ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Preamble

The States Parties to this Statute,

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

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

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

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

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

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

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

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

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

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

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

Have agreed as follows:

Literature:

Roger S. Clark/Tuiloma Neroni Slade, *Preamble and Final Clauses*, in: Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT AND THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (1999).

Contents: margin No.

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A. General Remarks

1. Drafting history

1 The Preamble as adopted by the Rome Conference has 11 paragraphs, the majority of which were only included at the final stage of the Conference. This procedure is logical insofar as the Preamble summarizes the aims and purposes of the Statute and thereby mirrors the results achieved as well as the compromises which were agreed upon only at the very end of the Conference.

Early draft statutes, like those of the Committee on International Criminal Jurisdiction of 1951, revised in 1953, did not contain a preamble. The same is true for the ILA and the AIDP Drafts of the mid-1920s, even though at that time, for instance, the "General Treaty for Renunciation of War as an Instrument of National Policy" of 27 August 1928 included some *introductory* language starting with "persuaded ...; convinced ...; hopeful that ..."[1].

The Draft Statute elaborated by the Bellagio-Wingspread Conferences in 1972 also did not have any preamble, nor did those proposed by the ILA at its Belgrade Conference in 1980 and Paris Conference in 1984. The same is true of the Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other international crimes of 1980, and of the Draft Statute presented by M.Ch. Bassiouni in 1987[2].

2 It was the ILC which proposed in its 1994 Draft Statute a preamble with three paragraphs, beginning with the words: "Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court". The ILC emphasized in paragraph 2 that "such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole", while in paragraph 3 the complementarity "to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective" was mentioned[3]. This

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1 See for the early drafts O. Triffterer, Preliminary Remarks on Part 1, margin No. 2 with further references, and for the just mentioned General Treaty 1928, the Briand Kellogg Pact, League of Nations-Treaty Series, Doc. 7, No. 2137, pp. 190 et seq. (1929).

2 See for these documents O. Triffterer, *ibid.*, margin Nos. 4 et seq.

3 See for the 1994 ILC Draft Statute Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May-22 July 1994, U.N. Doc. A/49/10, pp. 43 and 44, reprinted in: M.Ch.

rather short summary of "the main purposes of the draft Statute", as it was expressed in the commentary to this Draft, was included in later drafts; the Siracusa and the Updated Siracusa Draft, for instance, did not change or amend this proposal of the ILC[4].

The 1995 Ad Hoc Committee repeated in its report only "the third preambular paragraph of the draft statute", stating that the ILC "did not intend the proposed court to replace national courts", but it mentioned that the issue required further elaboration[5].

However, according to its discussion reflecting the 1996 Session, the *Preparatory Committee* Report contains, in addition to the ILC Draft, proposals dealing with paragraph 3 and the question of complementarity between international and national jurisdiction. For the principle of complementarity its phrasing was more disputed than its establishment as such. Correspondingly, it was also proposed "that it is the primary duty of *States* to bring to justice persons responsible for such serious crimes"[6] (emphasis added). The Preparatory Committee did not deal with the preamble during its sessions in 1997, but mentioned nevertheless preambular paragraph 3 when dealing with article 35, "Issues of admissibility"[7]. Referring to the fact that the Preparatory Committee had not considered the preamble in 1997, the *Zutphen Draft* repeated only what had been printed in the Preparatory Committee's Report Vol. II. The *Consolidated Draft* did likewise, albeit with a footnote reference to proposals changing the ILC Draft[8]. The *Model Draft Statute* presented by L.S. Wexler and M.Ch. Bassiouni replicated the ILC 1994 Draft Statute with the exception that preambular paragraph 3 was shortened to be consistent with paragraph 1 of article 1, a proposition which several persons put to the Preparatory Committee[9].

What had amounted to a rather embryonic drafting history received fresh impetus at the Rome Conference. As early as 25 June 1998, Spain proposed an expanded preamble comprising eight paragraphs instead of the original three, covering aspects like the reminder of the sufferings of victims, the relationship to the United Nations, the recognition of protected values, as well as emphasizing, firstly, that "this Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and the powers of the organs of the United Nations", and 3

4 See for these documents O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 7 et seq.

5 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. Doc. A/50/22 (1995), p. 6, reprinted in: M.Ch. Bassiouni, *supra* note 3, 673. See also S.A. Williams, article 17, margin No. 18.

6 Discussing the second paragraph of the Preamble it was mentioned (without a concrete proposal) the necessity "to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts" and that "genocide met the jurisdictional standard referred to in the second paragraph of the preamble"; see Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/51/22 (1996), Vol. I, pp. 15 and 17 respectively for the discussion on the second paragraph Vol. II, pp. 20, 21 and 36 and for the proposals Vol. II, pp. 1 et seq., but also 155 et seq. on the further discussion on the question of complementarity, reprinted in: M.Ch. Bassiouni, *supra* note 3, 383, 385, 387 et seq. and 403 respectively 449 and 556 et seq.

7 See Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, U.N. Doc. A/AC.249/1997/L.8/Rev.1, p. 10, reprinted in: M.Ch. Bassiouni, *supra* note 3, 320.

8 Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, U.N. Doc. A/AC.249/1998/L.13 (1998), p. 11 with reference to U.N. Doc. A/51/22, *supra* note 6, reprinted in: M.Ch. Bassiouni, *supra* note 3, 145; for the Consolidated Draft see Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, U.N. Doc. A/CONF.183/2/Add.1 (1998), p. 10, reprinted in: M.Ch. Bassiouni, *supra* note 3, 11.

9 See 13*ter* NOUVELLES ETUDES PÉNALES 1 (1998).

secondly, that "the relevant norms of general international law will continue to govern those questions not expressly regulated in this Statute"[10].

Andorra proposed on 30 June 1998 that the preamble should begin with a reference (as it now states in preambular paragraph 1) to our "common bond, and that our cultures are woven together in a shared history" as well as to the threat to the "well-being of our world", three aspects which were eventually integrated into the adopted Preamble[11]. The Dominican Republic proposed (as Spain had done before) that the *permanent* character of the Court and the need "to put an end to the impunity with which such acts are committed" be included, mentioning also "the duty of every State to exercise its penal jurisdiction against those responsible for crimes of international magnitude"[12].

From the outset of its discussion, the Committee of the Whole had entrusted a representative of Samoa "with the task of coordinating informal consultations on the text for the Preamble to the Statute". After these consultations concluded, the Co-ordinator submitted to the Committee of the Whole a proposal containing nine preambular paragraphs which in large part dealt with the aspects contained in the adopted Preamble[13]. On 14 July 1998, the Committee of the Whole presented the recommendation of the Co-ordinator in 12 paragraphs[14] with some changes. The Report of the Drafting Committee to the Committee on the Whole shortened the Preamble to 10 paragraphs on 16 July 1998. There was a shortened reference in preambular paragraph 1 to the "common bonds and ... a shared heritage", and a new reference in paragraph 3 to, "[r]ecognizing that such grave crimes threaten the peace, security and well-being of the world"[15].

2. Legal and political importance

4 The *legal* significance of the Preamble was only briefly mentioned during the drafting process. The ILC first pointed out in its commentary to the 1994 Draft Statute that the preamble of the Statute was "intended to assist in the interpretation and application of the Statute, and in particular in the exercise of the power conferred by article 35", which at that stage of the process was dealing with "[i]ssues of admissibility". Already at that time the question of whether "the preamble should be an operative article of the statute, given its importance", had been discussed[16]. The reasons why the latter opinion did not prevail in the end were twofold: *First*, with reference to article 31 of the Vienna Convention on the Law of Treaties, it was stated that "the preamble to a treaty was considered part of the context within which a treaty should be interpreted". Therefore, any terms of the Preamble "would form part of the context in

10 See U.N. Doc. A/CONF.183/C.1/L.22.
11 See U.N. Doc. A/CONF.183/C.1/L.32.
12 See U.N. Doc. A/CONF.183/C.1/L.52.
13 See U.N. Doc. A/CONF.183/C.1/L.61.
14 See U.N. Doc. A/CONF.183/C.1/L.73.
15 See U.N. Doc. A/CONF.183/C.1/L.82. See for an additional aspect of this development margin No. 7.
16 For both quotations see Report of the ILC, *supra* note 3, commentary to the preamble, paras. 3 and 4, p. 44.

which the statute as a whole was to be interpreted and applied"[17]. *Second*, what was included in the draft preamble in 1994 was not considered to be sufficiently detailed and precise to substitute "a definition or at least a mention ... in an article of the statute" with a view to removing "any doubt as to the importance of the principle of complementarity (for instance) in the application and interpretation of subsequent articles"[18].

Both opinions confirm that the Preamble does not belong in the operative part of the Statute and that its *legal* significance is to describe the main purposes of the Statute and results of the negotiation process which form the basis for the acceptance of the Statute, as well as to reiterate – and perhaps specify – the obligations of States in certain respects. The Preamble, therefore, has to be taken into consideration when interpreting the articles and provisions of the Statute.

That the Preamble is an integral part of the Statute can be seen from the common heading: "Rome Statute of the International Criminal Court". Both the Preamble and the operative part of the Statute must, therefore, be treated equally in comparison with other sources of international law pursuant to article 21 para. 1. Needless to say, in relation to each other, the operative articles have higher rank. Consideration of the Preamble would normally only be necessary in cases of doubt, as mentioned by the ILC in its commentary[19].

Since the Preamble is "part of the context within which a treaty should be interpreted" and "intended to assist in the interpretation and application of the Statute"[20], it must also be considered when the Statute or specific articles or provisions thereof shall be amended and reviewed according to articles 121-123. This "limiting or prejudicing" effect of the Preamble has to be taken into account when defining elements of crimes, as provided in article 9, or the crime of aggression, the latter being, according to article 5 para. 2, one of the two conditions for the exercise of relevant jurisdiction of the Court[21].

The *moral* and *political* importance of the adopted Preamble should not be overlooked. The credibility of States that have signed the Statute, especially those that decide to become States Parties, will in large part depend on their unreserved respect for the principles and standards of the Preamble. This is particularly true with regard to preambular paragraph 6, which recalls the duty of States to exercise their criminal jurisdiction to fulfil the purposes and aims described in the Preamble, even with regard to those international crimes not falling within the jurisdiction of the Court. 5

17 Report of the Ad Hoc Committee, *supra* note 5, para. 37, p. 7, reprinted in: M.Ch. Bassiouni, *supra* note 3, 674.

18 *Ibid.*, para. 36, p. 7 (brackets added); see also para. 54, p. 11: "... reflected not only in the preamble but also in an operative provision." See also Report of the Preparatory Committee, *supra* note 4, Vol. I, para. 63, p. 19: "... appropriate language could be added to the preamble or on operative provision" and para 156, p. 36: "... the preamble of the Statute to reiterate the obligation of States in this respect."

19 See margin No. 4 before *supra* note 16.

20 See for the first quotations Report of the Ad Hoc Committee, *supra* note 5, para. 37, p. 7 and for the latter Report of the ILC, *supra* note 3, commentary to the preamble, para. 3, p. 44.

21 This is consistent with article 10 which does not prohibit such efforts for purposes within this Statute; see O. Triffterer, article 10, margin Nos. 14 et seq. For articles 9 and 5 para. 2 see also O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 61 et seq.

In Nuremberg and Tokyo the Allies repeatedly declared that the law according to which they judged the major war criminals would have to be applied in the future to judge their own behaviour. The same is true with regard to all States Parties of the Rome Statute. Their fundamental moral obligation has to be taken as seriously, if not more, as the words of the American Chief Prosecutor, Justice Robert H. Jackson:

> "We must never forget that the record on which we judge these defendants to-day is the record on which history will judge us to-morrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."[22]

B. Analysis and interpretation of elements

"Chapeau"

6 The Preamble was adopted alongside the rest of the Statute at the Rome Conference by no less than 120 negotiating States, whilst 20 States abstained, and a mere seven opposed. The chapeau of the Preamble did not, however, appear in the adopted version, even though it was contained in earlier drafts and its absence was pointed out to members of the Drafting Committee before adoption. It had simply been forgotten in the Report of the Drafting Committee to the Committee of the Whole on 16 July 1998[23], the most hectic day before the closing session of the Conference on 17 July 1998. It was later reinserted, when, after the Rome Conference, the whole Statute was examined carefully and minor corrections, which had been overlooked during the frenetic last three days of the Conference, were distributed to the participating States and other institutions for approval or objection within a specified time period.

It was obvious that *only* "[t]he States Parties to this Statute" could "[h]ave agreed as follows", namely to establish the ICC and bring it into operation. Consequently, the omission of the chapeau was considered a clear case of oversight and the alteration accepted. Any interpretation of the Preamble without its chapeau would in any event have led to the same result[24].

I. Paragraph 1: Global context

7 Preambular paragraph 1 makes it clear that States Parties, when accepting the Statute, are "[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be

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22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS. PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, Part I, 20 Nov. 1945 to 1 Dec. 1945, p. 51 (available also on the Internet, at http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm); for the German translation and a similar statement by the French Chief Prosecutor Francois de Menthon, see DER PROZEß GEGEN DIE HAUPTKRIEGSVERBRECHER VOR DEM INTERNATIONALEN MILITÄRGERICHTSHOF NÜRNBERG, Vol. II, 118 respectively Vol. V, 480 (1947-1949).

23 See U.N. Doc. A/CONF.183/C.1/L.82 in comparison with the Recommendations of the Co-ordinator, 14 July 1998, U.N. Doc. A/CONF.183/C.1/L.73, which were, with minor changes, adopted by the Committee of the Whole.

24 For the corrections made by the Drafting Committee in cooperation with the Committee of the Whole, see U.N. Doc. A/CONF.183.C.1/L.61, L.73 and L.82. See also Note from the Secretary General, C.N.502.1998.TREATIES-3 (Depositary Notification).

shattered at any time". This represents an important statement of fundamental value-based considerations that seem to have become universally recognised. Opening the Preamble with such a declaration serves as a useful reminder that the foundational principles and interests underlying the emerging system of international criminal justice do not exist in a normative vacuum. Rather, they echo, in the arena of international affairs, the loftiest aspirations of an ever advancing civilisation.

Being aware "that all peoples are united by common bonds, their cultures pieced together in a shared heritage" means that all human beings, regardless of their citizenship and religious, ethnic, social or other origin or identity, are essentially members of one human race simply by being human beings. Born with inherent potentialities and equal in dignity, all human beings enjoy the same fundamental human rights and freedoms that protect interests such as life, physical integrity, personal liberty and individual conscience. The references to "common bonds" and "shared heritage" recognise that humankind is essentially *one*, despite political, legal or socio-economical divides or considerations of national or geographic separation. The enforcement of international criminal law through an international jurisdiction has the potential to contribute to the further *unification* of humankind by bringing peace through justice.

At the same time preambular paragraph 1 recognises that the peoples of the world are entitled to preserve the essential diversity of humankind as it traditionally exists as well as evolves in the future. It refers to the cultures being "pieced together" and that this constitutes a "delicate mosaic". Essentially, paragraph 1 addresses the need for the various peoples of the world to afford respect and tolerance for one another.

The unity in diversity of humankind, as recognised by the metaphor of a "delicate mosaic", was already expressed in a proposal by Andorra of 30 June 1998, which emphasized:

> "that our cultures are woven together in a shared history, a delicate tapestry that may at any moment be rent and torn asunder by unspeakable acts of brutality and ignorance that threaten the well-being of our world"[25].

The original Andorran image of the "tapestry" was later replaced with the reference to a mosaic. The delegations of Japan, France and some Islamic States found "tapestry" to be culturally inappropriate. Once "tapestry" was replaced with "mosaic", the verb "rent" did not make sense any longer. It is noteworthy that the Drafting Committee deleted the image of the "mosaic" altogether (as it has now become) through document L. 82, but Andorra objected firmly to this change. It was put back in through L. 76, later in the day on 16 July 1998 (although given a higher number, L. 82 was in fact issued before L. 76). The original proposal gradually lost its scope and flavour, as the expression "be rent and torn asunder" was first replaced with "be pulled apart" and finally with "be shattered", and some of its concepts were incorporated into other paragraphs; "threaten the peace, security and well-being of our world", for instance, was placed in preambular paragraph 3.

Notwithstanding these alterations, the final format of the paragraph expresses the recognition by the States negotiating at the Rome Conference that this "delicate mosaic", the cultures of all peoples pieced together in a shared heritage, may "be shattered at any time". Armed conflicts constitute an integral part of the reality of

[25] U.N. Doc. A/CONF.183.C.1/L.32.

international affairs, providing sobering material that confirms that such conflicts continue to generate "grave crimes [that] threaten the peace, security and well-being of the world", as referred to in preambular paragraph 3.

II. Paragraph 2: Reminder to victims

8 Endeavours to develop international criminal law and to establish an international criminal jurisdiction have been stirred since mid-18th century by "unimaginable atrocities", shocking not only distinguished individual observers such as Henry Dunant and Friedrich von Martens. Since then new waves of atrocities have moved steadily better organized institutions to exert pressure on combatants to conduct hostilities with at least a bare minimum of humanity. New armed conflicts, however, seemed bent on evoking deeper levels of inhumanity, thus challenging society's increased desire to ensure elementary respect for basic human rights and freedoms.

Over the centuries and especially after World War I the number of victims in armed conflicts had become as unpredictable as the events leading up to such cruelties. At the end of World War II the figures of victims had reached such abhorrent proportions that they unavoidably obscured the individual victim and his or her sufferings. This development shocked people and the conscience of humanity. After this cruel awakening the Allies and the UN devoted their energies to promoting the rule of law in an effort to protect themselves and those lacking the economic, political or legal capacity against state sanctioned abuse of power. Earlier, the Carnegie Endowment for International Peace had investigated the causes of the Balkan Wars 1912/13 and reached the axiomatic conclusion that those in power could have stopped the conflict and the attendant atrocities with just one word[26]. Subsequently, the Allied powers of World War I were too concerned with imposing Carthaginian peace terms and exacting reparations to be far-sighted in relation to the establishment of a *permanent* international criminal jurisdiction.

The move towards establishing a framework of resistance on behalf of potential victims all over the world nevertheless improved in the 1930s with the endeavours of the international community, as evidenced by the Briand Kellogg Pact, the General Treaty for Renunciation of War as an Instrument of National Policy of 27 August 1928, and the Convention for the Prevention and Punishment of Terrorism of 1937[27]. The situation during and after Word War II brought victims even closer together and concentrated the human conscience once more on the plight and powerlessness of victims of the most serious international crimes. The sheer numbers of victims and their suffering transcended all imagination. The concept of justice was revisited so that it could be meted out not only in the name of individuals or groups of victims, but also on behalf of humanity as such. In an effort to ensure that this history remains at the

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26 See Carnegie Endowment for International Peace, Division of Intercourse and Education, REPORT OF THE INTERNATIONAL COMMISSION TO INQUIRE INTO THE CAUSES AND CONDUCT AT THE BALKAN WARS, Publication No. 4, reprinted 1993 with an introduction by G.F. Kennan; for the Versailles Peace Treaty see Reichsgesetzblatt of Germany No. 140 (1919).

27 See for the text and the number of ratifications League of Nations, *supra* note 1 and for the Convention for the Prevention and Punishment of Terrorism O. Triffterer, Preliminary Remarks on Part 1, margin No. 2 with fn. 3 there.

forefront of the collective human conscience, the Preamble refers to the suffering of millions of the most innocent human beings[28].

III. Paragraph 3: Recognition of protected values

Whilst preambular paragraph 2 is a *memento ad memoriam*, paragraph 3 recognises 9
that the "unimaginable atrocities" mentioned in paragraph 2 are not just "ordinary crimes" with which society has learned to live (alas, not yet to prevent effectively). Rather, they are "such grave crimes" because they endanger *protected* legal values of the international community as a whole: "the peace, security and well-being of the world". This formula refers primarily to *basic, inherent* values of the community of nations, but also to those which belong to the *national* legal orders but need *supplementary* protection by the *international* legal order to counter the threat of abuse of State power. The formula makes clear that attacks by States on the well-being of its own population, especially cases of genocide, deportation or expulsion, are no longer an internal affair, but endanger the international community as such[29].

This preambular paragraph contains the basis for international criminal law, namely that this emerging discipline is in reality the criminal law of the community of nations, with the function of protecting the highest legal values of this community against "such grave crimes [that] threaten the peace, security and well-being of the world"[30].

The first two values are well known and expressly recognized by the Charter of the 10
UN. They appear there more than twenty times[31] and have featured prominently in the different ILC Draft Codes of Crimes (formerly: Offences) against the Peace and Security of Mankind[32]. Article 20 of the 1996 Draft Code expressly states that "war crimes constitute[s] a crime against the peace and security of mankind when committed in a systematic manner or on a large scale".

Against this background, paragraph 3 marks two developments which ought to be 11
kept in mind when the Statute is interpreted with due consideration being given to the Preamble[33]:

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28 Besides children and women men are mentioned; the latter may be caught by their own activities which tend to generate an autonomous, self-executing dynamic that strikes back on the individual originator, making him perpetrator and victim. The number of soldiers needing psychiatric treatment after the wars in Vietnam and on the territory of the former Yugoslavia confirms this danger.

29 For details see O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 20 et seq. with fn. 47. See also *Prosecutor* v. *Tadic*, Case No. IT-94-1-AR 72, 2 Oct. 1995, para. 59, where the Appeals Chamber quotes and confirms from the Trial Chamber (para. 42) that these crimes are "transcending the interest of any one State" and that "they affect the whole of mankind". See also O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 11 et seq. and 85.

30 *Ibid.*, margin Nos. 14 et seq. (brackets added).

31 O. Triffterer, *Der ständige Internationale Strafgerichtshof – Anspruch und Wirklichkeit*, in: K.H. Gössel/O. Triffterer (eds.), GEDÄCHTNISSCHRIFT FÜR HEINZ ZIPF 545 et seq. (1999) with references in fn. 110 to the relevant articles of the UN Charter.

32 Already as early as 1928, for instance, it was for States considered "their solemn duty to promote the welfare of mankind" as a whole or at least independent of their individual territory, see General Treaty, *supra* note 1, Preamble, para. 1, p. 190.

33 See to this function of the Preamble margin No. 4.

- The peace and security of mankind were for a long time the only expressions summarizing the basic, inherent values of the community of nations which had to be protected in the interest of all, individuals and States alike. According to common opinion such protection should include, as *ultima ratio* against especially grave violations, *international* criminal law by which such crimes could be punished *directly*. The formula "*well-being* of the world" was added in order to emphasize that not only the narrow security of people, but the distribution of basic conditions for their well-being, especially minimum guarantees for the existence of human life, is at stake. It describes *additional* aspects of value protection, which have to be respected, for instance, when defining aggression or interpreting elements of crimes. This is especially true when an amendment or review of the Statute is considered.
- There is a change in the wording which might be of equal if not greater importance. Previously, "peace and security" were both connected with "mankind" or at least this reference was clearly expressed with regard to "security". The Rome Statute does not mention the word "mankind" anymore, while "conscience of humanity", for instance, appears at the end of paragraph 2. The structure of the paragraph means that the concept of "security *and* well-being" refers to "the world", whilst only peace can stand by itself. However, it may as well be included in this references under the expression "peace ... of the world".

  But the use of the word "world" in preference to "mankind" means more than just mankind or humanity. It includes not only human beings but also the world around them and thus *its* well-being, for instance, the natural environment which is the basis for our lives. This enlargement is mirrored by the war crimes definitions in article 8 para. 2 (b) (iv), where "the natural environment" is expressly mentioned and (xxi), where one of the alternatives is defined as "outrages upon personal dignity"[34]; the latter covers "in particular humiliating and degrading treatment", but goes (far) beyond these two examples and may include cases where the well-being may be violated by interfering with basic living conditions or even without causing physical harm. The ICTY has crystallised this conception with the following words:

> "The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law: indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their person dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."[35]

Whatever may emerge from the jurisprudence of the ICC over the final interpretation to be given to this new approach in paragraph 3, it will be interesting to see if this paragraph provides a basis for broadening the scope of international criminal law by

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[34] For a corresponding interpretation see *Prosecutor* v. *Anto Furundzija*, Case No. IT-95-17/1-T, 10 Dec. 1998, p. 72, para. 183.

[35] *Ibid.*

progressively developing new definitions for crimes falling under this concept even if they do not lie within the jurisdiction of the Court[36].

IV. Paragraph 4: Affirmation of aims to be achieved

After recognizing in paragraph 3 the theoretical basis and justification of international criminal law by pointing out which values it is meant to protect, paragraph 4 affirms the practical aims of this new discipline. The subject-matter is not *all* "crimes of concern to the international community as a whole", not even all *serious* crimes, but only "the *most* serious crimes". This implies either that there are *serious* and *ordinary* crimes "of concern to the international community as a whole" or that such crimes are *not* "of concern to the international community as a whole". The first interpretation is preferable, because, with reference to paragraph 3, only "the most serious crimes" are "such grave crimes" that threaten to violate protected values of this community, namely "the peace, security and well-being of the world". Furthermore, paragraph 4 clarifies that institutions other than the ICC have to deal with crimes falling outside the group of "the most serious crimes of concern to the international community as a whole". 12

Paragraph 4 further affirms an objective of criminal policy, namely, that the particularly grave and dangerous group of "the most serious crimes ... must not go unpunished". This has always been the main aim of international criminal law, at least in those cases where its *deterrent* effect has not been successful. How this aim will be reached, is of lesser importance. Since its early beginnings those favouring the development of international criminal law have always been aware that the possibility to prevent or prosecute crimes under international law by a *direct* enforcement model may lie in the distant future and that, therefore, *indirect* enforcement is needed to guarantee, with the assistance of *national* criminal jurisdictions, "their effective prosecution". Affirming this aspect appears necessary since – as the experience of the ICTY and the ICTR clearly indicates – even out of the group of "the most serious crimes of concern to the international community as a whole" not all crimes committed can *in practice* be prosecuted before the ICC[37]. Hence, it appeared necessary to point out and affirm that "the effective prosecution must be ensured by taking measures at the *national level* and by enhancing international cooperation" (emphasis added). 13

This paragraph does not deal with the relationship between the jurisdiction of the ICC and national jurisdictions. It primarily makes clear that the ICC needs the national level *and* international cooperation for there to be effective prosecution of "the most serious crimes of concern to the international community as a whole". This is true not only in cases where the *national* jurisdiction *directly* prosecutes such crimes, but also in cases where the ICC is exercising its *inherent* jurisdiction; in the latter situation the ICC 14

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36 For some considerations in this direction see O. Triffterer, *supra* note 32, 532 et seq. and 545 et seq. See also for the basis of such an agreement O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 20 et seq., all with further references.

37 See, for instance, O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 49 et seq.

depends on national cooperation, insofar as suspects do not normally surrender to the Court voluntarily, presenting all the necessary evidence themselves[38].

V. Paragraph 5: Prevention by enforcement

15 The aim of paragraph 4, to guarantee "that the most serious crimes ... must not go unpunished", leads logically to the objective expressed in paragraph 5: "to put an end to impunity for the perpetrators of these crimes". But the mere goal of punishing covers only one of the two functions of criminal law, namely the *repressive* one. Successful crime prevention or deterrence, the first function of criminal law, is the more effective method of protecting legal values in practice. Therefore, both functions and their interrelation are mentioned in paragraph 5. "[T]o put an end to impunity", the necessary *substantive* and enforcement basis must also be realised. An effective enforcement at the same time contributes to the *prevention* of such crimes by building awareness and showing potential perpetrators that "the most serious crimes of concern to the international community as a whole" will no longer enjoy immunity from effective enforcement mechanisms[39]. Thus, paragraph 5, considered in connection with paragraph 4, focuses mainly on "the prevention of such crimes", meaning the "core crimes" to which has been referred in the preceding paragraphs of the Preamble, in order to protect the highest values of the community of nations, mentioned in paragraph 3[40]. Besides, article 27, "Irrelevance of official capacity", is one of the clearest manifestations in the operating part of the Statute of the determination in the Preamble "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

VI. Paragraph 6: Recalling to States their duties

16 As already stated in paragraph 4, the *practical* side of the affirmation needs to be supported by *national* criminal jurisdiction. Thus, paragraph 6 reminds ("recalling") the States Parties that it is the duty of every one of them to "exercise its criminal jurisdiction over those responsible for international crimes," listed in article 5.

17 The wording of paragraph 6 refers to "international crimes", a rather broad notion compared with the list of "core crimes" in article 5. Some aspects of this broader concept emerge from the drafting history of article 5. There was considerable debate as to whether other crimes, like drug offences, should be included as well[41]. Moreover, given the context of paragraph 6, it appears that this wording reminds States that their duty is not limited to exercising their criminal jurisdiction over those responsible for

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38 See for details O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 50 et seq. with further references and especially margin No. 61.

39 See, for instance, B. Crosette, *"A 'Pinochet Syndrome' Is Humbling Some Strongmen of the World*, HERALD INTERNATIONAL TRIBUNE, 24 Aug. 1999.

40 For a general overview on the possibilities and limits to effectively fight criminality see P.-H. Bolle/K. Hobe (eds.), LEGAL ASPECTS OF CRIME PREVENTION – IN MEMORIAM HELGE RÖSTAD (1999).

41 For a very broad notion see O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 60 et seq.; see also A. Zimmermann, article 5, margin Nos. 5 et seq.

crimes *within the jurisdiction of the ICC*; this has already been affirmed in paragraph 4. The purpose of paragraph 6 is to recall that there is a class of "crimes under international law" for which States have an obligation to prosecute even if these crimes do not fall within the jurisdiction of the Court. As regards these crimes the only dispute was whether there is an obligation to proceed on the basis of *universal* jurisdiction or on a *territorial* or *national* basis. The paragraph was deliberately left ambiguous. It has been described by Roger S. Clark as "a sort of Martens clause which insists that just because the others are not expressly dealt with this does not mean that there is now impunity for them"[42]. Furthermore, it is in the interest of all States to fight transboundary organized crimes falling within a broad concept of international crimes, through combined efforts. The Preamble, therefore, reminds States to cooperate not only with the Court on the *vertical* level, but also pursuant to their mutual interest in order to better protect well established legal values in their respective *national* legal systems and to be more effective in fighting, for instance, internationally organized crime[43].

VII. Paragraph 7: Reaffirmation of the UN Charter principles

Preambular paragraph 7 reaffirms the purposes and principles of the UN Charter, as expressed by its articles 1 and 2, "in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". The UN organisation was created by nations united to "save succeeding generations from the scourge of war"[44]. It is exactly during wars that crimes that fall within the jurisdiction of the Court occur most frequently. In wars the life and physical integrity of civilians and other persons protected by international humanitarian law tend to come under massive attack. Maintaining and restoring international peace and security, therefore, bears directly on the need to undertake international judicial intervention in the face of crimes of international concern. To the extent a reaffirmation of fundamental Charter principles may serve as a reminder to States to effectively prevent and stop armed conflicts pursuant to the settlement regimes of the Charter, it contributes to the international prevention of the crimes within the Court's jurisdiction. As international peace and criminal justice mandates gradually develop more mature modes of co-existence, it may be useful to remind ourselves of the commonality of the fundamental values of human life and person underlying both the Charter and the ICC Statute. 18

VIII. Paragraph 8: Non-intervention in internal affairs

The eighth preambular paragraph emphasizes that nothing in the Statute "shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State". The ICC Statute concerns individual criminal liability and the 19

42 Personal letter on file with the author.

43 See for the differentiation between crimes under international law and crimes under national law for which the international cooperation is regulated by international documents O. Triffterer, *supra* note 32, 545. See also O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 50 et seq.

44 Preambular paragraph 1 of the UN Charter.

enforcement of certain norms of international criminal law. It does not deal with State responsibility or the settlement of disputes. It is correct that the subject-matter jurisdiction of the Statute includes numerous prohibitions of international law which are applicable in internal armed conflict, but article 8 para. 3 makes it clear that this "shall not affect the responsibility of a Government to ... defend the unity and territorial integrity of the State, by all legitimate means". Alleged crimes occurring in internal armed conflicts will undoubtedly be made the subject of extensive presentation of evidence in the Court, but that does not amount to intervention by one or more States Parties in the *internal affairs* of the State which suffered the internal armed conflict or in the *armed conflict* as such. It may be warranted to describe it as international judicial intervention pursuant to treaty obligations or Security Council action based on Chapter VII of the UN Charter. But the ICC Statute does not provide legal basis for intervention in internal affairs or armed conflicts by one or more individual States, and one may well question the necessity of including preambular paragraph 8 in the Statute.

IX. Paragraph 9: Crimes of international concern

20 Paragraph 9 states the determination, "to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole". The point here is the signal that only "the most serious crimes of concern to the international community as a whole" may fall within the jurisdiction of the Court. Operative article 1 cements this concern by repeating that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern". The fact that it was surprisingly difficult to negotiate the language of article 1 does not reflect meagre support for the restrictive approach taken. Moreover, when agreement had been reached on the language of article 1, the relevant part of preambular paragraph 9 flowed naturally from the former.

21 Paragraph 9 does not require that the suspected crime be a crime attacking the international community as a whole directly. It must be "of concern to" the whole international community. Such a concern can be established by different links. The Statute envisages that legally recognised values of the community of nations as a whole are protected by its jurisdiction. A crime whose commission threatens such protected values is punishable directly under international law, even if it may not be punishable according to the law of the State of nationality or territoriality[45]. In any event, the idea is not to construct a threshold whereby war crimes must also be crimes against the whole international community, with genocide and crimes against humanity already incorporating legal interests that go beyond the protection of the individual victim. However, all crimes within the Court's jurisdiction may, even if attacking individual persons only, threaten the peace and security of mankind and, thus, be of concern to the whole international community and directly punishable under the laws of the

[45] See, for example, O. Triffterer, Preliminary Remarks on Part 1, margin Nos. 15 et seq. and 25.

community of nations[46].

In other words, paragraph 9 points less to jurisdiction than the basis on which the complementarity principle rests, a principle described in the next preambular paragraph and on which the Court is based. The Statute builds on and reinforces the traditional repression system of international humanitarian law, according to which the principal responsibility for its enforcement lies with States. Confirming the complementarity principle was important in bringing on board as many States as possible in the negotiation process. Therein lies some of the significance of this preambular paragraph[47].

X. Paragraph 10: Complementarity

22 This subparagraph simply provides that "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". This is an essential quality of the Court's jurisdictional system. The national criminal justice systems of States Parties have jurisdictional primacy *vis-à-vis* the Court, which represents a reversal of the system of the *ad hoc* Tribunals. The complementarity standard is developed further in article 17. It essentially dictates that as long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter which has come to the Court's attention, the Court does not have jurisdiction. If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction which has seized itself of the matter. The ICC is only meant to supplement national investigation and prosecution. Primary responsibility for enforcing criminal liability for violations of the subject-matter jurisdiction of the Court rests on the States Parties. The matter stands in a different light when the Security Council has referred a situation to the Prosecutor pursuant to Chapter VII of the UN Charter as recognised by article 13 (b).

XI. Paragraph 11: Respect for and the enforcement of international justice

23 The final preambular paragraph expresses the general resolve of the States Parties to the Statute to "guarantee lasting respect for and the enforcement of international justice". This is a resolve to guarantee both lasting respect for international justice and, more importantly, its enforcement. The broad term "international justice" is used, not "international criminal justice". Although the paragraph does not say *international* enforcement of international justice, its preambular context clearly suggests that "international justice" should be interpreted as "international criminal justice" which involves the enforcement of international criminal law in international and national criminal jurisdictions.

It is not easy to measure the value of a declaration by a State that it resolves to guarantee *lasting respect* for international justice. It is difficult to imagine any State that would not be prepared to make such a political declaration. This part of the paragraph may prove to have a real function to the extent it serves as a reminder to States Parties

46 See, for example, *ibid.*, margin Nos. 16 et seq.

47 Article 8 para. 1 may be seen in the same light.

of the object and purpose of the Statute and their obligation to co-operate fully with the Court in its investigation and prosecution of crimes within its jurisdiction and to comply with its requests.

The relative importance of the final preambular paragraph lies in the cumulative resolve to guarantee the *enforcement* of international justice. This amounts to a guarantee by the States Parties that they will enforce international criminal law either through international or national criminal jurisdictions.