

## **4. COMPLEMENTARITY OF THE JURISDICTION OF THE ICC**

### **4.1 *The Principle of Complementarity of the ICC***

The Statute encourages States to exercise their jurisdiction over the ICC crimes. Its Preamble states that the effective prosecution of the ICC crimes must be ensured by taking measures at the national level and by enhancing international cooperation. In addition, it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. Nevertheless, there is nothing explicit in the Statute imposing an obligation to prosecute the ICC crimes. This obligation can be found in other treaties, for some of the crimes listed in the Statute, but not for all of them. Under the four Geneva Conventions of 1949, States Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing grave breaches of the Conventions. Under article 5 of the Genocide Convention, States Parties undertake to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties for persons guilty of genocide. The history of the second half of the 20th century shows us that this obligation was only minimally respected.

Nevertheless, the Statute does not deprive States of the power to prosecute the perpetrators of international crimes. Further, the ICC's jurisdiction defers to that of States Parties. While the Statute does not relieve States of the power to prosecute perpetrators of crimes within its jurisdiction, it institutes a Court that will do so in the event that States Parties neglect to prosecute these criminals or do not possess the means to do so.

Under the principle of complementarity, the ICC only exercises its jurisdiction when States Parties fail to investigate or undertake judicial procedures in good faith, after a crime covered under the Statute has been committed. The ICC cannot hear a case when a State has decided to act.

### **Exceptions to the principle**

However, it is essential that procedures initiated by the State in question be undertaken in good faith, that is, respecting international law. There are therefore several exceptions under which the ICC can hear a case that has already been referred to a State. These are provided in article 17:

- when the State in question is unwilling genuinely to investigate or prosecute;
- when the State in question is unable genuinely to investigate or prosecute;
- when, after investigation, the decision of a State not to prosecute a person is motivated by the desire to shield the person from being brought to justice;
- when, after investigation, the decision of a State not to prosecute a person is motivated by its inability to conduct judicial proceedings.

The ICC becomes involved when there is a lack of either willingness or ability on the part of a State. Under article 17 (2), "Unwilling" means:

- the proceedings were undertaken with the aim of shielding the person in question from criminal responsibility for the crime;
- the decision not to pursue the matter was made by the State in order to shield the person in question from criminal responsibility;
- the proceedings were subjected to unjustified delay which in the circumstances, is inconsistent with an intent to bring the person concerned to justice;
- the proceedings are not or were not conducted independently and impartially, and they were or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice

Under article 17(3), “Unable” means:

1. the State’s national judicial system has substantially or totally collapsed;
2. the State’s national judicial system is unable to obtain the accused or the necessary evidence or otherwise unable to carry out its proceedings

Although it was imperative that priority be given to States to prosecute and punish perpetrators of international crimes, it was equally necessary to have a mechanism ready in the event that a State would conduct sham proceedings or would not possess the technical means required for a proper investigation and trial. Without this mechanism, it would be too easy to defeat justice. A State who was unwilling to prosecute the perpetrator of a crime could manipulate the procedures to ensure a not-guilty verdict by engineering a stay of proceedings, buying off the jury, deliberately violating the fundamental rights of the defendant, or by creating unreasonable delays. More simply still, a State could deliberately omit to present critical evidence to the hearing.

### Ne bis in idem

The jurisdiction of the ICC to try an individual who has been the object of sham proceedings in a national court is technically an exception to the principle of criminal law in which a person may not be prosecuted twice for the same crime (*ne bis in idem*). Article 20 allows the ICC to prosecute a person for a crime referred to in the Statute, even after being tried for the same act in a national court if:

- a) the proceedings were aimed at shielding the person from criminal responsibility; or
- b) the procedure was not independent or impartial in accordance with the norms of due process recognized by international law, and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Criminal justice has been rendered then, only when it has been rendered in accordance with due process and other international standards. The first example concerns a situation such as a State charging a perpetrator of genocide with assault. Such a trial, although respecting all the safeguards concerning impartiality, would be aimed at shielding the person from responsibility for an extremely serious crime. The second ex-

ample covers a larger spectrum of situations. It does not mean, however, that the ICC will have the power to intervene in every case where it judges that a procedural safeguard was violated in a trial conducted by a national authority. In order for the ICC to begin a new trial, the violation of procedural safeguards must have been committed with the aim of preventing the person concerned from being brought to justice.

The principle of *ne bis in idem* can be found in most national criminal codes, in some constitutions and in article 14 of the International Covenant on Civil and Political Rights. It would be preferable if the national law implementing the ICC Statute made mention of the exception to this principle provided by the Statute.

### **Ordinary offences versus ICC crimes**

Article 22 states that a State may not prosecute someone for a crime listed under the Statute for which he or she has already been sentenced or acquitted by the ICC.

Under article 20 (1), if the judicial authorities of a State have properly prosecuted a person for an act under the ICC's jurisdiction, the ICC may not try that person again. Whether the person was genuinely prosecuted for a sufficiently serious crime under national law (for example, for the commission of multiple murder rather than genocide) or for an international crime, will determine whether the ICC can exercise its jurisdiction.

### **Sentences**

When a national court prosecutes and sentences the perpetrator of an offence referred to in the Statute, it has the power to impose the sentence it considers appropriate. Article 80 does not affect application of sentences provided by the domestic law of States Parties. Nor may subsequent rulings concerning pardon, parole or suspension of sentence result in the case being referred to the ICC.

### **Amnesties and pardons**

Many constitutions allow the Head of State a discretion to make amnesties or grant pardons.

- i) A Head of State may grant pardons or amnesties in relation to any national prosecution or sentence. If the person was granted a pardon after being convicted at the national level, the ICC would not try that person again unless the proceedings were aimed at shielding the person from criminal responsibility.
- ii) However, the Head of a State Party cannot use this power where a person has been convicted by the ICC. Article 110(2) provides that the Court alone has the right to reduce a sentence it has imposed.

The issue of amnesties and truth commissions and the like is not specifically mentioned within the Statute, even in the provisions on Complementarity. This reflects mixed

views within the international community as to the effectiveness of such measures in bringing about lasting peace and reconciliation. There are also varying approaches to the granting of amnesties across different jurisdictions, some of which are more expedient than others. When the Court is considering issues of admissibility, it will consider how genuine the efforts of States have been and will no doubt take into account how closely any “truth commission” resembles a genuine investigation process. It will also consider the basis upon which a decision not to prosecute was made, to determine whether the Court should interfere with a genuine process of reconciliation.

## 4.2 *The Jurisdiction of the ICC*

### *Description*

Under article 1, the Court shall have the power to exercise its jurisdiction over persons “for the most serious crimes of international concern”. Article 1 also states: “The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute”. Note that the ICC only has jurisdiction over persons who were 18 or over at the time of the alleged offence (article 26).

### **Non retroactive jurisdiction**

Article 11 states that the Court has jurisdiction only with respect to crimes committed after entry into force of the Statute. If a State becomes a Party after entry into force, then the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, except where it has made a declaration under article 12(3) accepting the jurisdiction of the Court as a non-State Party.

### *Complementarity Requirements*

If a State Party wishes to prosecute ICC crimes, at a minimum, it should enact legislation allowing it to exercise territorial jurisdiction over such crimes and extra-territorial jurisdiction over its nationals who commit crimes abroad.

### *Implementation*

States that wish to prosecute ICC crimes should ensure that they have national legislation in place that allows them to exercise jurisdiction over people committing crimes in their territory, and nationals who commit crimes abroad. This may simply require an amendment to the criminal code.

A further basis that a State may wish to consider for exercising jurisdiction is “universal jurisdiction”, as set out in the 1949 Geneva Conventions and their 1977 Additional Protocols in relation to “grave breaches”. Note that different concepts of “universal jurisdiction” exist: some interpret this term to mean that a State can exercise jurisdiction over anyone found in its territory, while others interpret it to mean that a State can arrest anyone, wherever that person may be in the world and regardless of any linkage to

the State in question. Other grounds States may wish to consider include jurisdiction based on the victim's status.

For example, the Canadian *Crimes Against Humanity Act* states that persons alleged to have committed, outside of Canada, offences of genocide, crimes against humanity, war crimes or breach of a commander's responsibility may be prosecuted for these offences if: (a) at the time the offence is alleged to be committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a State that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a State, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict; or (b) at the time the offence is alleged to have been committed, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the offence on the basis of the person's presence in Canada and, after that time, the person is present in Canada."

### 4.3 *Crimes listed under the Statute*

It is prudent for a State Party to ensure that its national law incorporates definitions of the crimes that reflect the Statute's provisions in their entirety because the Statute has refined international criminal law with respect to the definitions of the offences in some instances. These definitions were adopted by 120 States participating in the Rome Conference. Therefore, they represent the views of the majority of States, in terms of the current state of international criminal law. They are based on existing treaty and customary law proscriptions, and take into account the jurisprudence of the ICTY/R. Therefore, all States that incorporate these definitions into their national laws are indicating their strong support for international norms and standards.

## **Genocide**

### *Description*

Genocide is the "crime of all crimes". It can be considered as the most serious of all crimes against humanity. The Rome Statute has adopted word for word the definition of genocide established by the 1948 Convention for the Prevention and Repression of the Crime of Genocide. The definition of this crime is based on three components:

- 1) commission of one or more of the five following acts:
  - murder;
  - causing serious physical or mental harm;
  - deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part;
  - imposing measures intended to prevent births;
  - forcibly transferring children of the group to another group.

- 2) targeting a national, ethnic, racial or religious group, as such.
- 3) intent to destroy the group, in whole or in part. The requirement of guilty intent is very high. The person must be shown to have acted with the intent to destroy a group. Genocide cannot be committed by negligence. The term “in whole or in part” signifies that an isolated act of racist violence does not constitute genocide. There must be an intent to eliminate large numbers of the group, although not necessarily to completely destroy the group.

### *Complementarity Requirements*

It would be prudent for States Parties to the Rome Statute to incorporate the offence of genocide as defined by the Statute into their national law. States that have ratified the Convention on the Prevention and Punishment of the Crime of Genocide have already undertaken to enact the necessary legislation to give effect to the provisions of this convention and to provide effective penalties for persons guilty of genocide.

### *Implementation*

If States Parties to the Statute have not already incorporated genocide into their national legislation, they have several options, if they wish to be able to prosecute such crimes themselves:

- a) First, they could adopt a definition taken verbatim from article 6 of the Statute, or that refers to it directly. The advantage of this method is its simplicity for the author of the implementation law and the fact that it would bring the law into concordance with the Statute’s requirements.
- b) Another option would be to adopt a series of independent offences connected with each of the acts listed in the Statute. For example, a State’s criminal code could specify that multiple murder committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group, as such, constitutes genocide. The same could be done for the four other acts listed under article 6 of the Statute. This is a similar approach to the one that was taken by Australia with its existing War Crimes legislation.
- c) States can also use existing general law offences to prosecute the authors of genocide, using offences sufficiently serious to describe the crime perpetrated. However, if some of the acts that constitute genocide do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts. States Parties need to ensure that prosecution under general law offences does not shield persons from criminal responsibility for their actions.

The definition of genocide may be somewhat modified for adoption into national law, but only with the object of bestowing it with a similar or broader meaning than that provided by the Statute. For example, France indicated in its national legislation that

genocide could be committed against any group. Care must be taken in this process, however, because each of the terms contained in Article 6 has a particular significance and is the result of extensive debate, both in 1948 and 1998.

## **Crimes against humanity**

### *Description*

Under article 7, the expression crime against humanity is employed to designate multiple acts of inhumanity committed as part of a widespread or systematic attack directed against a civilian population, in peacetime or wartime. The Rome Statute definition of crimes against humanity contains six components, some of which may differ from previous definitions of this crime:

- a) Widespread or systematic attack. “Widespread” signifies a high number of victims and “systematic” refers to a high degree of organization, pursuant to a plan or policy. The presence of the word “or” means that those are not cumulative conditions. The murder of a single civilian can constitute a crime against humanity if it were committed in the course of a systematic attack.
- b) Directed against a civilian population. National or other ties between the perpetrator and victim are of no import.
- c) Commission of inhumane acts. The Statute lists the acts that could constitute crimes against humanity in the context of such an attack:
  - murder
  - extermination
  - enslavement
  - deportation or forcible transfer of a 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;
  - persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other universally recognized grounds;
  - enforced disappearance of persons;
  - apartheid;
  - other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

- d) Knowledge of the attack against a civilian population.
- e) For acts of persecution only, political, racial, national, ethnic, cultural, religious, gender, or other universally recognized grounds must be shown.
- f) Context. A crime against humanity may be committed in peacetime or in wartime. It is not necessarily committed in connection with another crime. An exception is the persecution of any identifiable group or collectivity; persecution must be linked to another act enumerated in article 7(1), or any crime within the ICC's jurisdiction.

Finally, it should be noted that the second paragraph of article 7 of the Statute contains definitions for all of the important terms contained in the first paragraph.

### *Complementarity Requirements*

It would be prudent for States Parties to the Statute to incorporate all acts defined as crimes against humanity in the Statute into their national laws. States who already have a law regarding crimes against humanity may need to modify it so that it closely reflects the developments contained in the Statute. For example, the Statute develops international criminal law by explicitly listing sexual offences and large-scale enforced disappearances as crimes against humanity. The definitions contained in the second paragraph of Article 7 should also be respected and reflected in national legislation.

### *Implementation*

States Parties to the Statute can incorporate the offence of crime against humanity into their national law in a variety of ways.

- a) First, they could adopt a definition taken verbatim from article 7 of the Statute or that refers to it directly. The advantage of this option is that it is easy for the author of the implementation legislation and it brings the law into concordance with the Statute's requirements.
- b) Another option would be to adopt a series of independent offences, linked to each of the acts listed in the Statute. For example, a state's criminal code could provide that slavery, committed in the context of a widespread or systematic attack launched against a civilian population, constitutes a crime against humanity. It would also be necessary to include in each relevant provision of the criminal code, a similar definition of the acts to that described in the Statute. This would have to be done for every act listed under article 7 of the Statute. The advantage of this method is that it simplifies the task of national judges and allows drafters to make certain adaptations. Clearly, some modifications can be made to the definitions of this offence, but only to bestow it with a similar or broader meaning than that provided by the Statute, to ensure that it does not shield anyone from criminal responsibility for such crimes.



- c) States can also use existing general law offences to prosecute the authors of crimes against humanity, using offences sufficiently serious to describe the crimes perpetrated. However, if some of the acts that constitute a crime against humanity do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts.

## **War crimes**

### *Description*

War crimes have traditionally been defined as a violation of the most fundamental laws and customs of war. Such criminal acts are listed in numerous international instruments (see the list of instruments in Appendix II). The negotiating process that culminated in the Rome Statute was characterized by both compromise and the development of international law. The Statute definition of war crimes is narrower in some respects than the traditional definitions of war crimes. At the same time, it is broader than the traditional definition, because it covers acts that had never before been codified. The major innovation of the Statute is that it enshrines the recent evolution of international jurisprudence criminalizing war crimes committed during non-international armed conflict.

### **War crimes committed during an international armed conflict**

International armed conflict exists at the moment there is a confrontation between armed forces of different nations. Article 8 does not define an international armed conflict. However, some jurists have suggested that armed conflict may be considered to be international in the following six cases:

1. armed conflict between States;
2. internal armed conflict that has been recognized as belligerency;
3. internal armed conflict involving one or several foreign interventions;
4. internal armed conflict involving UN intervention;
5. wars of national liberation;
6. war of secession.

Acts committed during an international armed conflict that are defined as war crimes under article 8 (2)(a) of the Statute are as follows:

- 1) Grave breaches of the Geneva Conventions of 1949, in other words the following acts committed against wounded, sick or shipwrecked members of armed forces, prisoners of war or civilians:

- 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 right to a fair and regular trial;
  - Unlawful deportation or transfer or unlawful confinement;
  - Taking of hostages.
- 2) Article 8(2)(b) also criminalizes other serious breaches of laws and customs applicable in international armed conflicts. It is unnecessary to provide the complete list here; the text of the Statute is sufficiently clear in this respect. These crimes are based on various sources, including the 1907 Hague Regulations, the First Additional Protocol to the Geneva Conventions, and various conventions banning certain weapons. The criminal acts include:
- Intentionally directing attacks against the civilian population not taking direct part in hostilities;
  - 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;
  - Intentionally launching an attack against personnel or installations involved in humanitarian assistance or a peacekeeping mission in accordance with the Charter of the United Nations;
  - The transfer by an 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;
  - Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence constituting a serious breach of the Geneva Conventions;
  - Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
  - Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

### **War crimes committed during a non-international armed conflict**

The Statute criminalizes certain serious violations of the laws of war committed during internal armed conflicts. In all cases, the definition of “internal armed conflict” as stated by the Statute does not include situations of simple internal disturbances such as riots, sporadic or isolated acts of violence or any similar act (article 8(2)(d)). Crimes committed during non-international armed conflicts are separated into two paragraphs.

First, article 8(2)(c) criminalizes the acts enumerated in article 3 common to the four Geneva Conventions, which deals with serious violations. The crimes in paragraph (c) can occur in any non-international armed conflict. The following list of war crimes would apply when committed against individuals not directly participating in the hostilities, including members of armed forces who have laid down their arms or been placed hors de combat due to illness, injury, detention, or any other cause:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Taking of hostages;
- The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees that are generally recognized as indispensable.

Second, paragraph 8(2)(e) criminalizes some acts prohibited by the two additional Protocols of 1977, various treaties on the laws of warfare and customary international law. However, under paragraph (f), these crimes can occur only when there is a protracted armed conflict on a State’s territory between State forces and organized armed groups, or between organized armed groups. States should be aware that the threshold of paragraph (e) of the Statute is lower than the threshold of Protocol II: neither responsible commanders, nor control on a part of the territory is required. The existence of a protracted armed conflict is sufficient. The crimes listed in paragraph (c) could also apply during such a conflict. The criminal acts listed under article 8(2)(e) include:

- Intentionally directing attacks against the civilian population not taking direct part in hostilities;
- Intentionally launching attacks against personnel or equipment of a humanitarian or peacekeeping mission, according to the Charter of the United Nations;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of the four Geneva Conventions;
- Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

- 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.

### *Complementarity Requirements*

It would be prudent for States Parties to the Rome Statute to incorporate the offence of war crimes as described in the Statute. Their laws should cover both war crimes committed during international armed conflict and those committed during an internal armed conflict, and should be applied to civilians and State officials as much as to members of its armed forces. States that have ratified the Geneva Conventions have already undertaken to enact legislation necessary to provide effective penal sanctions for persons committing grave breaches of these instruments during international armed conflicts (now all offences under article 8(2)(a)).

### *Implementation*

The chapters on article 8 in Otto Triffterer's "Commentary on the Rome Statute of the International Criminal Court" describe the exact source of each of the crimes listed under this article. Those States that have already incorporated many of the existing conventions on war crimes may wish to review those chapters, to identify the relevant modifications and additions they may need to make to national laws, to ensure that they can prosecute all of the crimes within the ICC's jurisdiction. Otherwise, States Parties can employ a variety of means of incorporating the definition of a war crime into their national legislation.

- a) The easiest method is to adopt a definition taken verbatim from the text of article 8 of the Rome Statute or that refers directly to it. This solution has the advantage of being easy for the author of the national law and brings it into concordance with the requirements of the Statute.
- b) Follow the example of existing Australian War Crimes legislation, which makes murder and similar acts into war crimes in certain situations.
- c) States could also use their general law offences to prosecute the authors of war crimes, using offences sufficiently serious to describe the crimes perpetrated. However, if some of the acts that constitute a war crime do not constitute any general law offence under national law, a State Party may need to amend its criminal code and create new offences covering those acts, to ensure that no-one is shielded from criminal responsibility for such crimes.

## **4.4 Grounds for Excluding Criminal Responsibility**

### ***Description***

Article 31 sets out certain grounds for excluding criminal responsibility in the context of ICC prosecutions. Other provisions that are relevant in this respect are contained in Part 3 of the Statute on General Principles of Criminal Law

### ***Complementarity Requirements***

States that decide to try persons charged with one of the crimes mentioned in the Statute in their national courts are not obliged to allow an accused person to use the grounds of defence provided under the Statute, or the other means of defence accepted by international criminal law. However, States Parties may need to revise defences allowed under their national criminal justice system in order to ensure that these defences do not shield the person from criminal responsibility for acts that constitute ICC crimes. A trial where a person is acquitted of an ICC crime by a national court because of a means of defence too easy to raise could be considered a sham trial.

### ***Implementation***

Many of the grounds for excluding criminal responsibility under the Statute are already recognized in most jurisdictions, as well as under international criminal law. In common law jurisdictions, they are more frequently described as defences. The principle of complementarity does not require that States Parties establish a national judicial system that is governed by the same rules as those governing the ICC.

Nevertheless, States may wish to adapt existing provisions to bring them into conformity with the provisions of the Statute. These new grounds of defence would be admissible for the prosecution of international crimes. The advantage of this solution is that it brings uniformity to the proceedings. A person who is charged whether before a national court or the ICC can use the same grounds for excluding criminal responsibility.

## **The defence of superior orders**

### ***Description***

Article 33 of the Statute indicates that the fact that a crime under the ICC's jurisdiction was committed under orders of a superior – whether military or civilian – does not absolve the perpetrator of criminal responsibility. There is an exception however, where:

1. the accused person was under a legal obligation to obey orders of the government or of the superior in question;
2. the accused person did not know that the order was unlawful; and

3. the order was not manifestly unlawful.

These three conditions are cumulative, and the Statute specifies that any order to commit genocide or a crime against humanity is manifestly unlawful at all times. This ground of defence is thus probably only applicable to persons who were ordered to commit war crimes or, when it will be defined, a crime of aggression. Otherwise, the defence of superior orders can only be used as an attenuating circumstance, for example, to reduce the penalty.

This means of defence has always been controversial. The Charters of the Nuremberg and the Tokyo Tribunals, as well as the Statutes of the ICTY and the ICTR state that the defence of superior orders is not admissible in any situation. It was believed that as the order to commit a crime was in itself unlawful, it could not be used as a justification for the behaviour of a subordinate.

Yet national law in many States has adopted the opposite point of view with regard to the defence of superior orders, and so is in overall conformity with article 33. This means that in most States this ground of defence exists as such and a subordinate cannot be found guilty of the crime unless he or she knew that the order was unlawful or if the order given by the superior was manifestly unlawful. This rule is contained in the codes of military discipline of Germany, the United States, Italy and Switzerland, and the notion of conditional responsibility has been enshrined by the jurisprudence of national tribunals on war crimes. Only a handful of States prohibits the defence of superior orders in their national legislation. Other States take a two-pronged approach: they permit use of the superior orders defence when one of their nationals has been charged, but prohibit it when the accused person was in combat against an enemy or bases their plea on the law of a foreign country.

### *Complementarity Requirements*

It would be prudent for States Parties to make some changes to their national law if this is required to ensure that any such defence is no broader than article 33. If a national judicial system were to acquit an individual because it had a significantly lower threshold for superior orders, this could be seen as a means of shielding the person from the appropriate criminal responsibility. For example, the defence of superior orders may not be used in cases where there was an order to commit a crime against humanity or genocide.

### *Implementation*

States Parties to the Statute do not have to change their national legislation if it does not provide this ground of defence to an accused person. In States where the national law provides this ground of defence, an amendment may need to be made making it inadmissible when the order in question concerned the commission of a crime against humanity or genocide.

Still, States Parties desiring to harmonize criminal procedures could adapt their national law to the Statute's provisions. In this case, the following adjustments may need to be made:

- declare the defence of superior orders generally inadmissible;
- declare it admissible only when the accused person could show that his or her case conformed to these three cumulative conditions:
  1. the legal obligation to obey the order;
  2. he or she did not know the order was unlawful;
  3. the order was not manifestly unlawful;
- declare the defence of superior orders as inadmissible when the accused person received an order to commit a crime against humanity or genocide;
- declare that the defence of superior orders should be subject to the same rules, whether the order in question was given by a military or a civilian authority.

#### ***4.5 Individual Criminal Responsibility and Inchoate Offences Provided Under the Statute***

##### ***Description***

The crimes within the jurisdiction of the Statute are most often offences committed by a number of persons. Crimes against humanity and genocide are offences that are generally committed by many individuals operating as part of an extensive criminal organization. Those holding the highest degree of criminal responsibility for these crimes are most often individuals in positions of authority who had no direct contact with the victims. They either issued the orders, incited others to commit the crimes, or furnished the means with which to commit these crimes.

This is why the Statute does not restrict criminal responsibility for these crimes to individuals who are directly involved in their commission, but extends it to those who were indirectly involved as well. Under article 25, a person is criminally responsible if he or she:

- commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- 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 be made with the aim of furthering the criminal activity or criminal purpose of the group, or be made in the knowledge of the intention of the group to commit the crime;
- in respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - attempts to commit such a crime.

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 the Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose (article 25(3)(f)).

### *Complementarity Requirements*

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should ensure that their implementation legislation includes all the forms of individual criminal responsibility and inchoate offences provided by the Statute. Otherwise, they may not be able to prosecute in national courts the majority of individuals responsible for the commission of the crimes described in the Statute.

### *Implementation*

Most national criminal legislation already describes individual criminal responsibility in these terms; there would be no need therefore to adopt any particular legislative amendments. States should however ensure that this responsibility applies to all the crimes within the ICC's jurisdiction.

## **4.6 Responsibility of Commanders and Other Superiors**

### *Description*

International law requires that all persons in positions of authority have the obligation to prevent those under their orders from violating the rules of international humanitarian law. Articles 86(2) and 87 of the First Additional Protocol to the Geneva Conventions codified this principle. As stated by the ICTY in the Delalic case, military commanders of each State Party to the Statute should correctly instruct their soldiers concerning the rules of international humanitarian law, ensure that these rules are observed when making decisions on military operations, and set up a communications network so that commanders can be quickly informed of each breach of the laws of war committed by their soldiers. They should also apply corrective measures for every violation of international humanitarian law.

Article 28 of the Statute covers the responsibility of commanders and other superiors, and is divided in two sections. Paragraph (a) deals with the responsibility of military



commanders. Paragraph (b) details the responsibility of commanders of civilian authorities.

### **Military commanders**

Military commanders may be held responsible for crimes committed by their soldiers if the commanders knew or should have known that the crimes had been committed, and if they neglected to take the necessary measures for preventing or repressing the commission of these crimes. The responsibility of military commanders involves three essential elements:

- effective command and control over the persons committing the crimes;
- the commander knew of or should have known that a crime was about to be committed or had already been committed;
- the commander did not take all necessary and reasonable measures within his or her power to prevent the crime or punish the perpetrator.

### **Non-military superiors**

Non-military superiors may be held responsible for crimes committed by their subordinates when they had knowledge of, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit ICC crimes; when the crimes were connected to activities under the control of the superior; and when the superior neglected to take the necessary measures for preventing or repressing the crimes or to inform civilian authorities with competency to investigate and initiate appropriate judicial proceedings. The elements of the offence are the same for non-military commanders, with the exception of the element concerning knowledge of commission of crimes. Article 28(b) of the Statute indicates that in the case of a civilian commander, the level of proof required in order to convict is higher than that required for military superiors. Either knowledge of the crime's commission or a conscious disregard of pertinent information must be demonstrated. In other words, to establish the guilty intent of a non-military superior, it is necessary to show that information indicating the significant possibility that subordinates had committed or were about to commit a crime was available, that the superior was in possession of this information, and he or she decided not to act on it. The civilians targeted by these provisions are political leaders, business people and high officials. Military commanders are held to a stricter standard under international humanitarian law because military structure and the need to maintain military discipline make this necessary and appropriate.

### **Subordinates**

The presence of a hierarchy of power is a necessary condition to the determination of responsibility of a superior. However, power does not derive solely from the official title of the accused person. The determining factor is the effective exercise of authority and control over the actions of subordinates. Control can be officially conferred or

simply exercised. Also, the legal power to lead subordinates does not constitute an absolute condition for establishing responsibility of the commander, who may in some cases be part of an indirect line of command. For example, military leaders can be held responsible for acts committed by individuals who are not officially under their control in the chain of command, but on whom they could have exercised in fact power to prevent or repress the commission of a crime.

### **Omission to take necessary measures**

A superior can only be held responsible for omitting to take measures that were within his or her capacity to take. Therefore, even if a superior did not officially have the power to take measures concerning offences that had been committed, he or she can be held responsible if it is demonstrated that in the circumstances, he or she could have acted.

### ***Complementarity Requirements***

States Parties to the Statute desiring to prosecute criminals in their national courts under the principle of complementarity should incorporate the concept of responsibility of commanders and superiors into their national law, as defined in article 28.

### ***Implementation***

Few national criminal codes deal with the concept of the responsibility of commanders. It would be prudent for an implementing law to introduce this concept into national law. Generally speaking, the notion of the responsibility of commanders does not exist for general law offences. For example, a deputy minister cannot be held criminally responsible for fraud committed by an employee in his or her department, nor can a captain be held responsible for the murder of a soldier by another soldier. International crimes are treated differently; high-ranking military and civilian authorities are frequently found to have criminal responsibility. Since it is often extremely difficult to establish responsibility, due among other reasons to the complexity of the chain of command, the concept of the responsibility of commanders and superiors is an essential tool for the prosecution.

## ***4.7 Rules of Evidence and National Criminal Justice Proceedings***

### ***Description***

The principles in the Statute on which the Court's procedures are based, are derived from existing international human rights standards. The Statute does not explicitly require States Parties to modify judicial procedures in criminal matters. Yet, rules of evidence and rules of proceedings in criminal matters should not unnecessarily restrict proceedings initiated concerning crimes defined by the Statute. There are some evidentiary rules that almost systematically result in acquittal. For example, some criminal

jurisdictions require the testimony of several men in order to establish proof that a woman was raped, even if only one man was involved in the rape.

### ***Complementarity Requirements***

Under the principle of complementarity, States Parties should ensure that when crimes listed in the Statute are committed, they can be effectively investigated and prosecuted. They should also make sure that their rules of proceedings in criminal matters do not prevent victims from laying charges, or prevent the establishment of evidence of crimes.

### ***Implementation***

Not all States Parties may wish to adjust their rules of proceedings in criminal matters. Also, the adjustment will probably only affect a few rules. However, every act that is likely to constitute one of the crimes listed in the Rome Statute should be considered in terms of the rules of evidence and proceedings in order to determine if any rules could pose a major obstacle to the proper functioning of an investigation or trial, and to ensure that persons are not shielded from criminal responsibility. The rules of evidence and proceedings concerning sexual offences are those that are most likely to present a problem of this kind in many jurisdictions.

## **4.8 *Military Tribunals***

Military tribunals, just like ordinary courts, can be used to prosecute the authors of ICC crimes. The Statute does not make any distinction between these two types of systems and States Parties are free to choose which domestic court will have jurisdiction over ICC crimes. A State Party can decide that the procedures related to the Statute will be taken in charge by its ordinary courts, by its martial courts or by both, depending on the general organization of its judicial system. Nevertheless, military tribunals generally have a restricted competence. They can only prosecute military personnel and usually do not have jurisdiction over civilians. ICC crimes, however, can be committed in times of peace by both members of armed forces and civilians. For example, police forces or non-State armed groups can commit crimes against humanity, as a civilian can participate in the recruiting of children, thereby committing a war crime. Therefore, States Parties willing to prosecute authors of ICC crimes should, most of the time, use their common law jurisdictions, except if their military tribunals have a sufficiently broad jurisdiction to cover crimes committed in times of peace and crimes committed by civilians.

### **The Special Character of Military Proceedings**

In many States, proceedings before military tribunals are different than those before ordinary courts. Proceedings are sometimes more expeditious in military tribunals, and in some jurisdictions due process may not be guaranteed to the same extent as in ordinary criminal proceedings. Nevertheless, the ICC can not find admissible a case

prosecuted by national jurisdictions unless the proceedings at the national level were undertaken with the aim of shielding the person from criminal responsibility or are being conducted in a manner inconsistent with an intention to bring the person concerned to justice. Thus, any military proceeding undertaken in good faith is highly unlikely to result in the ICC subsequently assuming jurisdiction over the same matter, just because the proceedings were expeditious. Military tribunals should be able to determine the criminal responsibility of an individual that is described by the Statute, taking into account as much as possible the definitions of the crimes, the means of defence, and the general principles of criminal law described by the Statute.

### **Military Justice and Practice**

The Statute does not state explicit obligations for States Parties with respect to the conduct of their armies. Nevertheless, one of the aims of the Statute is to ensure a greater respect for the laws of armed conflicts and many ICC crimes are related to military practice. Thus, every prohibition resulting from the definitions of genocide, crimes against humanity and war crimes should be applicable to the members of the armed forces of the States Parties. Furthermore, the general principles of criminal law, and the defences established by the Statute should be incorporated in States' military codes. As prevention measures, States Parties should include in their military manual and adapt the training and the instruction of their troops, if necessary, in order to respect the prohibition of the use of certain arms stated by the Statute. The same should be done concerning the questions related to the superior orders defence.

## **5. RELATIONSHIP BETWEEN THE ICC AND STATES**

### **5.1 *Broader State Obligations and Rights of States Parties***

#### **Treaty Requirements**

##### *Description*

The Rome Statute stipulates in article 126 that the International Criminal Court will come into existence on the 1st day of the month that follows the period of 60 days after the deposit of the 60th instrument of “ratification, acceptance, approval or accession”. Thus, once 60 States have acknowledged their acceptance in the form required by their constitutional regime, the Statute will enter into force some 2-3 months later.

Signature of the Statute closes on December 31, 2000, as provided for in paragraph 1 of article 125. In order to become a Party, a State must either ratify, accept, approve or accede to the Treaty. The term “accession” usually means adhering to the treaty after its entry into force but may designate a specific process for a given State. A State wishing to ratify the Statute before the closure of the date for signature would normally sign it and then deposit its instruments of ratification, acceptance or approval with the Secretary General of the United Nations.

For a State ratifying, accepting, approving or acceding to the Statute after the deposit of the 60th instrument, the entry into force of the Statute for such a State shall be the 1st day of the month following 60 days after its action of ratifying, accepting, approving or acceding to the Statute (article 126(2)).

#### **Reservations and declarations under the Statute**

Under article 120, States can not make any reservations to the Statute. States Parties must accept the Statute as adopted by the Rome Conference.

However, article 124 of the Statute provides that a State may declare that upon becoming a party to the Statute, “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.” This provision is intended to allow States Parties sufficient time to train all their military personnel in the requirements of the Statute with respect to war crimes, as some of the provisions in the Statute may differ from existing international obligations.

#### **Withdrawal from the Statute**

Article 127 provides that a State Party may withdraw by giving a written notification to the Secretary General of the United Nations that it intends to withdraw from the

Statute, taking effect one year from the date of the notification or at a later date if the State so declares. It should be noted that article 127(2) outlines the obligations and duties of the State, which persist notwithstanding the notice of withdrawal and the actual withdrawal itself.

### **Settlement of disputes**

Under Article 119, disputes which arise between two or more States Parties relating to the interpretation or application of the Statute should initially be settled through negotiations, if possible. If it cannot be settled in this manner within three months, the matter will be referred to the Assembly of States Parties, which may seek to settle the dispute itself, or make recommendations on further means of settlement of the dispute. The Statute gives the Assembly of States Parties the power to refer the dispute to the International Court of Justice “in conformity with the Statute of that Court” (article 119(2)).

### ***Obligations***

- a) States may ratify, accept, approve or accede to the Rome Statute, as appropriate (article 125).
- b) States may not make any reservations to the Statute (article 120), but they may make a declaration under article 124, which defers acceptance of the jurisdiction of the Court over war crimes within its jurisdiction, for seven years after entry into force of the Statute for the State concerned, when a war crime is alleged to have been committed by the State’s nationals or on its territory.
- c) States Parties wishing to withdraw from the Statute must follow the procedure, and continue to observe the relevant obligations and duties, as outlined in article 127.

### ***Implementation***

States will probably already have in place procedures to address all of these issues. The only provision that may differ significantly from other standard treaty provisions, is article 124 on the special case of war crimes within the jurisdiction of the ICC. States should note that the basic principles underlying the war crimes provisions of the Statute do not deviate markedly from existing humanitarian law treaty and customary law obligations. The main difference is that breaches other than “grave breaches” of the Geneva Convention are also criminalised under the Statute.

However, States should already have legislation proscribing such conduct as breaches of the laws of war, and military personnel should already be aware of these provisions. Therefore, most States are unlikely to require seven years to educate the relevant personnel on the requirements of the war crimes provisions of the Statute. It would be unfortunate if a State Party decides to make a declaration under article 124, and is subsequently invaded by a hostile force that commits numerous war crimes, yet the State

cannot find any redress because it does not accept the jurisdiction of the ICC over such crimes and may not have the resources to carry out such a prosecution itself. Therefore, States should consider carefully whether to make a declaration under article 124, when ratifying the Statute, as it could have unwelcome consequences.

## **Financing of the Court**

### *Description*

Article 114 states that the 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. The funds of the Court will be provided by States Parties and any voluntary benefactors, rather than by the general budget of the United Nations. However, there are provisions that the United Nations may contribute, subject to approval by the General Assembly and that the United Nations contribution will, in particular, relate to operations referred to the Court by the Security Council (article 115(b)).

The Statute does not make the financing of the Court a universal, compulsory obligation for all States in the United Nations, but rather provides that the financial obligations to the Court of States Parties will be established following the assessment parameters provided in article 117 of the Statute, notably an agreed scale of assessment based on the scale adopted by the United Nations for its regular budget.

Article 117 further states that the scale of assessment shall be adjusted in accordance with the principles on which the scale is based. This refers to the general principle of the regular budget of the United Nations adopted by the General Assembly that there is a limit to the maximum contribution a State is required to make. At the present time no State may pay less than 0.001% and no State may be required to pay more than 25% of the budget.

An important feature of the financial arrangements for the Court concerns the stipulation that the budget of the Court will be set by the Assembly of States Parties. The assessed contributions therefore will be established after the budget is adopted.

### **The Budget**

The budget will be on a year to year basis as reflected in the annual audit clause in article 118. Thus, although the volume of the Court's activity and the activities of the Prosecutor and the Registrar will vary in relation to the volume, the requirement for annual budgets will allow the Court to adapt to changing circumstances when required.

The budget for the first fiscal year of the Court will be adopted by the Assembly of States Parties based on the proposal submitted by the Preparatory Commission. The Financial Rules and Regulations of the Court, and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies are to be established by the Assembly of States Parties as provided for in article 113.

Note that States Parties' voting rights in the Assembly of States Parties and in its Bureau may be affected in certain circumstances as stipulated in article 112(8) where a State's arrears equal or exceed the contributions required for the preceding two years. The same paragraph provides for the suspension of this sanction where the Assembly of States Parties is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

Voluntary contributions to the Court are permitted under article 116 where it is stated that they must be considered as additional funds. Thus they may not be sought or utilised in any manner to replace or fulfil the regular budget expenses.

### *Obligations*

States Parties must provide the Court with specified financial contributions, which will 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 (articles 115(a) & 117).

States Parties that are in arrears may lose their right to vote in the Assembly of States Parties and in the Bureau, if the amount of their arrears equals or exceeds the amount of the contributions due from them for the preceding two full years. However, the Assembly may permit a State Party to vote where it is satisfied that the failure to pay is due to conditions beyond the control of the State Party (article 112(8)).

### *Implementation*

Member States of the United Nations will already be familiar with the method of providing contributions to an international body in accordance with an agreed scale of assessment of contributions. All States Parties must ensure that their annual budgets provide for their assessed contributions to the ICC.

## **Allowing the ICC to sit in a State's territory**

### *Description*

Article 3(1) provides that the seat of Court will be in The Hague and that the Assembly of States Parties will approve the headquarters agreement between the Court and the host State. Articles 3(2) & 62 suggest that the Court may also sit outside of its headquarters for a specific trial or series of trials regarding a situation referred to the Court. Thus, States Parties may wish to provide for the Court to sit in their territory where this is necessary or desirable. The Rules of Procedure and Evidence are likely to specify more detailed procedures for the Court to sit outside of its headquarters.

### *Obligations*

None of these provisions create obligations for States.



### *Implementation*

Many States may already have legislation and administrative procedures to allow for the ICTY/R to sit in their territory. This legislation and procedures would only require minor amendment, to allow the ICC to sit in their territory as well. Sometimes the effect of holding a trial in the place where the crime was committed is to give victims more of a sense that justice is being done, because they can clearly see the Court at work. Therefore States should consider the possibility of allowing for the ICC to sit in their territory.

## **Nominating judges and providing other personnel to the Court**

### *Description*

The nomination of judges to the ICC is a right of States Parties, therefore States may wish to implement procedures for nominating candidates. Article 36(4) sets out the procedures that a State Party may use to make nominations:

- i) the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
- ii) the procedure provided for the nomination of candidates to the International Court of Justice in the Statute of that Court.

Note that States Parties may nominate only one candidate for any given election. Candidates need not be nationals of the nominating State Party, but they must be a national of one of the States Parties (article 36(4)(b)).

Election of the judges will be by secret ballot at a meeting of the Assembly of States Parties held for that purpose (article 36(6)). Two methods of choosing a nominee are spelled out in considerable detail in the Statute. All candidates for judgeships on the Court must be chosen from among persons of high moral character, impartiality and integrity and who possess the qualifications required in their respective States for appointment to the highest judicial offices (article 36(3)).

Under article 35, all judges of the Court shall be elected as full time members of the Court and shall be available to serve as such from the commencement of their terms of office. However, the judges comprising the Presidency shall serve on a full time basis as soon as they are elected. The Presidency may decide to what extent the remaining judges shall be required to serve on a full-time basis in consultation with its members.

## **Ensuring the impartiality of judges and other ICC personnel**

Under article 41(2), a judge will be disqualified from hearing a case where 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. Therefore States Parties need to keep accurate records of the criminal trials that their

judges are involved in, if they envisage nominating their judges to the ICC at some stage.

States Parties may also provide Prosecutors and other ICC personnel for the Court, although there is no specific right for them to nominate such persons under the Statute. The Statute provides that the Prosecutor will be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties, but it does not specify who can make nominations of Prosecutors (article 42(4)). However, it specifies that the Prosecutor provides a list of candidates for the Deputy Prosecutors. Under article 44(4), States Parties may also offer gratis personnel to assist with the work of the organs of the Court.

Article 42(7) provides that Prosecutors and Deputy Prosecutors will be disqualified from a case if they have previously been involved in any capacity in that case before the Court or in a related case at the national level involving the person being investigated or prosecuted. It may also cause problems for the Court if any gratis personnel provided by a State Party could be perceived as partial by reason of previous involvement in a related case at the national level. Therefore, States Parties that envisage providing any personnel to the Court should ensure that they keep accurate records of all persons involved in criminal cases at the national level, to avoid the possibility of any of these persons giving the appearance of partiality and thereby undermining the legitimacy of the Court.

### *Obligations*

If a State Party decides to nominate a candidate for election as a judge of the ICC, it must follow one of the procedures set out in article 36(4). It must also observe the requirements under article 36(3) as to the type of qualities that the candidate must possess.

### *Implementation*

States Parties that wish to take advantage of these provisions should implement appropriate procedures for selecting and nominating such persons. They may wish to create a list of persons who would be suitable candidates for various positions within the Court. They should also establish procedures, if they have not already, for keeping accurate records of all persons involved in criminal investigations and prosecutions in the State, to ensure that the ICC may have all the relevant information on which to base a decision to disqualify a person from involvement in an ICC case, if this is required. When States Parties are putting forward any candidates for the Court, they should bear in mind that the working languages of the Court will be English and French in most cases, so their candidates will need to be fluent in at least one of these languages (article 50(2)).

## Other rights of States Parties

The following situations are other instances in the Statute where rights of States Parties arise and States may wish to implement procedures to facilitate the exercise of these rights:

- States Parties may participate in the making of the Financial Rules and Regulations of the Court (article 113) and the rules of procedure of the Assembly of States Parties (article 112(9)).
- Under articles 13(a) & 14, States Parties may refer a “situation” to the Prosecutor, which gives jurisdiction to the Court to investigate the matter. They have a right to be informed where the Prosecutor concludes that information given by the State Party on a situation does not form a reasonable basis for an investigation (article 15(6)). They also have a right to be informed of all investigations that are initiated by the Prosecutor, either *proprio motu* or on the basis of a State Party referring a situation (article 18(1)). Where the State Party referred a particular situation to the Prosecutor, it may submit observations where the Prosecutor seeks a ruling from the Court regarding a question of jurisdiction or admissibility (article 19(3)). The State Party may also request the Pre-trial Chamber to review a decision of the Prosecutor to initiate or not an investigation (53(3)(a)).
- If a State becomes a party to proceedings in the ICC, it has the right to present evidence (article 69(3)). Where a State Party is allowed to intervene in a case, it can request the use of a language other than English or French in which to address the Court (article 50(3)).
- States Parties have the right to receive Regulations of the Court and to accept or object to them (article 52(3)).
- They also have the right to receive co-operation and assistance from the Court where they are conducting an investigation or prosecution either in regard to situations where a crime is within the jurisdiction of the Court, or which is a serious crime under the national law of the requesting State Party (articles 93(10) & 96(4)).

## 5.2 Looking to the Future

### Assembly of States Parties

The Assembly of States Parties is going to be the manager of the Court, just as the General Assembly manages the UN. It will be comprised of representatives of all States Parties, who will meet on a regular basis to ensure the efficient functioning of the Court. Non-States Parties that have signed the Final Act of the Rome Conference and/or the Rome Statute are entitled to participate as observers in the Assembly, but are not entitled to vote (article 112(1)).

The main provision of the Rome Statute that deals with the Assembly of States Parties is article 112. Each State Party shall have one representative in the Assembly, however States may also bring their advisers and other personnel with them to meetings of the

Assembly. Each State Party has one vote (article 112(7)). Any decisions on matters of substance must be approved by a two-thirds majority of those present and decisions on matters of procedure are to be taken by a simple majority of States Parties present. However, the Assembly is exhorted to try to reach consensus in its decisions in the first instance.

Paragraph 112(8) stipulates that any State Party in arrears in the payment of its financial contributions towards the cost of the Court for the last two years shall lose its right to vote, unless the Assembly is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

### **The Powers of the Assembly of States Parties**

Paragraph 2 of article 112 sets out some of the broad functions of the Assembly, including deciding the budget for the Court. Paragraph 3 describes the management structure of the Assembly, comprising a Bureau consisting of a President, two Vice-Presidents, and 18 members elected by the Assembly for three-year terms, taking into account equitable geographical distribution and the adequate representation of the principal legal systems of the world.

Paragraph 4 grants additional powers to the Assembly, such as the power to create subsidiary bodies as necessary. Paragraph 5 provides that the President of the Court, the Prosecutor and the Registrar may participate in meetings of the Assembly and of the Bureau. Paragraph 6 sets out the timetable and preferred venue of meetings for the Assembly.

There are numerous additional references throughout the Statute to the details of the Assembly's role and responsibilities. For example, articles 2 & 3 provide that the Assembly will have to approve the agreements that are to be made between the Court and the UN, and between the Court and the host State. Under article 44, the Assembly is required to establish guidelines for the employment of any "gratis personnel offered by States Parties, intergovernmental organisations or non-governmental organisations".

One of the most influential roles that the Assembly will have is the selection of judges and other personnel for the Court. Most of the relevant provisions are in Part 4. Composition and Administration of the Court. The Assembly also makes the decision to remove judges and prosecutors if necessary and decides the salary of all senior ICC personnel (articles 46(2) & 49).

As mentioned previously, the Assembly must also adopt the Elements of Crimes and the Rules of Procedure and Evidence that are currently being finalised at Preparatory Commission meetings (articles 9(1) & 51(1)). For details on these texts, see below.

The Assembly may also have a disciplinary role, if this is ever needed. Under article 87(7), if the Court concludes that a State is acting inconsistently with its obligations under the Statute, it can refer the matter to the Assembly. There is no mention in the Statute of the Assembly's obligations once a matter has been referred to it. But it is

likely to consider the seriousness of the allegation and arrive at a suitable political solution. The Assembly will also have a role in the settlement of any disputes between States Parties (article 119).

Finally, the Assembly is to establish and administer a Trust Fund “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims” (article 79(1)). The Assembly will determine the criteria for managing the Fund (article 79(3)).

## **Elements of Crimes**

At present, a Working Group comprised of representatives from over 100 States is preparing a draft text of the Elements of Crimes within the jurisdiction of the Court. This draft text must be finalised by 30 June 2000. Once finalised, the Elements need to be adopted by a two-thirds majority of the Assembly of States Parties before they come into force (article 9(1)). The Working Group is making every effort to ensure that the Elements are consistent with the relevant provisions of the Statute, in order to maintain widespread support for the Court.

The purpose of these Elements is to specify the type of facts, mental awareness, and circumstances that the ICC Prosecutor will have to prove, in order to convict a person of one of the crimes within the jurisdiction of the Court. This precision will help in the successful dissemination of information about the ICC crimes to all of those who may potentially commit one of these crimes. For example, military personnel engaged in peacekeeping operations will need to know about the exact details of the requirements under the Elements of Crimes, if they are to avoid potential prosecution. States should endeavour to ensure that all of their nationals are appropriately informed and trained in any new procedures that may be required, in light of the Elements of Crimes, once they come into force.

## **Rules of Procedure and Evidence**

Several Working Groups comprising representatives of over 100 States are also discussing draft texts for all the Rules of Procedure and Evidence that are needed by the new Court. The Final Act of the Rome Conference requires that these Rules be in final draft form by 30 June 2000. The Rules and any amendments thereto are to be adopted by a two-thirds majority of the Assembly of States Parties before they can take effect (article 51(1)).

Once the Court is established, if the judges need to draw up their own provisional Rules in urgent cases, the Assembly can decide to adopt, amend or reject them at its next session (article 51(3)). Any amendments to the Rules cannot be applied retroactively to the detriment of an accused or convicted person (article 51(4)).

These Rules must also be consistent with the Statute and, in the event of any apparent conflict, the Statute takes precedence over all Rules of Procedure and Evidence (article 51(5)).

The purpose of the Rules is to clarify some of the procedural matters covered in very general terms in the Statute. For example, the Rules will specify the exact time limits that are required under certain provisions of the Statute, such as in article 92(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 ... within the time limits specified in the Rules of Procedure and Evidence.” Such provisions were drafted in this manner in order to expedite the process of negotiations at the Rome Conference, by leaving such issues to the States involved in drafting the Rules of Procedure and Evidence.

As their title suggests, the Rules will elaborate on procedures and evidentiary requirements for the Court’s proceedings. States Parties may need to change some of their procedures when the Rules are adopted, in order to ensure that they can continue to cooperate fully with the Court, in accordance with articles 86 & 88.

## **Review of the Statute**

Article 123 provides that the Secretary-General of the United Nations is to convene a Review Conference seven years after the entry into force of the Statute. At that Conference, the Assembly will consider any amendments to the Statute that have been proposed by States Parties, in accordance with article 121. The Assembly and the Secretary-General may then convene further review conferences, as required.

The Final Act of the Rome Conference recommended that the crimes of terrorism and international trafficking of illicit drugs should be considered for inclusion on the list of crimes within the jurisdiction of the Court. In addition, the definition and jurisdictional issues concerning the crime of aggression will be discussed at the first Review Conference.

## **Amendments to the Statute**

Generally, making amendments to the Statute, amendments to the Rules of Procedure and Evidence and to the Elements of Crimes are some of the most important rights that will concern States who ratify the Statute or adhere to it. Because amendments may change the relationship with the Court established in the Statute, States Parties have specific rights and must follow detailed procedures for proposing amendments, as well as for agreeing to consider them for adoption in a meeting of the Assembly of States Parties, and for giving them effect. Therefore States Parties may wish to implement appropriate procedures in order to facilitate the exercise of these rights.

### **Amendment procedures**

Generally, an amendment to the Statute can only be proposed seven years after the entry into force of the Statute (article 121(1)). In addition, it may only be proposed by a State Party, it must be circulated by the Secretary General of the United Nations to the States Parties, it may only be considered after a period of at least three months from the date of notification to the Secretary General and may not be considered for adoption

unless a majority of the States Parties which are present and voting at the next Assembly of States Parties decide to take it up. If the required majority agrees to take it up, it may be considered directly at the Assembly of States Parties or submitted to a Review Conference if the issue involved so warrants (article 121(2)).

Adoption of an amendment to the Statute requires a two-thirds majority of States Parties (article 121(3)). Note that this article repeats the emphasis on adoption of measures by consensus first enunciated in article 112(7) and provides for the two-thirds majority of all members only where consensus cannot be reached.

The next step in amending the Statute consists of a ratification or acceptance process outlined in paragraph 4 of article 121, entailing the approval of seven-eighths of the States Parties. These amendments enter into effect for all States Parties at that point. However, as mentioned above, amendments have the potential to effect a major change in a State Party's relationship to the Court, thus any State Party not in agreement with a given amendment of this type has a right to a withdrawal with immediate effect from the Statute (article 121(6)).

### **Amendments to crimes within the Court's jurisdiction**

A special case of amendments which is an exception to the general rule is set out in article 121(5), where an amendment concerns the crimes within the jurisdiction of the Court. For these amendments the same requirement of a majority of two-thirds of States Parties is required. However, the amendments become effective only for States that ratify or accept them. This is an important provision, in terms of the future effectiveness of the Court. It is especially significant in the case of the crime of aggression, as the definition that is yet to be determined will constitute an amendment to article 5 and therefore the Court will not be able to exercise its jurisdiction in respect to that crime if it is committed by the nationals or on the territory of a State Party that does not accept the amendment. Therefore it is particularly important for States Parties to achieve a consensus on any amendments to articles 5-8 of the Statute.

### **Amendments of an exclusively institutional nature**

State Parties will be able to propose certain amendments to the Statute at any time after its entry into force. Enumerated in article 122, these amendments concern matters which are of an exclusively institutional nature.

There is no change to the majority of States Parties required to adopt an amendment, but the date for entry into force of amendments in this category is six months after adoption by the required majority of States Parties rather than one year after ratification or acceptance as is the case in article 121. Amendments to these articles apply to all States Parties. There is no need for post-adoption ratification by a State Party for this kind of amendment.

Article 122 identifies the specific amendments considered to be of an exclusively institutional nature under the Statute as follows: the service of judges; some of the provisions concerning the qualifications, nomination and election of judges; judicial vacancies; the presidency; the organisation of chambers; some of the provisions concerning the Office of the Prosecutor, the registry, the staff of the Prosecutor and Registrar's Offices; removal of judges, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar from office; disciplinary measures; and salaries, allowances and expenses.

### **Amendments to the Rules of Procedure and Evidence and to the Elements of Crimes**

Amendments to the Rules of Procedure and Evidence and amendments to the Elements of Crimes may be proposed by other entities as well as by States Parties, and need only be adopted by a two-thirds majority of States Parties (articles 9(2) & 51(2)). They are similar in that respect to amendments of an exclusively institutional nature. Further, States Parties may suggest amendments to the Rules at any time after their initial adoption by the Assembly of States Parties (articles 9(2)(a) & 51(2)(a)). The rights of States Parties that these amendments generate are similar to those amendments of an institutional nature, despite the different time period in which they enter into effect.

### **Effect of amendments to the Statute on States Parties' rights to withdraw from the Statute**

Any amendment to the Statute will give rise to the right of immediate withdrawal from the Statute, with two exceptions: amendments of an exclusively institutional nature discussed above, and amendments to the list of crimes under the jurisdiction of the Court. There are two modes of withdrawal related to amendment of the Statute: specific withdrawal, with immediate effect, as provided for in article 121(6), and non-acceptance of amendments concerning the list of the crimes as provided in article 121(5).

The option of withdrawal with an immediate effect can be taken when an amendment has been accepted by seven-eighths of the States Parties. Every State that did not accept the amendment can, during a period of one year after its entry into force, withdraw immediately from the Statute.

The non-acceptance of an amendment concerning the list of the crimes under the jurisdiction of the Court will prevent the Court from exercising its jurisdiction over a new type of crime committed by a national or committed on the territory of the State that did not accept the amendment.

The amendments of an exclusively institutional nature do not confer any right of immediate withdrawal on a State desiring to withdraw as a consequence of adoption of the amendment. In such cases, as with amendments to the Rules and Elements, the normal withdrawal regime of article 127 applies.



## Crime of Aggression

Article 5(2) provides that the Court shall exercise jurisdiction over the crime of aggression once an acceptable provision is adopted at a Review Conference, no earlier than seven years from the entry into force of the Statute. This provision must set out both the definition of the crime and the conditions under which the Court shall exercise jurisdiction with respect to this crime, and be consistent with the “relevant provisions” of the Charter of the UN.

A Working Group on this crime was established at the third Prepcom meeting in November 1999, representing delegates from over 100 States. Many of these States are hopeful that an acceptable provision on aggression will be negotiated before the Court comes into operation. However, articles 5(2), 121 & 123 make it clear that the Court will not have jurisdiction over the crime of aggression until at least seven years after entry into force of the Statute.

### Background to the crime of aggression

The crime of aggression has always proved controversial. Proscriptions against “aggressive wars” were set out in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, and the 1928 Pact of Paris (Kellogg-Briand Pact). But none of these declared aggression an international crime. Needless to say, most of these agreements were made amongst the Western nations only, and did not even attempt to encompass the views of the rest of the world, unlike the Rome Statute.

After the Second World War, the UN War Crimes Commission *Draft Convention for the Establishment of a United Nations War Crimes Court* provided that such a Court would only prosecute persons “acting under the authority of, or claim or colour of authority of, or in concert with a State or political entity engaged in war or armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties.” In other words, Allied personnel could not be prosecuted by such a court, no matter how atrociously they behaved themselves. The judges at the Nuremberg Tribunal, in finding that “crimes against peace” and “war crimes” had been committed, relied mostly on peace and war crimes treaties to which Germany was a party.

In 1974, the General Assembly adopted a Resolution on the Definition of Aggression, which provided that “a war of aggression is a crime against international peace” (article 5(2)). However the Resolution did not deal with individual criminal responsibility for acts of aggression, and so it is questionable whether the definition of aggression in that Resolution is applicable to individual criminal acts.

The ICC Prepcom Working Group on the Crime of Aggression has a challenging task ahead of it, if it is to reach consensus on this issue. There is also considerable controversy over the exact meaning of the phrase in article 5(2) of the Statute, which provides that any provision on the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations.” Many States are of the view that this

means the Security Council has to make a determination that an act of aggression has occurred, in accordance with its powers under Chapter 7 of the UN Charter, before the ICC can assume jurisdiction over a crime of aggression. However, other States do not support such an interpretation. Therefore, work is proceeding slowly on an acceptable compromise for all concerned States.

### **Assistance of Defence Counsel**

The development of the international rule of law is obviously centred on the vigorous prosecution of alleged war criminals, which translates itself into the support of a strong and independent prosecutorial process. The implementation of the rule of law is equally based, however, on the way accused persons are brought before the ICC. The process for achieving such an objective includes ensuring a fair trial for all accused persons. That is why it is necessary to enable the development of a strong and independent defence process. Guaranteeing the rights of the accused is crucial to the establishment of such a strong defence process, and States Parties may need to adapt certain aspects of their criminal justice systems in the future, to ensure that their practices in relation to accused persons take into account the development of ICC jurisprudence in this area. Otherwise they may jeopardise the integrity of the process and undermine the future work of the Court.

One of the goals of the international criminal justice system is to encourage reconciliation between peoples and avoid acts of collective retribution. For this to happen, trial proceedings should respect the rights of the accused, guaranteeing them employment of all the means of defence to which they are entitled. There must be a fair trial, or members of the group to which the accused belongs will perceive themselves as being wronged by a justice system that is nothing but a front for organised vengeance.

### **The Rights of the accused**

Articles 55 and 67 outline the general rights granted to accused persons, and these rights affect the proceedings within the jurisdiction of the arresting and detaining State.

The rights and obligations alluded to are within the contemplation of the Universal Declaration of Human Rights, and more specifically guaranteed by the International Covenant on Civil and Political Rights (ICCPR) which is binding on the majority of member States of the United Nations. Article 67 makes it abundantly clear that there should be full equality between the defence and prosecution in any proceeding before the ICC. Thus the Rome Statute entrenches the principle of equality of arms.

In light of the rights of the suspect set out in both article 55 and article 67, it is crucial to a fair and effective proceeding that such rights are fully enabled and protected during the whole process. It is advisable that the arresting and/or detaining State endeavour to comply with all the rights set out in article 55 to guarantee fair trial procedures, and to avoid jeopardising the process in the event of any judicial review.

Article 54 states that the Prosecutor shall also fully respect the rights of persons arising under the Statute. This means that local authorities should co-operate fully with the Office of the Prosecutor during on-site investigations, and meet any requirements that will permit a full investigation to uncover both exculpatory and inculpatory evidence to be brought before the ICC.

### **Privileges and Immunities of defence counsel**

The exercise of the rights of the accused as detailed under both articles 55 and 67 will be facilitated by the general disposition concerning privileges and immunities as provided for in article 48. Article 48(4), in particular, grants counsel, experts, witnesses, and any other person required to be present at the seat of the Court "such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on privileges and immunities of the Court." This agreement is yet to be finalised by the Preparatory Commission. States Parties should ensure that this agreement is implemented once it is finalised, so that all persons involved in the work of the Court are treated appropriately.

### **Defence counsel and the Pre-Trial Chamber procedures**

In order to ensure a fair and effective trial, including a full and effective defence, the State in which the Pre-Trial Chamber is performing any of its functions under article 57 should ensure that defence counsel be appointed as soon as possible. Such States should also facilitate the work of the Pre-Trial Chamber in safeguarding and making available all evidence deemed necessary. Local authorities will be key actors in this investigative stage. National bar associations will be of great assistance in enabling the appointment of local counsel during this process.

### **Proceedings on an admission of guilt**

Article 65(5) sets out that any discussions between the Prosecutor and the defence regarding modification of the charges, admission of guilt, or penalty to be imposed shall not be binding on the Court. Local bar associations should make certain that any member counsel involved in the process are properly trained and fully aware that there is no enforceable plea bargaining before the ICC.

### **Protection of witnesses and their participation in the proceedings**

Article 68(5), in particular, raises issues of concern for the rights of the accused. Article 68(5) discusses situations where the disclosure of evidence may lead to grave endangerment to a witness or his or her family. In light of the rights provided to the accused, the Prosecutor must carefully weigh those rights in determining when to withhold evidence. Such measures should be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and the provision of a fair and impartial trial as entrenched in the Rome Statute.

### **Responsibilities of the Registrar related to the rights of the defence**

Pursuant to the Rules of Procedure and Evidence, which have yet to be finalised, the Registrar may be required to provide support to defence attorneys. For example, defence counsel may be entitled to copies of recent ICC judgements that are otherwise unavailable. The Registrar may also be involved with the development of a code of professional conduct and consult with independent legal associations on matters of mutual importance.

### **Defence attorney training**

The need for on-going education and training for potential defence lawyers cannot be over-emphasised. In order to ensure the strength and legitimacy of the Court, States should contact their national bar associations and request them to designate a coordinator/liaison for interested defence attorneys in that State. The coordinator/liaison could establish a relationship with the International Criminal Defence Attorneys Association (ICDAA) who would be prepared to assist with training for prospective defence attorneys to ensure they understand the operation of the ICC.

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## **APPENDIX I – THE FRENCH SOLUTION TO CONSTITUTIONAL ISSUES**

The French Constitutional Council examined the question of whether the Rome Statute contained provisions running counter to its Constitution. In its ruling, handed down on January 22, 1999, (Cons. Constitutionnel, 22 janvier 1999, *Traité portant statut de la Cour pénale internationale*, 98-408 DC, <http://www.conseil-constitutionnel.fr/decision/1998/98408/98408dv.htm>) the Council responded in the affirmative to this question, identifying three problem areas:

- 1) absence of immunity for Heads of state, contained in Article 27 of the Statute, contradicts three articles of the French Constitution.

Articles 26, 68 and 61-1 of the French Constitution read as follows:

### Article 26

No Member of Parliament shall be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the exercise of his duties. No Member of Parliament shall be arrested for a serious crime or other major offence, nor shall he be subjected to any other custodial or semi-custodial measure, without the authorization of the Bureau of the assembly of which he is a member. Such authorization shall not be required in the case of a serious crime or other major offence committed *flagrante delicto* or a final sentence. The detention, subjection to custodial or semi-custodial measures, or prosecution of a Member of Parliament shall be suspended for the duration of the session if the assembly of which he is a member so requires. The assembly concerned shall convene as of right for additional sittings in order to permit the preceding paragraph to be applied should circumstances so require.

### Article 68

The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical votes in open ballots and by an absolute majority of their members ; he shall be tried by the High Court of Justice.

## **TITLE X - ON THE CRIMINAL LIABILITY OF MEMBERS OF THE GOVERNMENT**

### Article 68-1

Members of the Government shall be criminally liable for acts performed in the exercise of their duties and classified as serious crimes or other major offences at the time they were committed. They shall be tried by the Court of Justice of the Republic. The Court of Justice of the Republic shall be bound by such definition

of serious crimes and other major offences and such determination of penalties as are laid down by statute. (<http://www.assemblee-nationale.fr/8/8ab.htm>)

- 2) The jurisdiction of the ICC affects the conditions for exercise of national sovereignty.

There are two scenarios where this would be so. First, in the event that the French Parliament passed an amnesty bill, the ICC might decide it had jurisdiction to prosecute individuals benefiting from such a law. Further, since there is no statute of limitations for crimes listed under the Statute, the ICC could exercise its jurisdiction and prosecute an individual despite the existence of French laws providing limitations on criminal offences, including international crimes.

- 3) The powers of the ICC Prosecutor affect the conditions for exercise of national sovereignty.

The power of the prosecutor to gather depositions from witnesses and conduct site inspections on a State's territory contradicts the rule giving French judicial authorities sole responsibility to perform actions requested in the name of legal co-operation by a foreign authority.

### **The Solution Adopted by France**

The French government considered that these were not major obstacles and could be surmounted by the inclusion of a new provision in the Constitution. They therefore added Article 53-2, written as follows:

The Republic may recognize the jurisdiction of the International Criminal Courts provided by the treaty signed on 18 July 1998. (Constitutional Law No. 99-568, July 8, 1999, inserting in Title VI of the Constitution, Article 53-2 with regard to the International Criminal Court, J.O. No. 157, July 9, 1999, 10 175).

The French justice minister affirms that this new article covers all the issues of unconstitutionality raised by the Constitutional Council and allows France to ratify the Rome Statute (Ministry of Justice of France, *Cour pénale internationale, adoption du projet de loi constitutionnel*, 1999, <http://www.justice.gouv.fr/arbo/publicat/note13.htm>). The advantage of this type of constitutional reform is that it implicitly amends the constitutional provisions in question, without opening an extensive public debate on the merits of the provisions themselves.

## **APPENDIX II – INTERNATIONAL INSTRUMENTS CRIMINALISING WAR CRIMES**

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