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The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11–19)

The Secretary-General hailed the adoption of the Statute of the International Criminal Court in Rome on 17 July 1998 as a 'gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law', as an 'achievement which, only a few years ago, nobody would have thought possible'.[1] It is true that the prospect of a functioning International Criminal Court[2] does provide hope to those who consider the international enforcement of international humanitarian law significant to the legitimacy of international law and its role in international relations. It is also true that the criminalization of violations of Article 3 common to the four Geneva Conventions for the Protection of Victims of War of 12 August 1949 and several provisions of Additional Protocol II of 8 June 1977 applicable to internal armed conflicts signals a certain convergence of international humanitarian law and human rights law, and lends strength to the human rights project of the United Nations. Moreover, it is likely that a functioning ICC will have a deterrent effect[3] and may provide a standing incentive for national investigation and prosecution of serious violations of international humanitarian law.

However, if the ICC is to operate according to even the most elementary expectations of the international community, it must have jurisdiction over appropriate situations and a basic ability to prosecute and adjudicate cases effectively and fairly. As the following preliminary remarks on the jurisdictional provisions in Articles 11

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1. *See*, 'Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court', p. 2.
2. Hereinafter referred to as 'ICC' or 'Court'.
3. Professor Theodor Meron thinks that 'the ad hoc tribunals and the prospects for the establishment of the ICC have had some deterrent effect on violations', *see* 'War Crimes Law Comes of Age', 92 *American Journal of International Law* (1998), p. 463.

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through 19 of the ICC Statute will show, it is questionable whether the ICC will be able to fulfil the promise of the Secretary-General without the continued involvement of the Security Council as an active partner in the international enforcement of international humanitarian law.

1. ARTICLE 11: JURISDICTION *RATIONE TEMPORIS*

Article 11(1)[4] provides that the ICC's temporal jurisdiction only covers crimes committed after the Statute enters into force. Article 126(1) defines the day of entry into force as 'the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations' It was a widely-held view among delegates at the Diplomatic Conference in Rome that the universality of the Statute should be reinforced by a high ratification threshold for entry into force. The same consideration of universality pre-empted the Court's temporal jurisdiction from including situations which predate entry into force of the Statute. Related concerns were also expressed by delegates in connection with the prohibition on non-retroactivity *ratione personae* in Article 24(1).

For states which become Party to the Statute after it has entered into force, Article 11(2) provides that 'the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State', unless that State has made a declaration accepting the exercise of jurisdiction of the Court in accordance with Article 12(3).

2. ARTICLE 12: PRECONDITIONS TO THE EXERCISE OF JURISDICTION

Articles 12 and 13 contain the cornerstone provisions on the jurisdictional regime of the ICC. Article 12 ('Preconditions to the exercise of jurisdiction') regulates the requirement of State acceptance of the Court's jurisdiction and the scope of the acceptance. Article 13 ('Exercise of jurisdiction') addresses how the Court's jurisdiction can be activated or triggered when the preconditions have been met.

Article 12(1) provides that a State which becomes Party to the Statute 'thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5', which in its subparagraph (1) simply lists the four categories of crimes within the Court's subject-matter jurisdiction. This principle has been referred to by some as 'inherent' or 'automatic' jurisdiction, but such terms are neither accurate nor helpful, especially in the early stages of the ratification process. Article 120 states that no reservations may be made to the Statute. This bar adds strength to the main rule of no opt-out from the Court's subject-matter jurisdiction. However, Article 124 contains a significant exception to that rule, for the war crimes provisions, which reads:

4. All references to the ICC Statute refer to the text in UN document A/CONF.183/9, dated 17 July 1998.

> Notwithstanding Article 12 paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 [on war crimes] when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with Article 123, paragraph 1.

Article 124 played an essential role in securing support for the final draft of the Statute put forward by the Bureau of the Committee of the Whole of the Diplomatic Conference.[5] The negotiations on a transitional opt-out régime were largely conducted outside the formal meetings of the Conference, involving, in particular, governments with a record of active participation in international peacekeeping and enforcement operations. Some delegations wanted the opt-out clause to be broadened so as to include crimes against humanity and cover a longer time period than seven years.[6] Others were reassured by the introduction of a limited clause which they considered adequate to accommodate concerns in their operative military circles, where it is not normally expected that their forces will commit crimes against humanity, but possibly exceptional acts which may be investigated as war crimes. An additional protocol with a broader opt-out régime presented in informal discussions was at one stage described as a 'substractional' protocol by a prominent European diplomat. That remark captured the position of the overwhelming majority of negotiating States. In the end, it proved significant that the European Union Member States managed to reach a consensus on what the limits of the scope of the opt-out régime should be.

Article 12(2) preconditions the exercise of the Court's jurisdiction on its acceptance by the territorial state or state of nationality. Either the state 'on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the state of registration of that vessel or aircraft'[7] (the so-called territorial state) or the state 'of which the person accused [sic] of the crime is a national'[8] must have become a Party to the Statute or accepted the Court's jurisdiction by a unilateral declaration in accordance with Article 12(3).[9] This precondition does not apply if the Security Council has referred a situation under Chapter VII to the Court, *see* the discussion in section 3.2. below.

Article 12(2) was the subject of prolonged negotiations during the sessions of the Preparatory Committee and the Diplomatic Conference. Some states, led by Germany,

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5. This is document A/CONF.183/C.1/L.76 with Add. 1–14, 16 July 1998, often referred to as the 'take-it-or-leave-it package' presented on the last day of the Conference.
6. The United States' delegation circulated a proposal for a 'protocol for opt-in' along these lines, *see* A/CONF.183/C.1/L.90, 16 July 1998, p. 2.
7. Article 12(2)(a).
8. Article 12(2)(b).
9. States which make such declarations are obliged to co-operate with the Court without any delay or exception in accordance with Part 9 on state co-operation, see Article 12(3) *i.f.*

argued that since there is universal jurisdiction for the core crimes of genocide, crimes against humanity and war crimes, the ICC must also have jurisdiction with regard to these crimes independent of state acceptance of the Court's jurisdiction.[10] Other states, the United States prominent and vocal among them, rejected the doctrine of universality and insisted that it not be given any recognition by the Statute. As stated by the United States delegation to the Diplomatic Conference:

> There are too many Governments which would never join this treaty and which, at least in the case of the United States, would have to actively oppose this Court if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the Court.[11]

The United States proposed that both the territorial state *and* the state of nationality of the alleged perpetrator must have accepted the Court's jurisdiction as a precondition to its exercise.[12] If the state is not a Party to the Statute, this régime would require 'the prior consent of the State'.[13] The United States maintained this position until the very end of the Diplomatic Conference, when its delegation requested a vote in the Committee of the Whole on a proposal to amend the final draft of the Bureau along these lines.[14] This initiative was pre-empted by a procedural no action motion which obtained a clear majority vote.

The Bureau's discussion paper of 6 July 1998[15] contained four options on acceptance of jurisdiction, option 1 of which was the so-called 'Korean proposal' [16] In its proposal, Korea wrote:

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10. *See* A/AC.249/1998/DP.2, 23 March 1998. In this discussion paper submitted to the Preparatory Committee, Germany stated: 'Under current international law, *all States may exercise universal criminal jurisdiction* concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every state can exercise its own national criminal jurisdiction, regardless of whether the custodial state, the territorial state or any other state has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice [T]here is no reason why the ICC – established on the basis of a Treaty concluded by the largest possible number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes'.
11. Quoted from the statement of the United States on 9 July 1998 in the Committee of the Whole in connection with the deliberation on discussion paper A/CONF.183/C.1/L.53, 6 July 1998, put forward by the Bureau of the Committee of the Whole. The statement continued: 'As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world and, if adopted in this statute, would erode fundamental principles of treaty law that every government in this room support'.
12. *See* A/CONF.183/C.1/L.70, 14 July 1998.
13. United States statement of 9 July 1998, *op. cit.* The passage appears in the context of prior consent of the state of nationality of the suspect.
14. The amendment proposal rested on the written submissions in A/CONF.183/C.1/L.70, *op. cit.*, and A/CONF.183/C.1/L.90, *op. cit.*
15. A/CONF.183/C.1/L.53, *op. cit.*
16. A/CONF.183/C.1/L.6, 18 June 1998.

> State consent constituting the basis of the jurisdiction of the Court should not be separated at the two different stages – acceptance and exercise of the Court's jurisdiction. By becoming a Party to the Statute, a State is considered as having accepted, and agreed to the exercise of, the jurisdiction of the Court once and for all . . Otherwise, it would deprive the Court of the predictability of its function by granting States a *de facto* right of veto to determine whether the Court is able to exercise jurisdiction . . . For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States has given its consent to the exercise of jurisdiction by the Court, which . . is acquired automatically by becoming a State Party to the Statute. The interested States should include the territorial State, the custodial State, the State of the nationality of the accused, and the State of nationality of the victim.[17]

Option 2 in the 6 July 1998 Conference discussion paper required jurisdictional acceptance only by the territorial state. Option 3 required acceptance both by the territorial state and the custodial state, and was a slightly modified version of the proposal by the United Kingdom of 25 March 1998.[18] Option 4 required the jurisdictional acceptance by the state of nationality of the alleged perpetrator alone.

In the Bureau's next proposal of 10 July 1998,[19] the Korean proposal was the only option presented for the crime of genocide and one of three options for crimes against humanity and war crimes. Option 2 for the latter crimes required acceptance by both the territorial and custodial states, whilst option 3 depended on the state of nationality of the alleged perpetrator.

The compromise in the final proposal by the Bureau of 16 July 1998[20] had reduced the principle of universality and Korea's list of four alternative states whose jurisdictional acceptance was required, to two alternative states: the territorial state or state of nationality. But even this significant tightening of the Statute's requirement was unfortunately insufficient to bring all states on board, albeit many states regretted the absence of the custodial state as the third alternative state. It is difficult to understand what the real concerns of the reluctant states were. In its statement of 9 July 1998, the United States delegation described its position:

> The fundamental question is this, will the Court be able to prosecute even the officials and personnel of a government without that government having joined the treaty or otherwise submitted to the jurisdiction of the Court? This is a form of extraterritorial jurisdiction which would be quite unorthodox in treaty practice – to apply a treaty régime to a country without its consent.

17. *Ibid.*, paras. 3 and 4.
18. *See* A/AC.249/1998/WG.3/DP.1, 25 March 1998, Article 7(2).
19. A/CONF.183/C.1/L.59, 10 July 1998.
20. A/CONF.183/C.1/L.76/Add.2, *op. cit.*, Article 12(2).

The fear expressed centres on the ability of the Court to target citizens of non-State Parties. It is conceivable that war crimes committed by members of an international peacekeeping or enforcement force could be so serious that it would be warranted for the ICC Prosecutor to become seized of the matter. If the territorial State is a Party to the Statute and the situation is not covered by the transitional opt-out clause in Article 124, the alleged offences committed by a member of an international force on that territory could be subject to the Court's jurisdiction even if his or her state of nationality is a non-State Party. It is not inconceivable that the alleged perpetrator is taken into custody by the territorial state, although that may be very difficult in practice. If both the Court and the state of nationality then request surrender or extradition from the territorial state, a situation of competing requests arises, which is regulated by Article 90 of the Statute. Article 90(4) concerns the situation where the requested state is *not* under an international obligation to extradite the person to the requesting state which is a non-State Party. In these situations the requested state must give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

However, international peacekeeping operations are normally conducted on the basis of status-of-forces agreements which customarily provide for exclusive criminal jurisdiction for the states sending the troops.[21] The territorial state would therefore normally be obliged under the terms of such agreements to transfer the alleged perpetrator to the sending state, if the territorial state would ever take custody in the first place. However, Article 90(6) of the ICC Statute provides that in situations where the requested state *is* under an existing international obligation to extradite the suspected person to a requesting state which is not a State Party,

> *the requested State* shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
> (a) the respective dates of the requests;
> (b) the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
> (c) the possibility of subsequent surrender between the Court and the requesting State (emphasis added).

Article 98(2) provides the sobering context in which Article 90(6) must be interpreted: the Court 'may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person

21. *See*, for example, Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and Its Personnel, 21 and 23 November 1995, para. 7 (para. 8 provides for immunity from personal arrest or detention for NATO personnel as experts on mission); and United Nations Model status-of-forces agreement for peacekeeping operations, A/45/594, 9 October 1990, para. 47(b).

of that state to the Court' unless the state consents. Status-of-forces agreements have traditionally not been drafted with the existence of an international criminal jurisdiction in mind. It has already been suggested that such agreements would have to be reformulated in order to include surrenders to the ICC as well.[22]

What may appear as statutory competence for a territorial state to go against the request of a non-State Party which has sent peacekeeping forces to its territory by transferring its suspected citizen to the ICC, can in reality be made a non-issue if the requesting non-State Party formally requests that the suspected person he transferred to its jurisdiction for domestic investigation and prosecution. If the non-State Party shows that it is able and willing to investigate the alleged perpetrator, the Court will have to rule the case inadmissible based on the principle of complementarity, *see* section 5 below. Thus, it would seem that the complementary nature of the ICC effectively places beyond the reach of the Court all States (including non-State Parties) which investigate and prosecute relevant offences diligently and in good faith. This makes it difficult to understand the real nature of the concern of those few States which objected to the compromise reached through Article 12(2) on the preconditions for the exercise of the Court's jurisdiction.

3. ARTICLE 13: EXERCISE OF JURISDICTION:

Article 13 deals with the so-called triggering mechanism whereby the Court may exercise its jurisdiction with respect to crimes within its subject-matter jurisdiction if:

(a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14;
(b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

3.1. Articles 13(a) and 14

Referrals by States Parties were not particularly controversial during the negotiations on the Statute. Many delegations were naturally concerned that it may not be a very effective triggering mechanism. Although Article 14(2) states that '[a]s far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation', it is

22. *See* Ruth Wedgwood: 'Fiddling in Rome: America and the International Criminal Court' in *Foreign Affairs*, Vol. 77, No. 6, p. 22: 'In another effort to allay US fears, the Rome treaty protects all bilateral agreements exempting US troops stationed abroad from local criminal justice systems. Terms can now be added to these 'status of forces' agreements to protect US troops from international turnovers as well.' And she continues, confidently: 'The odds are good that US partners will agree to such codicils if the matter is handled quietly'

clear from both the wording of Articles 13(a) and 14(1) and the negotiations that only *situations* can be referred, not specific cases.

3.2. Article 13(b)

Security Council referrals, on the other hand, were controversial during the negotiations. Some States, India eloquent and consistent among them, supported, *inter alia*, by Mexico,[23] did not want the Security Council to be able to play any role at all in the work of the ICC. However, the Security Council has twice established *ad hoc* Tribunals[24] under Chapter VII of the United Nations Charter as 'measures not involving the use of armed force' pursuant to Article 41.[25] The powers of the Council under Chapter VII are '*coercive vis-à-vis* the culprit state or entity. But they are also *mandatory vis-à-vis* the other Member States, who are under an obligation to co-operate with the Organization (Article 2, paragraph 5, Articles 25, 48) and with one another (Article 490), in the implementation of the action or measures decided by the Security Council'.[26] There can be little doubt that as a matter of fact the permanent members of the Security Council consider that the Council is competent to establish further *ad hoc* tribunals, also after the ICC Statute has entered into force and the Court has started operating.

Insofar as international judicial intervention can contribute to reconciliation in a conflict area and to the restoration of international peace and security, it is only natural that the Security Council, as the organ with primary responsibility for the maintenance of international peace and security,[27] has its ability to refer situations to the ICC recognised by the Statute. In the case of such referrals the Council would use the ICC as 'in instrument for the exercise of its own principal function of maintenance of peace and security, *i.e.* as a measure contributing to the restoration and maintenance of peace'[28] in the specific area of conflict.

Nevertheless, India formally moved to have the final proposal by the Bureau amended by deletion of Article 13(b) on Security Council deferral during the closing meeting of the Committee of the Whole of the Diplomatic Conference.[29] The amendment proposal was defeated by a strong majority vote in favour of a no action motion. The Indian delegation proceeded to make the following statement in its explanation of vote in the final session of the Plenary of the Conference:

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23. *See* A/CONF.183/C.1/L.81, 15 July 1998.
24. The Council did so for the former Yugoslavia (1993) and for Rwanda (1994).
25. *See* ICTY Appeals Chamber, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', Case No. IT–94–1–AR72 (*Tadić* case), 2 October 1995, para. 36: 'the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41'. For a general consideration on the constitutionality of the Security Council's decision to establish the *ad hoc* Tribunal for the former Yugoslavia, *see* paras. 26–48.
26. *Ibid.*, para. 31.
27. *See* Article 24 of the United Nations Charter.
28. *Tadić* jurisdictional ruling, *op. cit.*, para. 38.
29. *See* A/CONF.183/C.1/L.95, 17 July 1998.

> The power to refer is now unnecessary. The Security Council set up ad hoc tribunals because no judicial mechanism then existed to try the extraordinary crimes committed in the former Yugoslavia and in Rwanda. Now, however, the ICC would exist and the States Parties would have the right to refer cases to it. The Security Council does not need to refer cases, unless the right given to it is predicated on two assumptions. First, that the Council's referral would be more binding on the Court than other referrals; this would clearly be an attempt to influence justice. Second, it would imply that some members of the Council do not plan to accede to the ICC, will not accept the obligations imposed by the Statute, but want the privilege to refer cases to it. This too is unacceptable.[30]

This reasoning does not stand the test in situations of serious violations of international humanitarian law committed on the territory and by citizens of states that have not accepted the jurisdiction of the Court. In such situations the ICC would not have jurisdiction according to Article 12(2), unless the Security Council could make use of the opening which that subparagraph makes for its referral of situations. In the early phase of the life of the ICC, it is realistic to expect that the situations not involving the territory and citizens of the States Parties will be the rule, not the exception. The Security Council will need to refer situations unless the culture of impunity is to continue unabatedly. Referrals by the Security Council could become an important source of work for the ICC, by extending its jurisdictional reach to the whole world, including the territory and citizens of non-States Parties. Such referrals would also strengthen the financial basis of the Court.

Moreover, certain provisions of the Statute weaken the ability of the Court to prepare and try cases effectively. The weak state co-operation régime is an immediate source of concern. How can cases be prepared effectively if the Prosecutor of the ICC cannot control the process of the gathering of evidence? The main principle of the Statute is that the authorities of the requested state will execute requests for assistance from the ICC and thus, collect the evidence through its police and courts. This main rule also applies when the requested state is a territorial state directly affected by the alleged atrocities. In many cases, the police and military of territorial states will have played a direct part in the commission of the alleged crimes, and the responsible war-time Government or elements of it may still be in power. Needless to say, this portion of the Statute may create insurmountable difficulties for the case preparation of the prosecution. Despite two limited exceptions to this restrictive régime,[31] it must be

30. This is cited from the unofficial 'Explanation of vote by India on the adoption of the Statute of the International Criminal Court, Rome, July 17, 1998' which the author obtained from the Indian delegation after its presentation, and it should thus be checked against the official United Nations transcript of the relevant session.

31. First, the Prosecutor may execute requests directly on the territory of the requested state when that can be done without any 'compulsory measures'. This is subject to consultations with the requested state when it is a territorial state, and otherwise to 'any reasonable conditions or concerns raised by that State Party', *see* Article 99. This is reasonable and practical as regards voluntary interviews with potential witnesses, but falls far short of the requirements of effective international investigations of serious violations of international humanitarian law, particularly where there may be persons

expected that the Security Council will want to override such limitations by conferring upon the Prosecutor and the Court powers to obtain co-operation and compliance when it refers situations under Chapter VII of the United Nations Charter to the Court, so that the powers of the Court would not be significantly weaker than those of the *ad hoc* Tribunals which the Council has already established. The Security Council could do so in a binding manner pursuant to Article 103 of the United Nations Charter.[32] It is difficult to imagine how a situation referred to the Court by the Security Council could properly be investigated with the limited powers conferred upon the Prosecutor by the Statute.

3.3. Articles 13(c) and 15

The ICC Prosecutor's power to initiate investigations pursuant to Articles 13(c) and 15 was at least as contentious as the provisions on the role of the Security Council during the negotiations leading to the adoption of the Statute. Article 15(1) provides that the Prosecutor 'may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court'. This is a power to *initiate* and not actually to start investigations. Article 15 subparagraphs (2) through (6) regulate how the Prosecutor's initiative may lead to the launching of a full investigation. The Prosecutor shall, according to subparagraph (2), analyse the seriousness of the information received and may, to this end, 'seek additional information from states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and receive written or oral testimony at the seat of the Court.' It is significant that the Prosecutor can receive and seek information from relevant sources and interview witnesses at the Court's seat without judicial involvement, albeit Article 5(1) of the Statute states that the Court's jurisdiction is limited to 'the most serious crimes of concern to the international community as a whole'. The Prosecutor is empowered to react to reports of very serious crimes within its jurisdiction at a very early stage of conflicts. One should not underestimate the deterrent effect which his or her efforts to seek information from, for example, Governments may have.

Article 15(3) concerns the situation where the Prosecutor concludes that there is '*a reasonable basis* to proceed with an investigation', in which case the Prosecutor 'shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected' (emphasis added). Article 15(3) *i.f.* provides that victims may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence of the Court which the Assembly

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in authority with interests adverse to the prosecution. Secondly, if the Pre-Trial Chamber has determined that a State Party is clearly unable to execute a request for co-operation due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation, it can authorize the Prosecutor to take specific investigate steps within the territory of that state without having secured its co-operation, *see* Article 57(3)(d).

32. Article 103 provides that in 'the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

of States Parties will adopt. Subparagraph (4) continues: 'If the Pre-Trial Chamber, upon the examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case'. It is significant that the test which the Pre-Trial Chamber is to apply is one of reasonableness, not of *appropriateness*. The Pre-Trial Chamber is not asked to perform the role of the Security Council in the empowerment of the Prosecutor of the *ad hoc* Tribunals, which is essentially a political function administering a non-judicial standard. The judicial nature of the Pre-Trial Chamber is thus protected, while at the same time there is control over the Prosecutor's commencement of investigations by a panel of professional judges.

If the Pre-Trial Chamber refuses to authorize the investigation, Article 15(5) grants the Prosecutor the right to present a subsequent request for authorization 'based on new facts or evidence regarding the same situation'. If, on the other hand, the Prosecutor after the preliminary examination referred to in subparagraphs (1) and (2) concludes that there is no reasonable basis for an investigation, those who provided the information shall be informed. The Prosecutor is not precluded from 'considering further information submitted to him or her regarding the same situation in the light of new facts or evidence'.

Article 15 is based on the German-Argentine proposal of 25 March 1998 in favour of an *ex officio* power of the Prosecutor and the Pre-Trial Chamber to start investigations.[33] Subparagraphs (2) through (6) are taken from the German-Argentine proposal and slightly amended. The proposal received significant support when it was presented during the final session of the Preparatory Committee, but it also met firm resistance from some powerful states. A few months earlier, Justice Louise Arbour, chief Prosecutor of the two *ad hoc* Tribunals, had underlined the importance of equipping the Prosecutor with appropriate powers in this regard in her statement to the Preparatory Committee during its fifth session in December 1997:

> The Prosecutor [of the ICC] should be able to initiate investigations *ex officio* based on reliable information received from any source. It seems to me that this would best enable the Prosecutor to make a non-political, independent and professional selection of cases based on relevant legal criteria such as the seriousness of the alleged offences, the likely quality and accessibility of the evidence, the availability of resources and the relationship to other on-going investigations. The main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution.[34]

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33. *See* A/AC.249/1998/WG.4/DP35, 25 March 1998.
34. And she continued: 'Domestically, the general assumption is that enforcement is universal, *i.e.*, that all crimes beyond the *de minimis* range will be prosecuted, subject to the determination by the Prosecutor that a charge is appropriate based on a preliminary examination of the facts of the case. In the international context, particularly in a system based on complementary with state jurisdiction, the discretion

The United States consistently argued against the proposal for a *proprio motu* Prosecutor. In an informational position paper on the subject of 22 June 1998, the United States delegation argued that the proposal

> not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor's central task of thoroughly and fairly investigating the most egregious of crimes.[35]

Furthermore,

> it is essential that there be some screen to distinguish between crimes which do rise to the level of concern to the international community and those which do not. The only rational and workable proposal to date – even if it may fall short of the perfect – is to look to States, and in appropriate cases the Security Council, to speak for what is 'of concern to the international community as a whole'. For the United States, it is inappropriate and ultimately unworkable to suggest that this role is better vested in a single individual, the ICC Prosecutor.[36]

The United States delegation expressed concern for the 'considerable political pressure that organizations will bring to bear on the Prosecutor in advocating that he or she take on the causes which they champion.'[37] The Lawyers Committee for Human Rights, one of the most active non-governmental organizations during the Diplomatic Conference, circulated a response to the United States paper two days after it was issued, in which it maintained that

> Time and time again states have proved unwilling to refer violations of international law to the appropriate judicial bodies and will be more reluctant to respond to violations of international criminal law . . . The Security Council has also remained passive in the face of heinous crimes committed in international and internal conflicts worldwide over the last half

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to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones. Our experience to date suggests that we can dispose quickly of even large quantities of unsubstantial allegations. In any event, an appropriate process of vigorous internal indictment review, such as we presently have in place at the two Tribunals, confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded prosecution, should alleviate any fear that an overzealous or politically-driven Prosecutor could abuse his or her powers', *see* 'Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997', pp. 7–8.

35. *See* 'The concerns of the United States regarding the proposal for a *proprio motu* prosecutor', 22 June 1998, p. 1.
36. *Ibid.*, p. 2.
37. *Ibid.*

> century . . Political considerations have prevented states and the Security Council from reacting to mass atrocities in which hundreds of thousands, and some cases, millions of people were killed over the last several decades . . . Finally, the argument that only states and the Security Council 'can speak for what is of concern to the international community as a whole' reflects an outdated concept of what constitutes the international community. *Civil society is a well-recognized part of the international community* and has played a crucial role in seeking justice for the victims of heinous crimes. The ICC is being created to end impunity for such crimes and prevent future atrocities. Unless the ICC Prosecutor is allowed to initiate proceedings proprio motu, based on information from any source, this goal will not be achieved.[38]

It remains to be seen what the practical significance of Article 13(c) and 15 will be. A standing Prosecutor's Office can react quickly to emerging armed conflicts and other relevant situations, taking early steps to preserve evidence and spark the awareness of Governments of the importance of securing evidence when available. Such steps can have a deterrent effect among the parties to the conflict. Thus, the *proprio motu* capacity of the ICC Prosecutor may contribute to saving some lives and evidence. However, Articles 13(c) and 15 should not be used by members of the Security Council as an excuse to reduce Council referral of situations to the Court pursuant to Article 13(b), when that is required by the circumstances. It is only the Security Council which can empower the Prosecutor to conduct investigations and case preparation more effectively than the weak mode prescribed by the Statute (*see* section 3.2 *above*). It is not sufficient that the ICC Prosecutor is able to act in a *timely* manner through the *proprio motu* power to initiate investigations. The Prosecutor still needs the Security Council to be able to work *effectively*.

4. ARTICLE 16: DEFERRAL OF INVESTIGATION OR PROSECUTION

The provision on the so-called veto power of the Security Council over the work of the ICC can be found in Article 16, which says:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions.

A separate Security Council decision is required, which means that the permanent five members can use their veto power to block the decision if they do not agree

38. *See* Lawyers Committee for Human Rights, 'Response to US Concerns Regarding the Proposal for a *Proprio Motu* Prosecutor', 24 June 1998, pp. 1–3.

that the Court should be prevented from investigating and prosecuting.[39] In terms of the majority required, Article 27(3) of the United Nations Charter prescribes an affirmative vote of nine members including the concurring votes of the permanent members of the Council. Such decisions by the Council are legally binding on the Court as confirmed by the wording of Article 16 of the Statute.

The resolution must be grounded in Chapter VII of the United Nations Charter which essentially deals with enforcement measures in the execution of the Council's 'primary responsibility for the maintenance of international peace and security' under Article 24(1) of the Charter. The Member States of the United Nations have agreed that the Security Council acts on their behalf in carrying out its duties under this responsibility.[40] There are several ways international investigation and prosecution can interfere with peacemaking activities of the Security Council. It is predictable that the widely perceived dichotomy between peace and justice mandates will continue after the establishment of the ICC, although the favourable experiences made through the extensive co-operation between the ICTY and the international peacekeeping and enforcement forces in Bosnia and Herzegovina must necessarily affect the nature of this tension in a lasting manner. The open-ended possibility to renew the 12 month postponement of investigations and prosecutions has been criticized as being too wide and an invitation to abuse. One cannot fail to see that considerable responsibility for the effective enforcement of international criminal law continues to rest on the permanent members of the Security Council.

India adopted a more radical approach to the relationship between the ICC and the Security Council as illustrated by the delegation's explanation of vote during the concluding session of the Plenary of the Diplomatic Conference:

> The power to block is in some ways even harder to understand or to accept. On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the Conference accepts the proposition that justice could undermine international peace and security.[41]

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39. The original proposal by the International Law Commission, as later modified in the Preparatory Committee, did not require a separate decision by the Security Council; as long as the Council was seized of a matter under Chapter VII the Court would be prevented from investigating the situation, *see* A/CONF.183/2/Add.1, 14 April 1998, Article 10(7) option 1. The so-called Singapore proposal introduced the requiremenet of a specific Council decision, *see ibid.*, option 2. The adopted formulation of Article 16 is based on the United Kingdom's proposal on jurisdictional issues of 25 March 1998, A/AC.249/1998/WG.3/DP.1, Article 10(2). It was the latter proposal which expanded the provision to bar both investigation and prosecution, not only prosecution.
40. Article 24(1) *i.f.* of the United Nations Charter.
41. *See* the unofficial 'Explanation of vote by India on the adoption of the Statute of the International Criminal Court, Rome, July 17, 1998', *op. cit.*, p. 3.

5. ARTICLE 17: ISSUES OF ADMISSIBILITY

Article 17 sets out the admissibility standard of the Court. Subparagraph (1) starts by invoking the complementary principle as expressed in paragraph 10 of the Preamble and Article 1 of the Statute, both of which refer to the ICC as 'complementary to national criminal jurisdictions'. The Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3,
(d) The case is not of sufficient gravity to justify further action by the Court.

The core of the admissibility test is whether there is a state with jurisdiction which has the willingness and ability to investigate and prosecute. 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 meant to supplement national investigation and prosecution. According to Article 17(1) it must decline jurisdiction unless the Prosecutor can show that the state which has seized itself of the matter is 'unwilling or unable genuinely to carry out the investigation or prosecution'. The burden of proof rests on the Prosecutor. The nature of the 'unwillingness' and 'inability' tests will in many cases make the preparation of the admissibility argument more resource demanding for the Prosecutor than proving the guilt of the alleged perpetrator.

Article 17(2) defines 'unwillingness' by reference to three alternative situations whereby (a) the person concerned is shielded from criminal responsibility; (b) there is a delay in the proceedings inconsistent with an intent to bring the person concerned to justice; or (c) the proceedings are not independent or impartial, and are conducted in a manner inconsistent with an intent to bring the person concerned to justice. For the determination of 'inability' in a particular case, subparagraph (3) provides that the Court shall consider whether, 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.

The test of 'willingness' as elaborated in Article 17(2) is in effect a test of the good faith of national authorities. Whilst this must be considered most unusual in criminal cases, it should be possible for the Court to adjudicate this complex and litigious jurisdictional matter without compromising the position of the judges. The 'inability' test in Article 17(3) however, could become a serious challenge to the legitimacy of the judges. The test effectively forces the judges to sit in judgement of an entire criminal justice system. This may not be a test that lends itself well to con-

sideration by trial judges, as opposed to assessment by *ad hoc* judges or a political body. Moreover, an essential element of the rationale of the complementarity principle is that national authorities shall be given an opportunity to enforce international humanitarian law in accordance with their international legal obligations. The ICC will only be able to prosecute the most important cases in the situations over which it will have jurisdiction. It must be expected that the clear majority of the cases will in effect be referred back to the national criminal justice system. Associations of victims may find this difficult to understand when the ICC has declared the same authorities unwilling or unable to conduct investigations and prosecutions. The judges may need to find ways to narrow the scope of their findings of inability and unwillingness so that their credibility will not be harmed by persistent criticism by victims and others on the grounds of serious inconsistency. It remains problematic however, that the ICC as a general rule must rely on those same national authorities for the execution of its requests for assistance during the investigations, also when the requested state is a territorial state directly affected by the alleged crimes under investigations.[42]

Agreement was reached on the admissibility standard during the fourth session of the Preparatory Committee in August 1997 following difficult negotiations. The compromise reached then was not reopened for substantive negotiation later in the process for fear that the agreed formula would unravel. In retrospect, it can be asked if sufficient consideration was given in the Preparatory Committee to restricting the scope of the complementarity principle so that the primacy of national jurisdictions *vis-à-vis* the ICC would only be activated when national authorities have actually indicted the person in question. Furthermore, one possible procedural response to the damage which administration of the 'inability' test could cause to the credibility of the professional ICC judges over time, would have been to use separate *ad hoc* judges for the adjudication of admissibility. Only time will show if the concern and proposed remedies have merit.

6. ARTICLE 18: PRELIMINARY RULINGS REGARDING ADMISSIBILITY

Article 18 elaborates the complementarity principle as expressed through Article 17, by providing a mechanism for preliminary rulings regarding admissibility. Article 18(2) obliges the Prosecutor to defer to a State investigation if informed of the existence of such investigation within one month of his or her notification to all the States Parties (and other states which would normally exercise jurisdiction) of state referral or *proprio motu* initiation of an investigation. Such notification is prescribed by subparagraph (1).[43] The Prosecutor can apply to the Pre-Trial Chamber for authorization of an investigation which the Chamber may grant.[44] If the Prosecutor defers to a state's investigation, he or she may review the deferral after six months or when there has been 'a significant change of circumstances based on the state's unwillingness or inability

42. *See* Article 99 of the Statute. Narrow exceptions are provided for in Articles 99(4) and 57(3)(d).
43. Several delegations to the Diplomatic Conference reacted to the broad scope of the group of states that must be notified by the Prosecutor.
44. *See* Article 17(2) *i.f.*

genuinely to carry out the investigation'.[45] Both the state concerned and the Prosecutor may appeal the Trial Chamber's ruling, if necessary on an expedited basis.[46] A state which has challenged a ruling by the Pre-Trial Chamber under Article 18 is not prevented from challenging the admissibility under Article 19 on the grounds of 'additional significant facts or significant change of circumstances'.[47]

Article 18 is based on a United States proposal to the Preparatory Committee of 25 March 1998.[48] Although it met very significant opposition during the final session of the Preparatory Committee, it has found its way into the Statute, albeit in an amended version. One of the concerns raised by critical delegations was the fear that the notification by the Prosecutor to states could harm the investigations. Article 18(1) *i.f.* provides that the notification can be done on a confidential basis and the scope of the information provided to states may in certain situations be limited. However, the most serious challenge to the integrity of investigations will often come from territorial states which have not seen a change in régime since the time when the alleged atrocities were committed. Confidentiality would not prevent such Governments, alone or in co-operation with friendly régimes, from starting destruction of evidence or intimidation of possible witnesses. This problem is only partially ameliorated by sub-paragraph (6) which says that the Prosecutor may, on an exceptional basis, request authorization from the Pre-Trial Chamber to 'pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.'

7. ARTICLE 19: CHALLENGES TO THE JURISDICTION OF THE COURT OR THE ADMISSIBILITY OF A CASE

Article 19(1) determines that the Court 'shall satisfy itself that it has jurisdiction in any case brought before it' and it 'may, on its own motion, determine the admissibility of a case in accordance with Article 17'. Admissibility and jurisdictional challenges may be brought by (a) an accused or a person for whom a warrant of arrest or summons to appear has been issued; (b) a state which has jurisdiction over a case 'on the ground that it is investigating or prosecuting the case or has investigated or prosecuted'; or (c) a state from which acceptance of jurisdiction is required under Article 12.[49] As the main rule they may make the challenge only once and do so prior to or at the commencement of the trial,[50] the states referred to in (b) and (c) being obliged to do so at the earliest opportunity.[51] If the challenge is made by such a state, the Prosecutor

45. *Ibid.*, subparagraph (3).The Prosecutor may request that the state concerned periodically inform him or her of progress in the investigations and subsequent persecutions, *see* subparagraph (5).
46. *Ibid.*, subparagraph (4).
47. *Ibid.*, subparagraph (7).
48. A/AC.249/1998/WG.3/DP.2, 25 March 1998, Article 11*bis*.
49. Article 19(2).
50. *Ibid.*, subparagraph (4). The Court may in exceptional circumstances grant leave for a challenge to be brought more than once or at a later time than the commencement of the trial, *see ibid.*
51. *Ibid.*, subparagraph (5).

shall suspend the investigation until the Court makes a determination in accordance with Article 17.[52] Article 19(3) entitles the Prosecutor to seek a ruling from the Court on a question of jurisdiction or admissibility. In such proceedings victims and those who referred the situation under Article 13 may submit observations to the Court.[53] A challenge of jurisdiction or admissibility 'shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the court prior to the making of the challenge' [54]

This cursory overview of Article 19 shows that there is considerable potential for litigation of pre-trial questions of jurisdiction and admissibility. Prior to making substantial progress on resource demanding investigations into alleged crimes, the Prosecutor is likely to become entangled in prolonged and complex disputes with one or more states.

8. CONCLUSION

This preliminary consideration of the provisions in Articles 11 through 19 of the ICC Statute cannot do justice to the numerous complex jurisdictional questions which they raise and which will be made the subject of considered discussion and careful analysis over the months and years ahead. It is too early to draw far-reaching conclusions on the jurisdictional régime of the ICC. However, one striking feature of the ICC Statute is the strength of the complementarity principle. It is difficult to understand how states can have *bona fide* fear of the jurisdictional reach of the Court as long as it must defer to states with jurisdiction which are willing and able to investigate and prosecute. The Court is dependent on acceptance of jurisdiction by a territorial State or the State of nationality of the alleged perpetrator. Challenges to jurisdiction and admissibility can in reality be made before an investigation has actually started and in exceptional cases even until after trial has commenced. The Court is obliged to satisfy itself that it has jurisdiction in any case brought before it, and it may *ex officio* consider the admissibility of a case. The ability of the Prosecutor to initiate investigations *proprio motu* (but not to launch investigations without the authorization of the Pre-Trial Chamber) empowers the Prosecutor to do timely preliminary analysis of reports of alleged crimes early in conflicts. But the State co-operation régime of the Statute is so weak that it is questionable if the Prosecutor will be able to prepare cases effectively in normal situations without Security Council

52. *Ibid.*, subparagraph (7). Pending a ruling by the Court on the admissibility question, the Prosecutor may request authority from the Court to pursue necessary investigative steps (as referred to in Article 18(6)); to 'take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge'; and to prevent the absconding of persons for whom the Prosecutor has already requested an arrest warrant, *ibid.*, subparagraph (8).
53. *Ibid.*, subparagraph (3).
54. *Ibid.*, subparagraph (9). Subparagraph (10) regulates the Prosecutor's right to review of an inadmissibility ruling based on new facts which 'negate the basis on which the case had previously been found inadmissible under Article 17'. Finally, when the Prosecutor defers an investigation he or she may request the relevant state to make available information on its national proceedings, *see* subparagraph (11).

referral of situations under Chapter VII. In such cases of referral it is unrealistic that the Security Council will not empower the Court, the Prosecutor in particular, to conduct at least as effective an international investigation and prosecution as the *ad hoc* Tribunals can. The Security Council's power to postpone investigations and prosecutions of the Court may ensure a continuation of the tension between the requirements of peace and justice mandates in international conflict management.