)The I.C.C jurisdiction over non-signatory nationals

Under the Rome Statute embraced by the United Nations Diplomatic Conference on Plenipotentiaries on the establishment of an International Criminal Court, the ICC was to have jurisdiction

over various crimes against humanity, including war crimes and genocides. The International Criminal Court exercises jurisdiction if a "situation" is referred to the Prosecutor by a State Party to the treaty, or is referred to the Prosecutor by the U.N. Security Council, or is under an investigation initiated by the Prosecutor.

When a State Party has referred an investigation, as mentioned in the article 12, "the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court by special declaration: "(a)

The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; [or] (b) The State of which the person accused of the crime is a national"[44].

According to the Executive Branch of the United States, the ICC is unable to try a U.S. national if the United States does not ratify the treaty, in other terms, its national cannot be subject to prosecution before the Court.(46) However, consider that Italy and Yugoslavia have ratified the treaty and the United States hasn't. And, war crimes has been committed, within the territories of Yugoslavia by a U.S. national, held in Italy.

In fact, non-signatory nationals are not bound by crimes or norms newly created by a treaty. But, this is not the case when a new tribunal is

[44] Rome Statute of the International Criminal Court, art. 12(2)-(3)

being established for the prosecution of alleged violations of customary international law, where a crime have been committed and over which there is a universal jurisdictional competence and responsibility.

Therefore, Italy has the competence and responsibility to initiate prosecution of the criminal or to extradite him or to render him to another forum. Being a state that respects the terms of the international law, Italy has the right to do the above-mentioned since it has in its territories a person accused of war crimes under customary international law.

In addition to this, universal competence and responsibility apply whether the accused was an Italian national, or the victims were Italian or even if the crime was committed in Italy. Yugoslavia and the United States possess the same competence and responsibility under international law, noting that Italy can agree with another state or group of states to create a tribunal that takes over such responsibility and render to it every person reasonably accused of a certain crime under customary international law found in the territory under its control.

This refers to when the United States agreed with France, Great Britain and the Soviet Union – except for Germany – to establish the International Military Tribunal IMT at Nuremberg. [45]

"The Signatory Powers [to the London Agreement of August 8 1945 creating the Charter of the IMT at Nuremberg] established this Tribunal

[45] United Nations : Rome Statute Of the International Criminal Court. Art. 5.

... and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly, for it is not to be doubted that any nation has the right to set up special courts to administer the law. With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law." [46]

Accordingly, a German defendant could not have any complain about the fact that the IMT at Nuremberg lacked jurisdiction over crimes that any state could prosecute because each state creating or agreeing to the competence of the IMT had "done together what any one of them might have done singly."[47]

In fact, a tribunal can be created with or without the approval of Germany, and such a tribunal has proven to be able to prosecute German nationals even when the accused has committed the crime within the United States, France, Great Britain, or the Soviet Union, noting that these countries were not nationals of any of the constituting states.

The U.N. General Assembly declared that states shall cooperate on a bilateral and multilateral basis in order to stop and prevent war crimes

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[46] The United States and the ICC. Lanham Rowman & Littlefield Publishers, Inc., 2000

[47] United Nations : Rome Statute Of the International Criminal Court Art. 13.

From one hand, Italy tried to participate in the creation of an ad hoc international criminal tribunal similar to the IMT at Nuremberg to prosecute violations and customary international law and to render to such a tribunal any person accused of crimes found within territory under its control.

against humanity, and shall adopt domestic and international measures to achieve that purpose. The General Assembly also noted that states should assist each other to detect, arrest, and bring to trial suspected persons.

This declaration shows a general expectation that creating bilateral institutional processes between states is appreciated to prosecute such international crimes, and this cooperation is considered to be effective in halting, preventing and prosecuting these crimes. And, such duties are tied to obligations under the U.N. Charter.

Furthermore, Italy is capable with or without the consent of the United State of participating in the creation of the new ICC by treaty and is able to transfer part of its universal jurisdictional competence and responsibility to the ICC by such a constitutive treaty.

Italy can certainly render the accused to the ICC for trial once there is a universal jurisdiction over the alleged criminal activity, except when the constitutive treaty forbids Italy from rendering a non-signatory's national to the ICC.

According to the article 13 of the Statute, it is obvious that the Court is capable of exercising jurisdiction if a State Party has referred the case to the Court. Thus, in article 14, "the Court may exercise its jurisdiction" if a State Party refers a situation" to the prosecutor ... in accordance with article 14." [48]In fact, this latter only demands that the "crime [is]

[48] United Nations : Rome Statute Of the International Criminal Court. Art. 12(2)-(3).

within the jurisdiction of the Court" and "appear to have been committed." [49]And, in case the Prosecutor investigated *proprio motu,* the Court will also have jurisdiction. In article 12, the sole limitation is represented by the requirement that either the state on whose territory the crime has been committed or the state of nationality of the accused be a party to the treaty or must have accepted the jurisdiction of the Court by special declaration to that fact. [50]

And as mentioned in this same article, the alternative is that the state on whose territory the crime was committed should be a signatory or must agree to the Court's jurisdiction. As David Scheffer, the U.S. ambassador who led the U.S. delegation at Rome, "under the treaty's final terms, [nationals of] nonparty states would be subjected to the jurisdiction of the court ...

under Article 12". [51]

"Article 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a nonparty state. Under article 12, the ICC may exercise such jurisdiction over anyone anywhere in the world ... if either the state

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[49] See David j. Scheffer, The United States and the international Criminal Court,93 AM. J. INT'L, L. 12, 18(1999)

[50] War crimes within the jurisdiction of the ICC are addressed in Article 12, as supplemented by Article 21(1)(b) and 21(3). See Rome statute, supra note 1, arts. 8, 21(1)(b), 21(3). INTERNATIONAL CRIMINAL LAW : CASES AND MATERIALS 24,84 -86 , 744, 761, 967-69, 984 -94 (1996);

[51] See PAUST ET AL., supra notes, at 95, 102-03, 105

of the territory where the crime was committed or the state of nationality of the accused consents...[and thus] the treaty exposes nonparties[52] ..." In other terms, the ICC can exercise a kind of limited universal jurisdiction. It cannot be assumed that Article 12 awards any universal jurisdiction competence that signatory states have under customary international law and can delegate to a newly created institution and it could not be assumed that jurisdictional competence of the Court will only be based either on territorial or nationality prescriptive jurisdiction, noting that Articles 12, 13 and 14 are consistent with conferral of a limited universal jurisdictional competence.

Important to note that universal concern and competence are stated expressly in the preamble to the Rome Statute affirming that "the most crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be insured by taking measures at the national level and by enhancing international cooperation ... And it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[53]

The preamble provision also stressed on the fact that the conferees were "determined to these ends ... to establish an independent

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[52] See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 392-93, 405-07(1996) (concerning such prescriptive and enforcement competence and responsibility).

[53] See PAUST, supra note 8, at 393, 395 n.9 (concerning enforcement jurisdiction under international law that is often territorially based but can extend into other territory by consent).

permanent International Criminal Court ... with jurisdiction over the most serious crimes of concern to the international community as a whole." [54]

We cannot assume the fact that ICC jurisdiction can only occur if the state of nationality of the accused was a signatory or had specially consented to the jurisdiction of the ICC, understanding the ends, determinations and stated affirmations would be necessary.

Being consistent with customary international law, these ends are part of the object and purpose of the treaty and are a necessary and significant factor for adequate interpretation of a treaty under the law of treaties. Such general legal policies are gambled when the international community is found to have made a significant and historic effort in guaranteeing proper prosecution of some of the most serious international crimes in a permanent International Criminal Court.

And as mentioned in article 17 where a State is not limited to a State Party, "the Court shall determine that a case is inadmissible where:

a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; or

b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute;

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[54] See S.S.Lotus (Fr. V. Turk.), [1927] P.C.I.J. (ser. A) No. 10,at 4, 18-

c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under other portions of the Statute."[55]

Since all states have their own prescriptive jurisdiction over customary international crimes and are able to enter into force this competence once an accused is found under their control, a non-signatory state can then be investigating or prosecuting a case involving its national while another state is referring it to the Prosecutor or the Prosecutor is investigating *proprio motu.* This is when article 17 could preclude ICC jurisdiction under the terms of the ICC constituting instrument.

In reality, the ICC can retain jurisdiction if a non-signatory is investigating or prosecuting an accused and was found to be unwilling or unable genuinely to investigate or prosecute.

Concerning article 18, this article contemplates investigation by the ICC Prosecutor when a non-signatory state also "would normally exercise jurisdiction over the crimes concerned". [56]

The United States, enjoys a nationality and a universal prescriptive jurisdiction over the accused U.S. national. Hence, is it the same if this U.S. national is in Italy?

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[55] M. CHERIF BASSIOUNI & PETER MANIKAS. THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 200-01(1996)

[56] United Nations : Rome Statute Of the International Criminal Court art18.

Would the enforcement jurisdiction be required under article 17 or would the prescriptive jurisdictional competence be sufficient?The United States is capable of conducting an investigation of the person accused in absentia even if Italy has custody and is exercising enforcement jurisdictional competence since the accused was found in its territories.

In fact, if prescriptive jurisdiction is sufficient under article 17, this circumstance is covered by article 17 (1) a), as long the investigation is being conducted in good faith.

If the enforcement jurisdiction under article 17 exists in the United States at the time of investigation,[57] then a U.S. investigation would not preclude ICC jurisdiction when Italy is exercising its enforcement jurisdiction. Italy renders the accused to the Court or the Prosecutor initiates proceedings upon an Italian or Yugoslavian referral or does so *prop Rio mom.*

Since human rights law refuses any trial undertook in absentia, the United States would not actually prosecute any accused not physically present on its territory; in other terms, an accused being in custody in Italy cannot be prosecuted by the United States in absentia.

[57] See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES

It might happen that an accused U.S. national is being prosecuted in a U.S. military court-martial in Italy under the North Atlantic Treaty i.e. the Status of Forces Agreement SOFA and any other agreements with Italy. In this case, the Article 17 (1) a) is applicable. The United States would have then two competences, the concurrent prescriptive competence and the enforcement jurisdictional one.

When Italy is holding an accused U.S. national who is member of the "force", the United States can demand his pursuant to NATO , SOFA along with his "personnel belonging to the land, sea, or air armed forces ... in the territory ... in connection with their official duties"[58]. In fact, despite the fact that both states have prescriptive jurisdictional competence under customary international law, the United States has, under NATO SOFA Article VII (3) a) ii), primary jurisdiction over "offenses arising out of any act or omissions done in the performance of official duty". [59]

It should be noted that international crime is not classified under SOFA as an act or omission done in the performance of official duty where this term associated with "arising out of" might indicate acts going beyond the specific meaning of official duty activities. The act or omission out of which the offense arises must be "done in the performance of official

[58] Resolutions recognize that a refusal "to co-operate in the arrest.extradition.trial and punishment"of such persons is contrary to the U.N. GAOR,26th Sess.,Supp.No.29.at 88.U.N. Doc.A/8592(1971);see also G.A. Res.3074, supra note 14 : G.A. Res. 96, U.N. Doc. A/64,at 188(1946)

[59] NATO SOFA Article

duty", and international criminal acts cannot properly be classified as acts done in performance of official duty. [60]

Therefore, the United States might want to add to the statute of Forces Agreements a new provision indicating that: "The sending State shall have primary jurisdiction over members of its forces accused of international crimes committed outside the territorial jurisdiction of the receiving State".

Article 89 (1) and (90)-(6) contemplate jurisdiction over non-signatory nationals. Article 90 in itself tackles the issue of the ICC competence and primacy in the case of a requesting state that has jurisdictional competence but is not a party to the Statute for surrender or extradition of its national.

This is applicable when the United States request Italy to surrender the U.S. national to the United States and not to the ICC, and here Italy gives priority to the ICC if the Court has determined that the case is "admissible" and if Italy "is not under an international obligation to extradite the person to the requesting State."

The same article recognizes the fact that the Court is capable of deciding whether the case is admissible when the non-signatory State, that is in this example the United States, is requesting the signatory state, i.e. Italy, to surrender its national. The Court can clearly exercise

[60] See Rome Statute, supra note 1, art. 13(a).

its jurisdiction over the national of a non-signatory in many circumstances.

But, a possible interplay between NATO SOFA and articles 90 (4) and 90 (6) of the ICC Statute may cause a problem. This poses a dilemma whether to respect the ICC or not.

Hence, the United States has a primary concurrent jurisdiction over an offense under NATO SOFA and demands Italy to surrender the accused. Does Italy find itself under the obligation of executing the demand, and does it find itself under an international obligation to extradite the person to the requesting State within the meaning of article 90 (4) or (6) of the Statute?

Normally in that case of the United States and Italy, Italy would surrender a U.S. accused to the United States. This action can be considered as an implied obligation to surrender under article VII (5) a) stating: "The authorities ... shall assist each other in the arrest of members of a force ... and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions". [61]

This means that Italy might agree on handing over the accused or merely assisting in the process and not extradite him to a third pursuant in accordance with an extraordinary treaty or to an institutional process pursuant to some other treaty. And if not, NATO SOFA does not implicate an obligation to extradite to the United States within the

[61] See Rome Statute, supra note 1,. art. 14 (1)

meaning of article 90 (4) or (6) of the Statute, with no interpretation of the article 90 allowing an exception to the primacy of the ICC for surrender of the accused.

Another problem occurs when involving other international agreements and is mentioned in article 98 (2) that prevent the ICC from proceeding "with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court." [62]

But, this agreement does not exist since, for example, NATO SOFA does not preclude every sort of rendering of a U.S. national to another state or to an international tribunal. NATO SOFA only precludes a rendering when it concerns an exclusive or primary concurrent jurisdiction that has the United States over an offense. In any case, this limitation is not clear because NATO SOFA does not expressly require the consent of the sending State in case of extradition or sending to another Sate or to an international tribunal, nor to the Court.

Article 98 does not also preclude ICC jurisdiction over the nationals of a non-signatory or mostly require the consent of the State of nationality in

[62] See Rome Statute, supra note 1,. arts. 13 (c) & 15 (1)

opposition with the case when the request to surrender "would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person, [63] whereas international law simply does not permit immunity of a person accused of customary international crime.

In the end, the ICC will surely have jurisdiction over many non-signatory nationals and will be allowed to exercise a sort of limited universal jurisdiction. Even if the United States does not ratify the Rome treaty, the ICC will have jurisdiction over an accused U.S. national.

B) The U.S.A. and the I.C.C.

The ICC is simply an overdue addition to the family of international organizations, an evolutionary step following the Nuremberg tribunal, and a logical institutional development over the ad hoc war crimes courts in Bosnia and Rwanda. This resumes the idea that worldwide supporters have about the ICC.

The United States however does not see the ICC as part of the normal march of history toward peaceful settlement of disputes around the world. One of the reasons that the United States considers the Statute of Rome harmful to its national interests, to its foreign policy, and menaces the independence and flexibility America's military forces need to defend U.S. national interest around the world, is that the ICC's

[63] See Rome Statute, supra note 1,. art. 12 (2) & (3)

supporters aim to affirm the ICC dominance over nation states and to promote prosecution over alternative methods dealing with the worst criminal offenses.

From the United States perspective, this is a matter of Liberty. U.S. experts consider that the ICC does not fit into a coherent constitutional design delineating the way laws are made, adjudicated, and enforced.

The United States consider that the ICC's authority is vague and excessively elastic and not a court of limited jurisdiction. The U.S. senate for example cannot accept the statute's definition of genocide unless it is prepared to reverse the position it took in February 1986 in approving the Genocide Convention of 1948.

On the contrary, explicitly and without any reservation, Article 120 of the Rome statute argues that no reservations can be made to this Statute. This fact is considered to be an offense to the United States since the Senate does not have the option of attaching reservations to any possible ratification to the statute. This would cost the United States expansive definitional interpretations and politically motivated court. According to some U.S. officials this "no reservation" clause is against the United States benefit, and should never be approved.

From the same perspective, two other offenses are clearly vague: crimes against humanity and war crimes. The real risk is that "an activist court and prosecutor can broaden the language of the terms essentially

without limit. [64]The same vagueness led the US Supreme Court to invalidate state and federal criminal statutes failing to assess the proper notice that can determine the things to be prohibited under the name of "void for vagueness".

In fact, one of the many reasons that can be behind this American opposition is that from the ICC's point of view for example, the United States might be found guilty of war crimes once tackling the problem of its aerial campaigns over Germany and Japan in World War II. "*A fortiori,* these provisions seem to imply that the United States would have been guilty of war crimes for dropping atomic bombs on Hiroshima and Nagasaki". [65]

"The ICC is not needed especially when interjecting itself into extremely delicate matters in inappropriate times", this was the United States voice joined with Israel voting against the statute.

Another problem remains in the ICC's interpretative authority because of the decentralized and unaccountable way in which "international law", and particularly customary international law, is made.

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[64] Charles Madigan & Colin McMhon,A Slow. Painful Quest for Justice: Autopsy of a War Crime Tribunal, CHI. TRIB .

[65] See David J. Scheffer , Developments in international Criminal Law : The United States and the International Criminal Court , 93 AM. J. INT'L L. 12.21 (1999).

Customary international law evolves from practices of nation states over long years of deployment.

The international law sounds so comfortable and familiar to citizens and countries and bounds individuals and nations living under the rule of law.

However, this logic is naïve and abstract to the point of irrelevance from real international relations and in many instances simply dangerous. It mistakes the language of law for the underlying concepts and structures that actually permit legal systems to function, and it seriously misapprehend what law can realistically do in the international system.

In reality, the thing that happens in the international law, more specifically in the customary international law does not apply to any of the tests defining our concept of law.

In common sense terms, law is a system of rules regulating relations between individuals and associations and sources of legitimate coercive authority enforcing the rules. This source is legitimate to the extent it rests on popular sovereignty. And this is again considered to be the sole coherent and acceptable definition to every person who values liberty.

A framework or a constitution that defines government authority and limits it in order to prevent arbitrary power is essential to have real law

in a free society. As written by the great scholar C.H. *McIlwain*, "all constitutional government is by definition limited government".

And as proved by reasonable democratic popular controls over the creation, interpretation, and enforcement of the laws, there must also be political accountability.

These prerequisites are necessary to have agreement in three major structures: first, authoritative and identifiable sources of the law for resolving conflicts and disputes among parties; second, methods and procedures for declaring and changing the law; and third, the mechanisms of law interpretation, enforcement, execution and compliance.

All this does not essentially exist in international law. For democratic legitimization, no process ties international authority to the political consent of the global population.

No definitive dispute-resolution mechanism exists neither do any agreed-upon enforcement, execution or compliance mechanisms. In fact, no international organization truly meets any of the acceptable tests for accountability law-giving, law-interpreting, or law-enforcing institutions.

This constitutional issue is not simply a narrow, technical point of law, and certainly not for the United States, where the overwhelming popular

and political consensus supports the superior state of the constitution over the claims of international law.

Even worse than the ICC's and jurisdictional problems are the Court and the prosecutor which are the statute's main structures.

The most important is the independent prosecutor responsible for conducting investigations and prosecutions where the prosecutor initiates the latter based on referrals given by state's parties to the statute and based on information obtained by the prosecutor himself.

Hence, the General Assembly is prohibited any actual role in the ICC's work where on the other hand, the Security Council refers matters to the ICC .

Law enforcement is considered to be a necessary element of executive power. But, how should the United States act in front of the ICC policy?

In fact, the main concern is not that the prosecutor will target for indictment the isolated U.S. soldier who violates laws and disrespects doctrines by committing a war crime, the main concern should instead be the performance of the top civilian and military leaders responsible for the defense and foreign policy. These are the actual target of the ICC.

Although subsequent indictments and convictions are unquestionably more serious, the United States feels that a zealous independent

prosecutor will try to make dramatic news simply by calling witnesses and gathering documents without ever bringing formal charges.

Hence, what is more important and should be a matter of concern is the assumed independence of the prosecutor.

True political accountability is almost totally absent from the ICC which lacks semblance of democratic accountability and effective governmental oversight and control. If anything, "public choice" analysis tells us that the ICC will be "captured" not by governments but by NGOs and others with narrow special interest, and the time and resources to pursue them.

The United States considers that the American concept of separation of power reflects the settled belief that liberty is best protected when the various authorities exercised by the government are placed in separate branches.

It also prevents the excessive convergence of power in limited numbers of hands and provides good protection for the individual liberty.

The Prosecutor does not answer to any superior executive power, whether it was elected or appointed. The prosecutor is answerable only and partially to the Court.

The ICC's structure contrary to long lasting American principles completely fails to provide sufficient accountability to guarantee vesting the prosecutor with the statute's great power of law enforcement.

Political accountability and politicization are different; the latter should play no part in the decisions of the prosecutor or the court. But, today, the ICC has almost no political accountability and therefore it holds a big risk of politicization according to the U.S. point of view.

This synthesis shows that the main concern is not the isolated prosecution of individual American military personnel around the world, but it is all related to the fundamental American fear of unchecked and unaccountable powers.

ICC supporters are always citing cases where world community failed to pay proper attention to, or failed to interfere in a sufficient timely manner in order to prevent genocide or other crimes against humanity. The new court and prosecutor will now guarantee against such failures.

From the American point of view, this is something fanciful. Deterrence ultimately depends on perceived effectiveness and the ICC fails totally on this. It is thought that despite the ICC administrative competence, it will surely fail to make a difference to war criminals and to the whole world.

Why will a potential perpetrator feel deterred by the mere possibility of future legal action in cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as

they were happening. For example, Paul Pot who has most likely committed crimes against humanity will not be affected by a weak and distant court. Would The Hague succeed where armies have failed?

The US also considers that because parties to the ICC may refer alleged crimes to the prosecutor, we can virtually guarantee that some will, from the very outset, seek to use the court for political purposes. Another significant failing is that the Rome Statute substantially minimized the Security Council's role in ICC affairs.

In requiring an affirmative Security Council vote to stop a case, the statute shifts the balance of authority from the Council to the ICC. [66]

What leaves the ICC unsupervised is that the vote is made by a permanent member of a restraining Security Council resolution. Attempting the marginalization of the Security Council is a key problem posed by the ICC that will deeply influence the U.S. foreign policy. The Security Council fears to witness the intervention of the ICC in its ongoing work with all the attendant confusion between the appropriate roles of the law, politics and power in settling international disputes; it seriously undercuts the role of five members of the Security Council and radically dilutes their veto power.

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[66] Phyllis Hwang, Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court, 22 FORDHAM INT'L L.J. 457,457 (1998).

Finally, these accumulated political and legal issues strongly influenced the US decision makers and is still pushing them towards more and more hostile positions regarding the ICC.

C)The effectiveness of the I.C.C.

Studying the effectiveness of the international criminal court and factors influencing that effectiveness requires a look at the history of each international criminal tribunal knowing that international criminal courts are the products of the political circumstances that create them.

a) Analysis of the newly legislated international criminal tribunals:

The International Military Tribunal at Nuremberg, the International Military Tribunal at Tokyo, the recent International Criminal Tribunals at for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

The factors governing the degree of these tribunals effectiveness comprise the level of defeat among the losing parties, the degree of collaboration among the winning parties, the approvals of judicial procedures unacceptable under almost any other circumstances and the weight of the evidence presented.

In breif, the experience of international criminal tribunals during the twentieth century shows that these courts cannot be detached from the political will and military power of the alliance supporting their creation and enforcing their verdicts.

The creation of a permanent international court (ICC) brings hope that the precedents of Nuremberg may be used to end impunity for gross violations of human rights. [67]

The success of the International Military Tribunals at Nuremberg and Tokyo at the end of the Second World War, that established precedents for the enforcement of international criminal law and human rights, in both trial results and public perception were achieved because of a range of factors starting from the degree of collaboration among winning parties, approvals of judicial procedures unacceptable under other circumstances and the weight of evidence. [68]

From the histories of these international criminal tribunals, we can see how they succeeded at Nuremberg and Tokyo, and how they failed to repeat that success in the Former Yugoslavia and Rwanda.

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[68] See David J. Scheffer, Developments in International Criminal Law: The United States and the International Criminal Court, 93 AM.J. INT'L L. 12,21 (1999) ; Phyllis Hwang, Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court, 22 FORDHAM INT'L L.457,457(1998)

This part is a brief history of modern international criminal tribunals: Nuremberg, Tokyo, the ICTY (International Criminal Tribunals for the Former Yugoslavia) and the ICTR (International Criminal Tribunals or Rwanda) and is essential in order to better understand the political and legal outcomes of such tribunals.

It must be clear that the jurisdiction of the Court is complementary to that of the national courts, and the court can only step in where the national system was unable or unwilling to prosecute a case, and had become an accomplice to the crime by shielding the accused or failing to initiate prosecution.

The United States, as we have seen before, fears that an abuse of this principle of complementarities could lead to inappropriate or biased prosecutions against U.S. nationals.

But like any national court, the ICC should have mechanisms to rein in a runaway prosecutor and it is proper for the judges to screen and approve investigations.

And unlike any national criminal court, the ICC is wholly dependant on the cooperation and assistance of national governments if it is to perform even its most basic functions. It is a hostage to them for its effectiveness.

Sometimes governments act as allies – as did the FBI in arresting the Rwandan indictee in Texas at the request of the Rwandan Tribunal.

It must be noted that an international body cannot protect its witnesses after they have testified and left the court because it has no police force. Protection can only be given by the local authorities in the country in which the witness lives.

The danger to a witness, who testifies about war crimes, and the international court's inability to provide protection, may make it all but impossible to prosecute crimes during an ongoing conflict where the only evidence is the testimony of insecure victims and eyewitnesses.

The ICC must be able to send its investigators to any country at any time to conduct investigations as they wish. When they need the help of local police, it must be made available and unconditional. The excavation, for example, of a mass grave and the forensic examination of its contents is a large-scale engineering operation, so the site must be kept secure from local residents who may believe themselves to be suspects in the crimes under investigation.

If the ICC orders an unwilling government to arrest an indictee or disclose its documents and records, there must be an agreed range of sanctions which the U.N. will be able and willing to impose to force compliance.

This indicates that national cooperation and international enforcement powers are essential for the creation of an effective ICC. As a Bosnian journalist argued, the implementation of the court's orders "depends on the good will of the local authorities" in Croatia and Serbia. In these countries the people who plunged them into the war and continued the war are still in power.

1- The Nuremberg and Tokyo Tribunals:

The international criminal tribunal at Nuremberg and Tokyo were the modern precedents for international criminal liability for genocide, war crimes, crimes against humanity, and aggressive war. [69]

In fact, at Nuremberg, some Nazis were sentenced to death, and others to prison, while in Tokyo, two former Japanese premiers and some generals were hanged.

The nature of criminal law is coercive, thus the international criminal tribunal could be as much effective as the unified political will and military power of the alliance creating and supporting it. Many differences can be noticed in the tribunals at Nuremberg and Tokyo because of many factors comprising the relative powers and interests of the participating nations and the structure of authority.

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[69] Gabrielle Kirk McDonald, The Eleventh Annual Waldemar A.Solf Lecture: The Changing Nature of the Laws of War, 156MIL.L.REV. 30,51(1998)

The Big Four powers negotiated the creation of the Nuremberg tribunal at London.[70] The Tokyo tribunal, in contrast, was created by the declaration of General Douglas Mac Arthur acting as supreme commander of the Allied Powers.[71]

The judges sitting on the Tokyo tribunal represented the eleven nations of the Far Eastern Commission, but Mac Arthur retained the sole authority to review prosecutions and sentences. [72]

The literature on the Nuremberg trials is vast, but it must be said that the condition which resulted in the establishment of the first modern international criminal tribunal and its prosecution of twenty-one former military and political leaders of one of the world's strongest powers are not likely to occur again. [73]

These conditions include the unconditional surrender of Germany, the poor prospects of escape, the relatively balanced alliance of the three great world powers, widespread international support and attention, and

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[70] Jonathan I.Charney,Editorial Comment : Progress in International Law ?, 93AM.J.INT'L L.452,455(1999)

[71] Charles Madigan & Colin McMahon, A Slow, Painful Quest for Justice : Autopsy of a War Crime Tribunal, CHI. TRIB., Sept.7,1999, at 1.The defense counsel for Dusko Tadic before the ICTY,Michail Wladimiroff, said in a situation like Bosnia"[y] ou aer not going to prosecute your own people."Id.

[72] Generally called in this Note the "Nuremberg tribunal" and the" Tokyo Tribunal" respectively.

[73] Taylor, infra note 20, 86 .

the Nazis' habit of keeping meticulous records of their genocidal activities. [74]

The allies achieved the unconditional surrender of Germany in 1947 which meant no negotiated terms but a complete submission to the victorious parties that were controlling Western Europe so they sealed off any escape.

But, they had one thing in mind: not to negotiate with the Nazis who were atrocious and liars.

The allies were divided, after the surrender of Germany, concerning the post war policy.

Russia ruled by Joseph Stalin wanted to establish hegemony in Eastern Europe and to sponsor communist revolutions worldwide.

The United States ruled by Roosevelt wanted to sponsor the democratic principles.

The United Kingdom ruled by Churchill wanted to keep her colonization and remain an imperial power.

Britain and Russia cooperated with the United States concerning the peace keeping in germany. France was too weak and defeated, but Britain and the United States wanted to restore the French power considering it necessary to confront Russia and Germany.

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[74] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF. 183/9,37I.L.M. 999 (1998)[hereinafter Rome Statute].

After the "unconditional surrender" of Germany, Hitler was dead and the German leaders surrendered to the United States and the United Kingdom. The Nazi leaders were surrounded by various armies, so they couldn't escape.

Later on, they were tried by an international military tribunal. The Nuremberg Tribunal, however, was limited to convict the crimes of the losing Axis Powers, and not crimes committed by Allied Powers.

The nations worldwide were then highly interested in the Nuremberg trials, following the publicity of atrocious crimes committed during the Nazi occupation. Therefore, the focus was to impose international criminal liability for aggressive war, crimes against humanity, war crimes and genocide.

By focusing world outrage, assuaging grief and stimulating German soul, the Nuremberg trials facilitated a catharsis to the Second World War. That is by no means complete, but is certainly better than the festering scars of the peace of Paris in 1919. [75]

The trials of the Nazis at Nuremberg relied mostly on the documents and careful records kept by the Nazis, so they incriminated themselves. Their fastidious habit of maintaining a big number of documents

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[75] See Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,Aug.8, 1945, art.6,59 Stat.1544, 82 U.N.T.S. 279,286-88; ROBERT JACKSON,THE NURNBERG CASE(1947)[hereafter Nuremberg Charter].The crime of aggressive war is called" crimes against the peace "in the Nuremberg and Tokyo charters. See generally id.

showing their planning and execution of thousands and exterminating their enemies made them pay a lot.

These facts in addition to the circumstances of the collapse of Nazi Germany resulted in great success for the International Military Tribunal at Nuremberg and international support for the verdicts. Not since then have these relatively equal powers, accepted the unconditional surrender of leaders of a major world power through force of arms and a demoralized enemy, established a joint occupation, prosecuted the enemy for war crimes by relying largely on that enemy's own documents. [76]

By contrast, the Tokyo tribunal shows how political realities influence the effectiveness of the enforcement of international criminal law. Although, the allied forces had shattered Japan's industry and navy, the main problem was that millions of armed Japanese remained resolved to die for their Emperor in suicidal attacks.

For that reason, the Emperor status consisted of a debated subject, for he inspired fanatical militarism, and his removal was necessary.

The emperor alone had the power to amend the Japanese constitution, however, so the United States considered that his status could help in the period of the postwar, especially concerning the issue of reforming the Japanese nation. The Japanese agreed to surrender under one condition; that the emperor remains the sovereign ruler of Japan.

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[76] TELFORD TAYLOR , THE ANATOMY OF THE NUREMBERG TRIALS 602 (1992)

They committed suicidal attacks to achieve this point, so the Allies acquiesced to their insistence and they granted this one concession to the Japanese. The Emperor, willingly, cooperated with the allied powers.

This U.S. conduct offended the courts status among those who wanted to try him as a war criminal.

When General Mac Arthur stated that such a trial would have tragic consequences, including the implementation of military government and at least one million reinforcement troops to combat probable resistance and guerilla warfare, criticism stopped. [77]

By then, the U.S. public was demanding to bring the soldiers back home and the rising costs and daily risks of occupation prevailed over the issue of getting the emperor to be tried.

The Australians and Russians objected to the U.S. decision to spare the Emperor of Japan. Their opposition, however, was worthless because the "Americans, as the principal occupying power, had vetoed all Allied forces preparations to invade Japan, the U.S. troops outnumbered the rest of the world's warships and were under the Supreme command of General Mac Arthur.

After Japan's surrender General Mac Arthur played the mediator between the Emperor and his government. Although the supreme

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[77] Id.at 613

commander exercised little operational control over the Tokyo Tribunal other than declaring the Emperor unimpeachable, his dominance over Japan and his ultimate power to review sentences left the lasting impression that the Tribunal administrated the victor's justice. [78]

The Tokyo Charter provided: "the tribunal shall not be bound by technical rules of evidence, it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence that it deems to have probative value". [79] The results of the Tokyo Tribunal were harsh but inconsistent, and they did not enjoy the respect of the Nuremberg Tribunal because of many cases of trials.

The Tokyo Tribunal, unlike the Nuremberg Tribunal, carried little independent moral force. Several circumstantial factors differentiated the two, and these factors were both political and legal:

1) The German surrender was truly unconditional, while the Japanese surrender was conditional on the Emperor's continued sovereignty and criminal immunity;

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[78] Id

[79] See David J.Scheffer, Developments in International Criminal Law: The United States and the International Criminal Court, 93 A.M. J. INT'L L. 12,21(1999).Scheffer describes how the final text of the Rome statute includes the crime of aggression , even though the conference had reached an impasse in trying to define it.Id. As a result , the United States did not immediately or enthusiastically sign the treaty . Id

2) Germany was almost completely conquered by the Allied Armies, while Japan's armies retained the strength and the will to fight;

3) Germany was already divided by the occupying armies when the Nazis capitulated; while Japan's occupation was accomplished under a unified command dominate by the United States;

4) The Big Four negotiated the Nuremberg Charter by a treaty, giving it international standing, while the Tokyo Charter was decreed by the Supreme Commander of the occupation forces;

5) While a majority vote was required in both tribunals, rulings in the Nuremberg Tribunal were often handed down, with the consent of three out of four judges, whereas in the Tokyo Tribunal a simple majority of the eleven judges could rule on procedure, verdicts, and sentences;

6) At Nuremberg, the prosecution had convincing evidence against most of the defendants without pushing liberal rules of evidence, while at Tokyo, the prosecution had at least one very questionable conviction and death sentence and did so by arguably stretching the same rules of evidence. [80]

[80] BRACKMAN, supre note 12, at 59-60

2 - The international Criminal Tribunal for Yugoslavia and Rwanda ICTY & ICTR:

No international Criminal Court was created for more than forty years after the Nuremberg and Tokyo Tribunals.

Though a near consensus existed among the international lawyers that such a court would facilitate justice, law, and order in lands torn by war and anarchy, the unsolved questions of how such a court would work and what its jurisdiction would be remained unresolved. [81]

Despite growing violations of human rights law[82] and stark images of crimes against humanity in places such as Cambodia and Iraq, the United Nations did not establish another International Criminal Court until atrocities in the Balkans continued unabated for several years.

The United States and several European powers postured and issued threatening press statements against the conflicting parties in the former Yugoslavia, but the problem only became worse. Eventually, after Croatia had declared its independence from Yugoslavia and

[81] TAYLOR , supra note10 , at 75

[82] BRACKMAN , supra note 12 , at 60

Bosnia-Herzegovina had become a bloody killing zone, the United Nations Security Council created the ICTY on May 1993.[83]

Less than a year later, Rwanda erupted in genocidal violence after president Juvenal Habyarimana was assassinated, resulting in the deaths of approximately 800.000 people and the dispersal of 2 million refugees to neighboring countries. The United Nations Security Council created the ICTR at the end of 1994.[84]

The ICTY [85] and ICTR, [86]like the Nuremberg and Tokyo tribunals, were ad hoc courts of limited jurisdiction. These two courts were created to respond to a large scale international conviction of war crimes and acts of genocide that should not go unpunished.

Under the jurisdiction of the ICTY ,the grave breaches of the Geneva Conventions of 1949, violations of laws or customs of war, genocide, and crimes against humanity were classified. As for the ICTR it only omitted war crimes from its jurisdiction.

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[83] See id.Those nations were Australia, New Zealand, Canada, the Netherland, France, Britain, the united States, the Soviet Union, China, and two colonial territories on the brink of of independence: India and the Philippines.Id.The Allied Council for Japan that advised the Supreme Commander consisted, however, of just four nations : Britain,China, the Soviet Union, and the United States.Most of the occupation troops in Japan were Americans. Id.

[84] War Crimes and the Limits of Legalism,97 MICH.L. REV. 2103,2115 (1999) reviewing MARTHA MINOW,BETWEEN VENGEANCE AND FORGIVENESS : FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998) and MARK OSIEL , MASS ATROCITY COLLECTIVE MEMORY , AND THE LAW (1997)

[85] TELFORD TAYLOR , FINAL REPORT TO THE SECRETARY OF THE ARMY OB THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO.10,at 86 (1949)

[86] RAYMOND G.O'CONNOR , DIPLOMACY FOR VICTORY:FDR AND UNCONDITIONAL SURRENDER(1971) ; RONALD H.SPECTOR , EAGLE AGAINST THE SUN , THE AMERICAN WAR WITH JAPAN 222-23 (1985)

a) International Criminal Tribunal for the Former Yugoslavia ICTY

War crimes in the Balkan wasted too much time in the past history. June 28, 1389, St. Vitus day witnessed the defeat of the Serbs by the Ottoman Turks at the Battle of Kosovo.

Muslims ruled most of the Orthodox Serbs for the following five centuries when they forced the Serbs all along that period of time to accept a second-class status. What happened then led to continuous revolutions and conversion of a number of Serbs – especially in the cities – to Islam in order to gain better status.

But, later generations of Serbs resented the local Muslims for the decisions of their ancestors.

To the west, Catholic Croats and Slovenes became part of the Hapsburg Empire and maintained relatively close ties to Austria, Hungary, and Italy and tense relations with Muslim Bosnians and Orthodox Serbs to the East and South. [87]

After the Balkan wars in 1912 and 1913, the Serbs obtained independence from the Ottoman Empire. Violent acts committed by Serb nationals marked that period. The goal was to change the ethnic character of the entire regions and unite all Serbs throughout the Balkans.

[87] DAVID EISENHOWER , EISENHOWER : AT WAR , 1943-1945, at 797 (1986)

In an attempt to force the hated Austrians out of Bosnia-Herzegovina, a Bosnian Serb nationalist and anarchist named Gavrilo Princip fired the fateful bullets that killed the Archduke Franz Ferdinand, heir to the Hapsburg throne.[88]

June 28, 1914, 525 years after the battle of Kosovo was the date of the assassination. Serbia had to rely on its traditional orthodox ally, the Russian Czar, after refusing the Austrian demands of handing over the conspirators to justice; and a series of international alliances set off the World War 1.

The Serbs fought on the winning side, and the Peace of Paris in 1919 gave birth to Yugoslavia, "the Land of the South Slavs".[89] King Alexander of Serbia united an uneasy dominion of Serbs, Croats, Slovenes, Macedonians, and other ethnicities, but this kingdom could not survive the onslaught of the Second World War.

Between the wars, Italian Fascists supported the Ustasha movement for Croatian independence; and Ustasha assassin murdered King Alexander in 1934. After the Germans and Italians invaded and partitioned Yugoslavia in 1941, the Ustasha gained supremacy in Croatia and Bosnia-Herzegovina and applied Nazi methods to exterminating the Serbs.

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[88] THE DIPLOMACY OF WORLD POWER : THE UNITED STATES , 1889-1920154-55 (Arthur S.Link & William M.Leary ,Jr., eds., 1970)

[89] JOHN TOLAND , THE LAST 100 DAYS 529 (1965)

It was the Croats that coined the term "ethnic cleansing;" in acts of calculated terror. They killed more than half a million Serbs and drove off a million others.

A Croatian communist by the name of Josip Broz Tito reunited Yugoslavia by driving out the Fascists and the Nazis and causing the murder of more than 100.000 Croats during the surrender of Ustasha at the end of a civil war in 1946.

Though the federal union of the six republics within Yugoslavia remained weak, Tito maintained control through his ruthless secret police and redrew state boundaries to disperse the Serbs among several regional governments. [90]

Tito was helped by the Soviets to unite the factions within the Yugoslav union by the Soviets threats to invade, when he died in 1991, war broke out.

While the origins of ethnic strife in the region are ancient, a government project of the nineteen eighties undertaken "from the top down incited rabid Serb nationalism".

Milosevic reminded the Serbs of the long period of oppression from Ottoman Turks to the Croatian Ustasha, that hard period that lasted centuries; and, Television was Milosevic's powerful propaganda tool.

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[90] EISENHOWER , supra note 22 , at 794 – 805

In 1991, he prevented the Croat Stipe Mesic form assuming the federal presidency as provided under the constitutional rotation. Then Croatia and Slovania declared independence and Milosevic sent units of the Yugoslav national army into those regions.

In the fall of 1991, the Serbs seized control of one third of Croatia's territory while Slovenia withstood the attacks of Serb forces and forced their withdrawal. They also murdered in Vukovar two hundred hospital patients and buried them in a mass grave. The U.N. then brokered a cease-fire after heavy casualties and achieved the withdrawal of the Yugoslav army.

But, Croatia did not wait long to regain its lost territories; when, after four years, it was rearmed with German aid. Bosnia-Herzegovina voted for the secession on March 1, 1992 rather than to stay attached to the nationalistic Serbs dominating Yugoslavia, composed of 43% of Slavic Muslims, 31% of Serbs, and 17% Croats.

The European community and the United States recognized then the independence of Bosnia.

The immediate attack was made by the Serbs using demobilized troops from the Yugoslav national army and Bosnian Serb militias. They controlled 70% of Bosnia's territory.

In the areas under Serb control, "ethnic cleansing" of non-Serbs was the policy: murder, beatings, rapes, concentration camps, confiscation of properties, and the burning of villages. [91]

The Serbs had displaced, by the end of 1994, 90% of the 1.7 million non-Serbs who had once lived in Bosnia. The Security Council, took no effective action to prevent the "ethnic cleansing." Had UN soldiers entered Bosnia at the time of the referendum for Bosnian independence, the Serbs would have been unable to exploit the military weaknesses of Bosnians without triggering an armed response from the Security Council. [92]

While the Serbs continued receiving arms from Belgrade, the Bosnian Muslims were under arms embargo. During this period, the U.N. economic sanctions had little effect. Still, the "no-fly" zone was also violated; the "safe-areas" under the U.N. witnessed horrible massacres, noting that the U.N. never held the threats back with force until NATO air strikes happened in 1995.

The result was the death of 100.000 victims during the interval of the Bosnian war in 1992 and the bombing campaign in 1995. The first international criminal tribunal since W W 2 was created by the Security Council after failing in the prevention of the carnage.

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[91] DAVID MCCULLOUGH , TRUMAN 345 (1992) . Roosevelt died on April 12 , 1945

[92] See RANDALL B. WOODS & HOWARD JONES , DAWNING OF THE COLD WAR : THE UNITED STATES' QUEST FOR ORDER 3-5 (1991)

The ICTY was an ad hoc court established under the chapter VII of the U.N. charter that gives the Security Council the authorization to enforce the peace. Cooperation with investigations and arrests were imposed by the ICTY statute on all members of the United Nations.

The ICTY spent most of its first three years dealing with administrative matters: offices and staff for the head quarters at The Hague, field offices in the Balkans, international cooperation in arrest and detention, funding, electing judges, and adopting rules of procedure and evidence. The tribunal's first trial, Prosecutor v. Dusko Tadic, resulted in a conviction, but it illustrated some problems that became inherent in the ICTY. [93]

Being safe from prosecution in Belgrade or in Bosnia Serb territory, the suspects that were the most responsible for the policy of ethnic cleansing were causing the most obvious problem for the ICTY.

As important as the Tadic trial was as a precedent, Tadic himself was by no means a major player in the Balkan politics, even if he was a despicable character. Radovan Karadzic and Ratko Mladic, for instance, were two of the most notorious suspects for Bosnian war crimes, but neither Bosnian Serbs authorities nor the Federal Republic of Yugoslavia did cooperate in arresting them.

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[93] SULZBERGER,SUCH A PEACE:THE ROOTS AND ASHES OF YALTA 124-26,158-61(1982)

Milosevic has also been indicted but as head of the government of Yugoslavia he was not likely to be captured without a coup d'état. Indeed, it is arguable that the indictment made him less likely to step down from power.

Most recently, the new Yugoslav foreign Minister, Goran Svilanovic, insisted that any trial of Milosevic or his advisors, whether for international human rights violation or domestic crimes, must take place on Yugoslav soil. [94]

b) International Criminal Tribunal for Rwanda ICTR

The population of Rwanda reached around eight million in April6, 1994. 85% of it were Hutus and 14% were Tutsis. [95]

From April to July 1994, somewhere between 500.000 and 800.000 were killed, most of them Tutsis. [96]

The reasons of the conflicts go back to many past centuries. After being ruled successively by the Germans and Belgians, independence happened in 1962. The Hutu majority dominated Rwanda and forced thousands of Tutsis into exile, often in Uganda.

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[94] See THEODORE A. WILSON, THE FIRST SUMMIT : ROOSEVELT AND CHURCHILL AT PLACENTIA BAY 1941 64 (1991)

[95] See WILSON , supra note 30 , at 64 .

[96] LEON MARTEL, LEND-LEASE, LOANS, AND THE COMING OF THE COLD WAR : A STUDY OF THE IMPLEMENTATION OF FOREIGN POLICY 4-6 (1979).

In a process like the one that created the ICTY, the Security Council created the ad hoc ICTR. Several points of tension between the ICTR and the Rwandan government nonetheless remained. First, the ICTR was controlled by foreigners but pursued justice for crimes committed in Rwanda and adjacent countries. [97]

Two cases in particular deserve mention as milestones in international law. In Prosecutor v. Akayesu, an international criminal tribunal tried and convicted an individual for genocide and crimes of sexual violence. The tribunal defined rape, listed as a crime against humanity under the ICTR statute, and applied its definition in a human rights context. [98]

In Prosecutor v. Kambanda, the ex-premier of Rwanda, Jean Kambanda, became "the first person in history to accept responsibility for genocide before an international court." [99]

Too slow for the demands of justice and too small for the task of punishing a massive government-mandated genocide, the ICTR has nonetheless set important precedents in international criminal law.

b) The EFFECTIVENESS of the International Criminal court

The ICTY and the ICTR provided the impetus for the creation of a permanent international criminal court despite their flaws. A permanent

[97] See WILLIAM L. SHIRER , THE RISE AND FALL OF THE THIRD REICH : A HISTORY OF NAZI GERMANY 1091-92 (1960)
[98] See JAMES LUCAS , LAST DAYS OF THE THIRD REICH : THE COLLAPSE OF NAZI GERMANY , MAY 1945 , 574-75 (1986)
[99] MCCULLOUGH, supra note 27, at 407-08

international criminal court was contemplated at the end of the First World War and again after Nuremberg, but was shelved due to the Cold War politics until the fall of Berlin Wall in 1989. [100]

New opportunities in human rights law were offered in 1991 when bipolar geopolitics ended and the experience of international cooperation took place during the Persian Gulf War.

The trials before the ICTY and the ICTR following the crisis of Yugoslavia and the genocide of Rwanda brought again the hope that weak people are not always the victim.

In Rome, summer of the year 1998, most of the world's nations gathered to negotiate a statute in order to create a permanent international criminal court. There, the Rome Statute of the ICC was adopted.

But, how would this court really work? The most debated provisions of the statute include:

1) The crimes under jurisdiction of the court

2) The definitions of those crimes

3) The independence of the office of prosecutor [101]

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[100] LUCAS , supra note 35 , at 574

[101] See generally MOSHE PEARLMAN , THE CAPTURE AND TRIAL OF ADOLF EICHMANN(1963) . Mengele too was eventually captured and tried. See generally GERALD POSNER & JOHN WARE , MENGELLE : THE COMPLETE STORY (1986)

And one of the vital conditions for the success of the court is the general obligation of nations to cooperate with the investigations and indictments of the court and the rules of procedure and evidence.

The jurisdiction of the ICC is "over persons for the most serious crimes of international concern ... and complementary to national criminal jurisdictions." [102]

These serious crimes comprise genocide, crimes against humanity, war crimes and aggression, noting that many delegations insisted on the inclusion of drug-trafficking and terrorism with the above listed crimes.

The Rome Statute can and does contain substantive law, including definitions of genocide crimes against humanity, and war crimes because the ICC is the creation of international treaty, not an ad hoc arm of the Security Council. In this way, international criminal law, which first developed ex post fact at Nuremberg, is becoming positive law. [103]

The definition of genocide is often difficult to be determined. Crimes against humanity include murder, extermination, enslavement, deportation, unlawful imprisonment, torture, rape and sexual violence, persecution, enforced disappearance of persons, apartheid, and other inhuman acts As for war crimes, these are defined in the Geneva Convention and the definition is adopted by the Rome Statute.

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[102] TAYLOR, supra note 10 , at 59

[103] Bass, supra note 19 , at 2103-04

The nations at the Rome Conference were divided into three groups: the largest cheered a strong court independent from the Security Council, the second consisted of the permanent members of the Security Council, who insisted on a strong role for the Security Council over the jurisdiction of the ICC as well as the exclusion of nuclear weapons from the list of prohibitions by the statute, and third was hostile to the Security Council and insisted on the prohibition of nuclear weapons and was in favor of a court with restricted powers.

Thus, it became obviously clear that a large number of countries preferred an independent prosecutor from the Security Council and free to pursue investigations and indictments at discretion. Yet as we have already seen, even without ratifying the treaty, any nation is expected to find its nationals under investigation and international indictment.

The Statute set three relatively easy triggers for the exercise of jurisdiction:

1) referral to the prosecutor by a state party

2) referral to the prosecutor by the Security Council

3) the prosecutor's discretion[104]

[104] LUCAS , supra note 35 , at 80-94

The statute allows a state to opt out from granting jurisdiction over war crimes for the limited period of seven years commencing from the date of ratification while no other reservations can be allowed.

The ICC protects its victims - like the ICTR and the ICTY – by conducting proceedings in camera or by electronic means. The trial chamber is consisted of three judges whereas the Appeals Chamber of five where the decision is taken by the majority vote.

Indeed, the ICC adopts the same European civil law rules on the admissibility of evidence taking into consideration the probative value of the evidence and any prejudice. And the statute also allows the prosecutor and the defendant to appeal a verdict. Two third majority of the Assembly of States vote other rules of procedures and evidence.

I- Factors affecting International Criminal Court effectiveness

The principles of Nuremberg enforced by the ICC include individual criminal accountability under international law for war crimes, crimes against humanity, aggressive war, and genocide, even if the individual acted upon the orders of his superiors, or merely failed to act in his official capacity to stop the crime.

Factors that determine the effectiveness of the ICC and control that of the prosecutor's actions are:

1) The degree of physical control exercised by the enforcing powers

2) The degree of cooperation among the enforcing allies, neighboring countries and interested parties

3) The perceived integrity of the tribunal's procedures

1) The degree of physical control

The degree of physical control over the Jurisdiction and the Defendants is related to the state's defeat in war and its severity and is well illustrated by the four international tribunals since the Second World War.

Fourty- five years later after it all began with Nuremberg when the Nazis defeat was total; the ICTY was created by the United Nations without exercising physical control and obtaining regional cooperation over most of its territorial jurisdiction and defendants. What triggered criticism was the inability of the ICTY to arrest and try the persons responsible for the war and atrocities in the Balkan.

Although it has convicted several higher officers since the Tadic trial, what mostly and severely hindered its mission is the lack of its physical control by the soldiers under the authority of NATO or the United Nations.

Thus, the ICTR largely depended on the cooperation of the Rwanda Unity Government, Rwanda's neighbors, and other countries in order to enforce service of its criminal indictments.

2) Degree of Cooperation Among the Enforcing Allies

This factor varies according to the case and the Nations involvement. The power of the ICC to investigate and to serve its indictments depends on geography, history, domestic politics, traditional alliances, and conflicts of interest.

For the ICTY, international cooperation has not been given, even to the extent found at the Tokyo Tribunal. So long as there is stalemate in the Balkans, whether peaceful or bloody, national loyalties and diplomatic expediency will hinder, if not prevent the completion of the ICTY's mission. [105]

Milosevic and his henchmen had no incentive to resign or retire, much less surrender to NATO or UN authority because of the ICTY indictments for war crimes.

Now that Milosevic is out of power, the ICTY still relies on the new regime in Belgrade to extradite those indicted, or hope that Milosevic and others will either give themselves up or go where NATO soldiers or UN-peace keepers can and will serve warrants.

The ICTR has not had as extensive a problem serving its warrants as the ICTY. First, Rwanda suffered not war, but government-sponsored

[105] See generally Nuremberg Charter , supra note 9;see also supra note 36 and accompanying text.

genocide and is not partitioned by political factions. Secondly, Rwanda is not the flashpoint for competing world powers, as is Yugoslavia.[106]

3) The Perceived Integrity of the Tribunal's Procedures

The perception of the justice administrated by an international criminal tribunal is just as important to the court's credibility as verdict in any single case. "Justice must not only be done but also be seen to be done." [107]

We must never forget that the record upon which we judge these defendants today is the record upon which history will judge us tomorrow ... We must summon such detachment and intellectual integrity to your task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice. [108]

First problem is the three–way conflict of legal positivism, legal realism, and natural law. In fact, the international criminal tribunal must go where the law has never been.

At Nuremberg, the Big Four powers appeared to have pushed beyond the limits of positive law and regular procedures without offending decency and justice.

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[106] See generally Nuremberg Charter , supra note 9 .

[107] MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 181 (1997) . Id. NORMA FIELD , IN THE REALM OF A DYING EMPEROR 45 (1991) .

[108] Bass , supra note 19 , at 2112

At Tokyo, in contrast, the tribunal failed to match the credibility of Nuremberg, and this failure illustrates one of the pitfalls of an international tribunal. The prosecution pushed the rules of evidence to the limit in order to convict Hirota and Kido of the crime of aggressive war, and by the time the trial was complete, it was obvious that the same evidence and testimony could also convict the absence of the Emperor.

Hirota was executed and Kido was sentenced to life in prison, but the Emperor remained above the law. It may be possible that a prosecutor of higher stature might have overcome the general point of view that the Tokyo Tribunal was a tool for political expediency.

In fact, what really happened was that once the Supreme Commander declared the Emperor being off-limits to the Tribunal, Joseph Keenan's hands were tied on the most critical issue of war crimes. He did his best but could not be Robert Jackson nor could avoid the impression of being the instrument of revenge.

And the ICTY's credibility falls mostly when it fails to arrest the defendants where it also encounters the second worst credibility problem which is the lack of speed.

At Nuremberg, the prosecution presented most of its case by submitting documents.[109]

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[109] Bass , supra note 19 , at 2112

The defense witnessed consumed most of the trial time, but the documents were damning and conclusive. On the contrary, the ICTY must prosecute most cases using dozens of witnesses and relatively few documents.

What undermines the credibility of the ICTY verdicts is the dependence of this latter on conflicting testimony. The civil law rules of evidence are broad. The rationale is that judges trained in the law, unlike common law juries, can weigh evidence on the whole, even hearsay evidence, and weigh it justly.

The ICTR may seem more successful than the ICTY because it has already convicted some of the major players in the Rwandan genocide, namely Kambanda and Ykayesu.

The conviction of Akayesu on a genocide charge was unprecedented in an international court. Any credibility of the ICTR superior to the ICTY is mainly due to the ICTR's ability to gain jurisdiction over those it indicts.[110]

The ICTR should not be blamed for the fact that many people around the world, and perhaps even in Rwanda, are not aware of its existence. The point is that international publicity is a major factor in the credibility of an international court, not only as a legitimate instrument of the rule of law, but also as a deterrent to similar crimes.

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[110] MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 15 (1997).

The ICTR can only try a fraction of the criminals. More than 140.000 are in custody for crimes against the Tutsis, a number a poor country can hardly sustain in its court systems or jails. "A perfect genocide – in which the rule of law has not been violated, because murder was the law – shatters the logic of criminal justice by redefining deviance." [111]

II - The ICC's Effectiveness Prediction

The general success of an international criminal tribunal is determined by three predictive factors: the degree of control by the enforcing powers, the degree of cooperation among the interested powers, and the integrity and credibility of the court.

The effectiveness will be case-specific and based on the following factors:

1) Two hypothetical Conflicts

If the ICC had been in place in 1990, it probably would have served the station in Rwanda better than the ICTR because the first trials would have taken place two to three years earlier.

A permanent ICC would have improved upon the lagging speed of the ICTY trials as well.

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[111] See JOHN W. DOWER , EMBRACING DEFEAT : JAPAN IN THE WAKE OF WORLD WAR II 443-84 (1999).

Crimes such as those committed by Saddam Hussein in Iraq, Kuwait and Israel are probably beyond a judicial remedy.

Crimes committed by a member of the Security Council such as China are most likely untouchable by the ICC or any other court.

After a genocidal bloodshed, the rebuilding of a country requires a rapid international response, if the ICC had been in place it could have spared the Rwandans months of waiting for the negotiation of jurisdiction of the ICTR and the first trials.

The ICC and the Rwandan Unity Government could have negotiated and divided the vast caseload according to the urgency and the magnitude.

While the genocide was still news, the ICC could have been issuing warrants and serving indictments. The Rwandan Unity Government could have immediately shipped out the leading suspects to the ICC sitting at The Hague.

Especially for the most notorious planners and executers of the genocide, the ICC would have been a suitable forum and may have commanded the world's attention and respect.

In the case of Yugoslavia, it is questionable if the ICC could have improved the work of the ICTY in any way other than shortening the length of the trials held.

It can be argued that if the ICC had existed in 1991, it may have deterred Milosevic and the Yugoslav federal government in Belgrade from launching an aggressive war to prevent Croatian, Slovenian and Bosnian secession.

It is just as likely that the Serb nationalists would not have taken any international authority seriously unless it was backed up by assertive ground forces of a major power.

The unwillingness of the United States to shed the blood of ground troops in the Balkans combined with the fear that a US led invasion of Serbia would provoke Russian intervention has thus given the Serb nationalists a relative immunity.

Thus, in the former Yugoslavia, the lack of physical control over the territory of the conflict's main instigator severely hindered the success and credibility of any international criminal tribunal, whether the ICTY or the ICC.

2) Predicting the ICC's Effective Deterrence

The ICC's most enthusiastic proponents acknowledge that political realities will often clash with the enforcement of human rights law, but

they argue that the ICC's existence as a permanent institution will have meaningful deterring effects.[112]

First, a nation's leaders will know that a court is in place to try them for human rights violations. While an ad hoc tribunal has no mission beyond its mandate. The ICC is a permanent institution and has power to investigate, indict, and try violators of human rights without several rounds of diplomacy.

Second, the ICC's advocates argue that violators of human rights will now know that impunity behind national boundaries cannot be tolerated. While Nuremberg, Tokyo, the ICTY, and the ICTR were rare exception to the principle of national sovereignty, the jurisdiction of the ICC is very broad and permanent.

Third, all nations, even major powers, will now more assertively monitor their own military operations, police, and penal institutions because of the possibility of the international embarrassment of an ICC investigation and trial.

But, the ICC can only deter through its credibility as an enforcer of human rights law. However, its credibility depends upon physical coercion and international cooperation as exercised by the powers that view the ICC's interest as their own.

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[112] DEMOCRATIZING JAPAN : THE ALLIED OCCUPATION 1,3 (Robert E.Ward & Sakamoto Yoshikazu eds., 1987 .

Two controversies in the Rome Statute illustrate this basic problem of deterrence:

1) The lack of agreement on a definition of the crime of aggressive war, and

2) The independence of the office prosecutor

The leaders of only two nations have ever been convicted, at least in modern times, of the crime of aggressive war: Germany and Japan.

Of all the defendants at Nurenberg and Tokyo, only five were convicted of the crime of aggressive war alone, and not one of those five was executed.

The ICC statute may never define in absolute terms aggressive war. If it does, the ICC prosecutor will be forced to make a political judgment on whether to pursue this issue after every conflict.

The lack of checks on the ICC prosecutor's jurisdiction and discretion as well as the uncertainties regarding the definitions of crimes, not only aggressive war, but also crimes against humanity and war crimes create opportunities for prosecutorial abuse. [113]

The office of ICC prosecutor is analogous in some ways to the United States office of independent council, but the ICC prosecutors mandated powers are broader. While the office of independent council only has power to disrupt and undermine the executive branch of the United

[113] U.PA. J. CONST. L.383,390-91 (1998)

States, the office of the ICC prosecutor can indict several heads of state at once.

The American office of independent council is ad hoc and granted a specific mandate by special division of judges. The ICC prosecutor is permanent and probably mandated by the Rome Statute to investigate any allegation of aggressive war, crimes against humanity, war crimes, and genocide that involves a national of or the territory of a state party to the Statute.

From the experience of the ICTY, it is unlikely that the ICC prosecutor can persuade all nations to cooperate with his or her investigations. Nonetheless, there are no other checks on the ICC prosecutor's powers, the threat of dismissal notwithstanding.

The ICC is a permanent institution intended to push the frontiers of international law. If the ICC were an ad hoc tribunal, then the flaws in the statute might not undermine its limited purpose. The majority of nations at the Rome Conference voted to make the ICC prosecutor independent of the Security Council, but the purpose of the ICC is not "to make us feel good, but to succeed." [114]

As a matter of function, the ICC prosecutor will often not be able to exercise jurisdiction over a criminal suspect without the cooperation and support of the most powerful members of the security Council.

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[114] WILLIAM P. WOODARD, THE ALLIED OCCUPATION OF JAPAN, 1945-1952 AND JAPANESE RELIGIONS 9-13 (1972).

While the majority of the nations at the Rome Conference historically had reason to distrust the Security Council's ability to pursue justice dispassionately and apolitically, the Security Council's flaws do not mean that the ICC prosecutor will not have reason to depend on the Security Council.

Without the Security Council's support, the ICC prosecutor is less of a prosecutor and more of an international protester-at-large.

The key obstacle to any international criminal court is that its activities could clash with highly political interests over which some states are not willing to relinquish control. [115]

By separating the office of ICC prosecutor from the powers that control most of the world's military transport, modern aircraft and ships, armored vehicles, and combat-ready infantry, the Rome Conference may have created an independent office, but not necessarily an effective one.

Meanwhile, the ICC prosecutor must gain the trust and cooperation of the same countries in order to litigate criminal trials for human rights violations. The ICC itself has no saber to rattle.

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[115] Ward, supra note 52 , at 3-4 (citing "Status of the Japanese Emperor , " National Archives , Notter Files , Box 63 , J-315 , may 25 , 1943)

Conclusion

On January 1998, Mary Robinson, the U.N. High Commissioner for Human Rights, viewed the world's continuing failure to prosecute genocides and crimes against humanity, as being a cause of shame.
In fact, this commissioner had then just returned from Cambodia where she witnessed the torture and death of 16.000 people during the Khmer Rouge period from 1979 in the Museum Tuol Sleng in Phnom Penh.
When observing the iron beds where victims were tortured, with torture tools they were equipped with. "...and walked past row upon row of photographs of young girls and boys, of old people, of people from every walk of life: civil servants, peasants intellectuals, soldiers, students; as I saw the piled up clothes and shoes it brought back so vividly my visit to Auschwitz, ... and the terrible aftermath of the genocidal killing in Rwanda which I saw ... in 1994.

How often have we said "never again"?...We must match our rhetoric with action. [116]

Just six months earlier, international help was asked by the Cambodian Government to bring to justice people responsible for the murder of more than one million people. The Cambodians knew that the U.N. has set up for Rwanda and Bosnia international tribunals to prosecute the guilty.

It is considered that these crimes constituted disrespect for the most basic human right which is the right for life. While Cambodia was searching for the Truth, the U.N. noted that another country tribunal cannot be created and the real need was for a permanent international criminal court enabled to prosecute future massive human rights abuses.

Is it possible that even in the 21st century perpetrators of genocides cannot be prosecuted in a permanent international criminal court?

The international criminal court is the answer to that question as it will be the first international court to have jurisdiction to prosecute genocide, crimes against humanity and war crimes in any country where the state

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[116] "The Universal Declaration of Human Rights : A Living Document, "by Mary Robinson, U.N High Commissioner of Human Rights, Tokyo, January 27,1998<>

cannot or will not bring those responsible to justice before its national courts.

Some consider this action impossible to be accomplished under the pretext that no court in any national government wills to surrender sovereignty allowing an international court to investigate in their territory, try nationals and compel them to comply with its decisions. This argument is given by such nationals by reminding

of the Yugoslav Tribunal's failure in arresting the Serb leaders in the Bosnian Conflict, Ratko Mladic and Radovan Zaradzic.

The relationship between the International Criminal Court (ICC) , national legal systems and the ways to ensure the Court receiving the full cooperation from states on which it depends are two of the hardest issues which will determine the effectiveness of the ICC.

Other issues include the scope of the ICC's jurisdiction and the crimes it can prosecute, the principles of criminal law it will apply and the penalties it can impose, its powers of enforcement, and the independence the prosecutor should be given.

The negotiators started with a draft Statute that was written by the Unites Nations International Law Commission, but when they moved away from this text, they were writing without precedents and charting a journey of which their only maps were the experience of the Nuremberg Tribunal and the brief histories of the Rwanda and Yugoslavia Tribunals.

The process in New York and Rome was unique in the history of either governmental action or criminal justice. This is the first time that states have moved beyond a normative discussion which defines the content of international criminal offenses such as genocide or war crimes, to the practical task of designing an international criminal court and defining the powers it will have.

None of the crimes within the ICC's jurisdiction is new. The laws of war have developed gradually, with the first 1868 treaty banning "dum dum" bullets as "contrary to the law", and are clearly defined in the 1949 Geneva Conventions and their Protocols. [117]

The Genocide Convention made genocide an international crime in 1948. Crimes against humanity were first written into the Nuremberg

[117] 1949 Geneva Conventions: 75 U.N.T.S. 85;75 U.N.T.S. 135;75 U.N.T.S. 287; Protocols : U.N. Doc. No. A/32/144(1997)

Charter[118] so national sovereignty could not be used to protect the Nazi leadership from international prosecution for acts which were "legal" under the German law.

The challenge today is the creation of an effective institution with the procedures to prosecute these crimes. And this action requires an international, independent, effective and fair court. Its responsibility will not only be limited to punishing the guilty, but it will be also responsible for deterring further crimes, encouraging reconciliation between groups in conflict by recording the truth about what has really happened, establishing individual responsibility and enabling the victims to focus their bitterness on those who have committed the crimes rather than on whole religious and ethnic communities.

A clear evidence of genocide war crime or crimes against humanity should be investigated by the Prosecutor even without the consent of the Security Council and should not be subject to a veto by one of its permanent members.

Therefore, unless the prosecutor has independent authority to investigate and prosecute cases on his or her own initiative, the Court will not only fail to deal with politically contentious situations, but –

[118] Convention on the Prevention and Punishment of the Crime of Genocide: 78 U.N.T.S. 227

equally damaging – it will inevitably be perceived as a political and not judicial body, and this will give states an excuse to refuse to cooperate.

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22- Articles 32 and 33 of the Rome Statute

23- Article 30 of the Rome Statute

24- Articles 38 (38-3) and (42-1) (42-4) of the Rome Statute

25- Articles 39-4 and 40 of the Rome Statute

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27- Articles 43-6 and 114 and 115 and 116 and 6 of the Rome Statute

28- Articles 3 and 11 and 12-3 of the Rome Statute

29- Articles 12 and 1-2 of the Rome Statute

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34- Articles 58-2 and 58-7 of the Rome Statute

35- Articles 59-2 and 59-7 and 60 of the Rome Statute

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37- Articles 61-11 and 55-1 and 62 of the Rome Statute

38- Articles 64-7 and 65 of the Rome Statute

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51- War crimes within the jurisdiction of the ICC are addressed in Article 12, as supplemented by Article 21(1)(b) and 21(3). See Rome statute, supra note 1, arts. 8, 21(1)(b), 21(3). INTERNATIONAL CRIMINAL LAW : CASES AND MATERIALS 24,84 -86 , 744, 761, 967-69, 984 -94 (1996);

52- See PAUST ET AL., supra notes, at 95, 102-03, 105

53- See JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 392-93, 405-07(1996) (concerning such prescriptive and enforcement competence and responsibility).

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74- Taylor, infra note 20, 86 .

75- Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. No. A/CONF. 183/9,37I.L.M. 999 (1998)[hereinafter Rome Statute].

76- See Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,Aug.8, 1945, art.6,59 Stat.1544, 82 U.N.T.S. 279,286-88; ROBERT JACKSON,THE NURNBERG CASE(1947)[hereafter Nuremberg Charter].The crime of aggressive war is called" crimes against the peace "in the Nuremberg and Tokyo charters. See generally id.

77- TELFORD TAYLOR , THE ANATOMY OF THE NUREMBERG TRIALS 602 (1992)

78- Id.at 613

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81- BRACKMAN, supre note 12, at 59-60

82- TAYLOR , supra note10 , at 75

83- BRACKMAN , supra note 12 , at 60

84- See id.Those nations were Australia, New Zealand, Canada, the Netherland, France, Britain, the united States, the Soviet Union, China, and two colonial territories on the brink of of independence: India and the Philippines.Id.The Allied Council for Japan that advised the Supreme Commander consisted, however, of just four nations : Britain,China, the Soviet Union, and the United States.Most of the occupation troops in Japan were Americans. Id.

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ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively

demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this 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. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. 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 requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. 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. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to

the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

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.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings

with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the

jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to

the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a

professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency,

competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, Intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the

Rules of Procedure and Evidence.

Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49
Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation
to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a

statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release

pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the

Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the lmission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to ove the crime to which the admission of guilt relates, and may convict the accused of that crime.

Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider e admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial ocedures provided by this Statute and may remit the case to another Trial Chamber.

Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the terests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

The onus is on the Prosecutor to prove the guilt of the accused.

In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of is Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language

which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to ıe defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence f the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of oubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and rivacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as efined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime ıvolves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during ıe investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of ıe accused and a fair and impartial trial.

. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to rotect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of vidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of exual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the ircumstances, particularly the views of the victim or witness.

. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be resented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not rejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be resented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of rocedure and Evidence.

. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, ecurity arrangements, counselling and assistance as referred to in article 43, paragraph 6.

. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the ecurity of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the ommencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures hall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and npartial trial.

. A State may make an application for necessary measures to be taken in respect of the protection of its servants or gents and the protection of confidential or sensitive information.

Article 69
Evidence

. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as) the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things,

providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision

shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction
or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during

the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86
General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. 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 or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of

cooperation which are specified under this Part.

Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's

probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the

reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party

and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the

proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112
Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113

Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a

Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, 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 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. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court

prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.