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Special Note: The Struggle for the International Criminal Court's Jurisdiction

Among the principles on which the Rome Statute[2] of the future International Criminal Court (ICC) adopted on 17 July 1998 was based, two in particular have for a long time been largely undisputed and have been therefore included in the Agreement as expected. These are:

a) the principle that the Court may only become involved if the criminal courts of individual states are unable or unwilling to prosecute a specific serious crime (principle of complementarity, Article 17);
b) the principle that the Court's jurisdiction is limited to four particularly serious core crimes (Article 5), which, in accordance with the principle of universal jurisdiction, are of concern to the international community as a whole: genocide, crimes against humanity, war crimes and the crime of aggression (the crime of aggression is, however, yet to be defined and an appropriate role for the UN Security Council with respect to this crime to be agreed).

According to the Statute, the Court can be activated by three mechanisms (Article 13):

– either by a so-called State complaint, in which a State party to the Statute refers a particular situation to the Prosecutor, requesting that he or she examine whether core crimes were committed by specific persons;
– or by the Prosecutor him or herself, who has the power, subject to the control of the Pre-Trial Chamber, to begin such examination *proprio motu*;
– or by the UN Security Council, through referring a particular 'situation' to the Court acting under Chapter VII of the UN Charter.

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2. UN Doc. A/Conf. 183/9 of 17 July 1998. The text can be found on the homepage of the UN under the following address: http//www.un/org/icc.

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In the latter case no further conditions apply; in the first two, however, it is necessary for the Court to be competent pursuant to the relevant articles in the Statute.

It is clear that the question of the practical form that this competence takes is of crucial importance for the Court. Looking back,[3] it becomes even clearer that this was the most important, politically most difficult and therefore most contentious question of the negotiations as a whole – the 'question of questions' of the Court project, so to speak. The jurisdiction and scope of the future Court remained highly controversial right up to the end of the Rome Conference and were decided, literally, on the last day at the last minute.

It is clear from the Statute that the question of the Court's general competence was resolved by means of compromise. In simplified form, the compromise on jurisdiction can be said to confist of the following four main elements:

a) The precondition for the normal complementary jurisdiction of the Court to apply is that either the State or the territory on which the crime was committed (territorial State) or the State of which the suspect is a national (suspect State) is a State Party to the Court Statute (Article 12, section 2).
b) An exception to this rule is the so-called Transitional Provision (Article 124) applying specifically to war crimes, by means of which the States Parties may exclude prosecution of war crimes committed on their territory or by their nationals for seven years following their accession to the Statute. However, such a 'partial withdrawal' from the Statute, which is what this is, can only be repeated under very narrowly defined circumstances since this 'Transitional Provision' is linked to the strict conditions for amendments to the Statute.
c) In the case of States not party to the Statute on whose territory or by whose nationals core crimes have been committed, the competence of the Court may also be based on their acceptance of its jurisdiction on an *ad hoc* basis with respect to a particular crime by lodging a special declaration (Article 12, paragraph 3). The principle of such an optional provision for States not party to the Statute was uncontroversial for a long time (this shall not be discussed in any more detail).
d) Nothwithstanding the above-mentioned provisions and cases, the Court is competent when the UN Security Council, acting under Chapter VII of the UN Charter, refers a country situation to it in which core crimes are presumed to have been committed on a large scale (Article 13b). In such a case, it does not matter whether the State concerned is a party to the Statute or not. That is why this provision is likely to be highly significant for the Court's effectiveness.

How was this package deal arrived at in Rome? What other options and proposals were wholly or partly taken into account, or rejected? What was the negotiating history?

The following contribution focuses exclusively on these questions. The attempt will be made from the point of view of a German participant to summarize the most important proposals and approaches for resolving the central question of jurisdiction

3. *See* H.-P. Kaul, 'Durchbruch in Rom. Der Vertrag über den Internationalen Strafgerichtshof', in *Vereinte Nationen*, No. 4/1998, p. 125 *sequitur*.

and to trace the course of the consultations in Rome, and earlier, in New York. Due to limits of space, it is impossible to discuss other interesting issues, of which a great number arise in connection with the complex Statute. This paper is intended to present the results achieved in Rome, and their deficiencies, in a way that is transparent and clear also to readers who were not themselves involved in the negotiations.

2.

At the negotiations of the UN Preparatory Committee[4] prior to the Rome Conference, which took place over several years, various – in part diametrically opposed – proposals and approaches were developed on the key question of competence. These models were either rejected or supported, depending on whether a state was concerned to restrict the Court's powers or, as a 'like-minded State', in favour of the Court.

In the process, it became increasingly clear that those countries primarily concerned with their sovereignty were sceptical, in spite of all their lip service, and wanted a Court that would 'initially' be weak and symbolic. It should only be able to act when the states concerned or the UN Security Council allowed it to do so in specific cases. If necessary, their own nationals were to be exempted from the Court's jurisdiction. Such countries did everything they could to ensure that the jurisdiction issue be regulated in this way.

What, then, was the nature of all the concrete proposals and approaches on the table in Rome to resolve the question of jurisdiction?

At half-time at the Rome Conference, around the beginning of July, there were still three main competing approaches:

a) The so-called 'opt-in/opt-out' régime developed by the International Law Commission (ILC). This would have enabled the states party to the Statute to selectively accept or reject the competence of the Court for specific crimes and for specific periods of time.
b) The proposal was originally made by France, the so-called 'state consent régime', according to which the consent of (all) the states concerned would have been required in every individual criminal proceeding against every individual suspect in order for the Court to have jurisdiction.
c) The approach, largely initiated by Germany, of automatic jurisdiction, whereby a state that had ratified the Statute thereby automatically accepted the jurisdiction of the ICC.

The number of choices was larger still because three further variants of the automatic jurisdiction approach were on the table in the form of proposals by Great Britain, Germany and South Korea.

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4. *See* H.-P. Kaul, 'Towards a Permanent International Criminal Court. Some Observations of a Negotiator', in 18 *Human Rights Law Journal*, No. 5–8 of 28 November 1997, p. 169 *sequitur*; B. Ferencz. 'Von Nürnberg nach Rom: Auf dem Weg zu einem Internationalen Strafgerichtshof', in *Humanitäres Völkerrecht* No. 2/1998, pp. 80–90.

It seems relevant to detail and assess these proposals, which could have been combined with each other, and to discuss the measure of support they received at the Rome Conference.

a) Opt-in/opt-out régime

This proposal, developed by the ILC in its draft Court Statute,[5] is an emphatically conservative and not very Court-friendly approach. It is obviously modelled on the submission rules for the International Court of Justice (Article 36 ICJ Statute), which in turn give the states considerable choice, allowing them complete freedom to 'pick and choose' after, in spite of, having ratified the Statute. Under this jurisdiction '*à la carte*' approach, states would have been able to submit themselves to the jurisdiction of the International Criminal Court through special declarations specifically for certain or even individual crimes and/or for certain periods of time. This approach, aiming at the complete freedom of choice of the member states, would probably have led to chaos, with very different declarations of submission depending on whether states chose to be open or restrictive towards the Court. It would therefore foreseeably have led to the Court being completely ineffective.

At the Rome Conference this approach was supported in principle by a minority – if a sizeable one – of 27 states. However, it must be taken into account that some of them were aiming at such an opt-in/opt-out régime either only for crimes against humanity and war crimes or only for war crimes.

b) State consent régime

This proposal was at the heart of the draft[6] submitted by France to the UN Preparatory Committee for a complete Statute in August 1996. It stated that in every individual case, every procedure and regarding every suspect the states affected would all have to give their explicit consent in order for the Court to be able to proceed (i.e. the territorial state where the crime was committed, the state of the nationality of the victim, the state of the nationality of the suspect and, if applicable, the state applying for extradition and the custodial state).

This French proposal, which has often restricted, would have made the jurisdiction of the Court, even in the case of core crimes, totally dependent on the discretion of the States Parties and their perceived interests. Highly selective jurisdiction and probably a far-reaching paralysis of the Court would have been inevitable.

In its pure, consistent form, this rather non-Court-friendly approach was no longer of any great relevance in Rome. It remained unclear whether the USA, which explicitly reserved its position, would support this proposal or not. However, a particularly

5. *See* Article 22 of the Draft Statute submitted by the ILC, UN Doc. A/49/355 (1994). The text is also contained in 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' Vol. II (Compilation of Proposals) UN Doc. A/51/22, Supplement No. 22a, p. 73.
6. *See* Article 34 of the Draft Statute submitted by France, UN Doc. A/AC. 249/L.3 of 6 August 1996.

critical element of the French proposal remained significant right up to the end: some states in favour of a weak Court, led by the USA, strongly and repeatedly demanded that it was only the state of nationality of the suspect which ought to be important. In order for jurisdiction to apply, this country would have to be a Party to the Statute or have agreed to the procedure.

c) Automatic jurisdiction

The first detailed proposal for this basically Court-friendly position was submitted by Germany back in February 1996. In the Preparatory Committee's Compilation of Proposals, the German proposal on the question of jurisdiction was presented as follows: 'A State which becomes a Party to this Statute thereby accepts the inherent jurisdiction of the Court with respect to the crimes referred to in the Statute.'[7] The provision agreed in Rome on automatic jurisdiction in Article 12(1) took over this proposal almost word for word, the only exception being the word 'inherent', which was left out.

Support for the 'main building block'[8] of automatic jurisdiction repeatedly called for by the German side had tangibly increased at the Preparatory Committee deliberations from 1996 to 1998. In a global demarche with a special position paper in May 1998, the German side made a strong appeal to all states in favour of automatic jurisdiction. Other 'like-minded' states also undertook parallel efforts. Thus, acceptance and understanding for this central proposal were gradually promoted. Among the 'like-minded' states themselves, a consensus emerged to the effect that provisions for the general competence of the future Court had to be based on 'automatic jurisdiction'.

Notwithstanding this basic consensus, however, the question had not yet been resolved as to which state or states would have to subject themselves to the jurisdiction of the Court: the state or the territory on which the crime had been committed (territorial state), the state in the custody of which the suspect was being held (custodial state), the country of which a national was the victim of the crime (victim state) or the country of which a national was the suspect (suspect state)? Or a combination of these countries? Each of the 'like-minded' UN members Great Britain, Germany and South Korea submitted its own proposal.

The British proposal,[9] presented at the concluding round of negotiations of the UN Preparatory Committee in March/April 1998, initially focused on the territorial state and (cumulatively) the custodial state. The British line taken in Rome was that the jurisdiction of the Court should be based on only the territorial state being a Party to the Court Statute.

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7. *See* UN Doc. A51/22, Supplement No. 22A, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), p. 73, Proposal 1 (German proposal).
8. *See* the statement of the German delegation made in the Preparatory Committee on 4 August 1997.
9. The British proposal is contained in 'Further option for articles 6, 7, 10 and 11' in the Draft Statute prepared for the Rome Conference, *see* UN Doc. A/Conf. 183/2/Add. 1. pp. 38, 39. *See* Article 7.

The German proposal,[10] also tabled in March/April 1998, was for its part based on the principle of universal jurisdiction over the core crimes. The underlying considerations were outlined in a so-called discussion paper: in accordance with modern international criminal law, genocide, crimes against humanity and war crimes, following the principle of universal jurisdiction, are punishable anywhere by any state, regardless of the nationality of the suspect, the victim or the place where the crime was committed. Since UN Member States can thus exercise universal jurisdiction nationally with regard to the three core crimes, they could also, by ratifying the Court Statute, transfer this universal jurisdiction to the ICC.

This conceptual approach and proposal was supported by various states, and particularly by the ICRC[11] and most non-governmental organizations, above all Amnesty International,[12] Human Rights Watch,[13] Lawyers' Committee for Human Rights and the 'NGO Coalition for an International Criminal Court'. At the same time, however, it became clear that there were considerable reservations and resistance to such an approach.

It was in this context that, at the beginning of the Rome conference, South Korea presented a further proposal[14] which was also court-friendly. Building on the basic principle of 'automatic jurisdiction' outlined above, it considered by the Court competent if, in a specific case, one or more of the relevant states were Parties to the Statute, i.e. either the territorial state or the custodial state or the state of which a national was a victim or the state of which a national was the suspect, or a combination of these states. It soon became clear during the discussions in Rome that the South Korea proposal, despite being a 'late arrival', caught the mood of the majority of the Conference participants and above all the 'like-minded' states, with the exception of Great Britain.

Thus the competing approaches and proposals were laid out in Rome. The moment of decision-making was approaching. For those states interested in a court which would be as effective and credible as possible it was a question of achieving an automatic and compulsory jurisdiction rule that was as wide and general as possible.

3.

So how did the negotiations in Rome proceed on the question of jurisdiction? Which circumstances were instrumental in leading to the actual compromise summarized above?

10. *See* UN Doc. A/AC 249/1998/DP. 2. (The Jurisdiction of the International Criminal Court. An informal discussion paper submitted by Germany.)
11. The ICRC delegation in Rome reaffirmed, in a statement made on 13 July, that the jurisdiction of the ICC should be based on the principle of universal jurisdiction. *See* UN Doc. A/Conf. 183/INF/9. *See also* the information paper of the ICRC of February 1998: 'Création d'une Cour Criminelle Internationale: Vers la fin de l'impunité'.
12. *See* Amnesty International, 'The International Criminal Court – Making the right choices – Part V – Recommendations to the Diplomatic Conference' of May 1998, AI Index: IOR 40/10/98.
13. *See* Human Rights Watch, 'Justice in the balance – Recommendations for an Independent and Effective International Criminal Court', pp. 51, 53.
14. UN Doc. A/Conf. 183/C. 1/L.

First, it seems necessary at this point to make a few remarks about the interesting negotiation method pursued by Mr Kirsch, the Canadian Ambassador, and charismatic Chairman of the Committee of the Whole. From a delegate's point of view, his methodological approach appeared to be as follows:

After numerous bilateral and group consultations, Mr Kirsch and the Conference Bureau successively presented various discussion papers to the participants in the course of the second half of the Rome Conference. The papers of 6[15] and 10[16] July contained different options on the unresolved key questions of the Statute, particularly jurisdiction. These options in turn were based on the basic draft presented at the Rome Conference and the various proposals and options it contained. The second step involved holding comprehensive orientation debates on each of these discussion papers, on which each state taking the floor had to present its national view on the precise questions formulated by the Conference Bureau.

This procedure, largely 'accepted' by the Conference, clearly had various aims: to focus the debate, to speed up the necessary opinion-building process among the delegates, to sound out majority views in order to be able to eliminate proposals which were supported by only a few states. The aim was to achieve an appropriate empirical basis for the Conference Bureau to make a package proposal which had good chances of being accepted.

This procedure proved to be effective.

As expected, it soon became apparent that the possibility, already envisaged by the ILC, for the Security Council to refer particular 'situations' to the Court pursuant to Chapter VII of the UN Charter, continued to be practically undisputed. Only a few States, such as Mexico, and in particular India,[17] did not want to allow the UN Security Council to have any role in connection with the Court's activities. However, since this opinion was held by only a very small minority group, it was clear to the great majority of delegates at an early stage that the right of the UN Security Council to activate the future ICC would become an important part of its jurisdiction.

Next, the German proposal that the Court automatically have universal jurisdiction was eliminated, as it already had been from the discussion paper of 6 July. The USA in particular had spoken out very clearly against this proposal. However, it was not so much American resistance as the lack of adequate support from other Conference participants which led to its demise. Approximately 25 states explicitly supported Germany's far-reaching proposal. In the orientation debate of 9 July in Rome, no less than 23 states reiterated their regret or surprise that it was no longer contained in the option paper of 6 July.

By contrast, the court-friendly South Korea proposal on automatic jurisdiction was gaining an increasing number of supporters. This became abundantly clear at the orientation debates of 9 and 13 July at the Rome Conference. In fact, these debates acted as a kind of opinion poll on the discussion papers of 6 and 10 July distributed by the Conference Bureau. These papers placed side by side the unresolved key questions of the central part 2 of the draft Statute ('jurisdiction, admissibility and

15. UN Doc. A/Conf. 183/C. 1/L. 53.
16. UN Doc. A/Conf. 183/C. 1/L. 59.
17. With regard to the proposal made by India, *see* UN Doc. A/Conf. 183/C. 1/L. 79 and L. 95.

applicable law') in the light of earlier consultations. For reasons of fairness both papers had to present the most important options, i.e. automatic jurisdiction, opt-in/opt-out and state consent régime in their various forms. In view of the clearly high level of support for the Korean proposal,[18] it was clear that the first option for both discussion papers would be regulating the central question of jurisdiction.

The 'NGO Coalition for an International Criminal Court' for its part followed the orientation debates of 9 and 13 July on the Conference Bureau's option papers of 6 and 10 July with great interest, as did the participating states. At the same time, it made the process of consultations transparent by publishing its own, very carefully-produced evaluation reports[19] on the orientation debates. They highlighted the great support enjoyed by the South Korean proposal: initially 73 per cent (74 states) and 75 per cent (64 states) respectively of the delegations taking the floor were in favour of automatic jurisdiction (with only 27 per cent or 21 states for opt-in). The Korean version of automatic jurisdiction was supported by even larger majorities: 79 per cent on 9 July and 85 per cent on 13 July.

This meant that the South Korean proposal was favoured by the overwhelming majority of the delegations. Consequently, it had to be the first choice for settling the critical issue of jurisdiction.

4.

How did it come about that a different compromise, which fell far short of the South Korean proposal, was agreed upon in the end?

As so often in critical phases of the UN decision-making process, the well-established co-ordination mechanisms among the permanent members of the Security Council came into play. Of course, it was France, in particular, which had since the beginning of the Conference been looking for a way to exempt war crimes and crimes against humanity from compulsory jurisdiction. The USA, too, wanted the ICC to have a merely optional competence for crimes against humanity and war crimes. In keeping with the so-called state consent régime approach, the native country of a suspect was to have the possibility to accept or reject a particular procedure. Unlike automatic jurisdiction the competence of the Court was thereby to be based on the possible explicit permission of the native country of the suspect in each individual case.

On 15 July, the permanent Security Council members apparently met to agree, in the usual way, on a 'compromise proposal' that was in keeping with their interests (the German side was not informed and not involved). The result was a temporary joint approach of the five permanent members of the Security Council who, on 16 July,

18. *See* the discussion papers mentioned above, footnote 14 and 15.
19. *See* 'The Numbers. NGO Coalition Special Report on Country Positions', in 'The Rome Treaty Conference ICC Monitor' of 10 July 1998. *See also* 'The Virtual vote – NGO Coalition Special Report on Country Positions on L. 59', in: 'The Rome Treaty Conference ICC Monitor' of 15 July 1998 (Revision 1). The text can be found at the following address: http://www.igc.org/icc.

informally presented to the Conference Bureau and selected states a restrictive compromise package[20] containing the following elements:

– Opt-out possibility for war crimes and crimes against humanity for ten years, including the possibility to extend the period by simple majority (!) This was obviously a French proposal.
– Non-States' Parties should be able to prevent the Criminal Court having jurisdiction by stating that the crime was committed on an 'official mission' (meaning a military mission). This seems to have been a restrictive American proposal which the United States also officially tabled on 16 July.[21]
– On the issue of jurisdiction, the British proposal, which feel short of that of South Korea, would have ensured that the territorial state would have to be a State Party to the Statute.

Later during the day Great Britain, seconded by France, introduced a slightly revised version of the above package in an EU coordination meeting. The main substantive change in this informal paper compared with the previous version was that the opt-out possibility for war crimes and crimes against humanity could no longer be extended by a simple majority but that the opt-out could be "prolonged by the normal amendment procedures". While Great Britain did not present this paper as a P 5 package or as a proposal of its own, it became clear that both Great Britain and France regarded the paper as a basis for compromise.

In this situation the German delegation reacted by presenting an informal counter-proposal on the afternoon of 16 July. It contained the following points on the central issue of jurisdiction:

– Jurisdiction ought to become more effective by either the custodial state's or the victim state's Statute membership should also be sufficient for the ICC to have jurisdiction.
– The opt-out possibility brought into play by France for war crimes was to be regarded as a 'confidence-building period'. It ought thus to be limited to a single three-year period, without the possibility to extend it, and be restricted to war crimes (i.e. no such opt-out ought to be possible for crimes against humanity).

The German counter-proposal was immediately supported by a majority of EU states and also by other 'like-minded states'. It played a key role in the Conference Bureau, headed by Ambassador Kirsch, proposing the following compromise, which was finally agreed on 17 July:

20. For the sake of transparency the text of the informal paper elaborated by the permanent members of the Security Council on 15 July 1998 is annexed as annex 1.
21. *See* the proposals submitted by the United States of America in UN Doc. A/Conf. 183/C. 1/L. 90 of 16 July 98 and L. 70 of 14 July 98. On 17 July 1998, these proposals were rejected in a vote on a 'No Action Motion' with 113 states voting in favour of 'No action', 17 states voting for them.

– Automatic jurisdiction for all core crimes on the basis of Statute membership of the territorial state or the native country of the suspect;
– A transitional provision (only) for war crimes (Article 124) which enables the States Parties to exclude jurisdiction for themselves over war crimes for seven years.

In the night from 17 to 18 July 1998, this compromise put an end to the year-long and at times dramatic struggle for the jurisdiction and extent of the powers of the future Court. 120 states voted for the Conference Bureau's draft compromise. Seven states voted against: the USA, China, Israel, Iraq, Libya, Yemen and Qatar. Twenty-one states abstained.

5.

The successful passing of the Court Statute and the results arrived at in Rome, have received a largely positive reaction internationally. Indeed, a new chapter in international law and international criminal law was opened in Rome and the foundations were laid for a new global institution of international jurisdiction which, using international criminal law will help to provide protection against the most serious human rights abuses and to prevent the most serious crimes from going unpunished.

It is a fact that the Court Statute could have turned out even better, particularly with regard to the compulsory jurisdiction of the Court. Already in Rome and often since then, it has been deeply regretted that the South Korean proposal for an effective jurisdiction, supported by so many, was more or less 'negotiated away' at the last minute. It would indeed have considerably improved the effectiveness and scope of the Court, in particular with regard to internal armed conflicts taking place in non-State Parties. In civil wars, the most common form of conflict today, the present compromise provision does not allow for any jurisdiction unless the state in question is a Party to the Statute. If, in line with the Korean proposal, it had also applied to the custodial states, this critical loophole could have been avoided. Such a provision would have meant that war crimes, crimes against humanity or even genocide committed during a civil war could have been prosecuted if suspects had been arrested in the States Parties.

It is, therefore, much more important that the Statute of the future Court has a second instrument at its command: The possibility for the UN Security Council to refer to the Court, pursuant to Chapter VII of the UN Charter, situations in countries where the most serious crimes are presumed to have been committed. Since such a Security Council decision is also binding for non-States' Parties, it could counter the effect of the Court not being competent because the state in question is not a Party to the Statute. Of course, it remains to be seen whether and to what extent the UN Security Council will make use of this option. Nevertheless, the fact remains that the weakness of the general jurisdiction provisions in any given 'situation' can be overcome if the Security Council has the necessary political will to do so.

Apart from the Security Council, the effectiveness of the current provisions governing the Court's compulsory and regular competence clearly depends on as many states as possible being members of the Court Statute. Those who want the Court to

be effective should make every effort to ensure that as many states accede as soon as possible.

ANNEX 1

Informal paper put together by the permanent members of the Security Council on 15 July 1998 in Rome

(The article numbers in this paper refer to L. 59 and may have to be changed)
Article 7 as in Option 2 with the deletion of sub-paragraph (b)
Article 7 *ter*: renumber existing text as paragraph 2, and add a new paragraph 1:

1) Where the person accused of a crime under Article 5 *ter* or 5 *quater* is a national of a State not party to this Statute and the activity alleged to constitute the crime is an act of the State in question acknowledged by it as such, the Court shall not exercise its jurisdiction in respect of that crime without the consent of that State.

Article X

1) The Protocol annexed to this Statute shall be open for acceptance by any State Party at the time it becomes party to the Statute.
2) The application of this Statute to a State Party which accepts the Protocol in accordance with paragraph 1 shall be subject to the terms of the Protocol and the declaration made thereunder by the State Party in question.

Protocol

Article 1

A State accepting this Protocol may make a declaration, at the time of its acceptance, covering either the crimes referred to in Article 5 *ter* or the crimes referred to in Article 5 *quater* or both. The consent of the State in question shall thereupon be required, in accordance with the provisions of Article 7 *ter*, paragraph 1, before the Court may exercise its jurisdiction over the cases referred to in that paragraph.

Article 2

1) This Protocol shall enter into force with the Statute and shall remain in force thereafter for a period of 10 years. Its duration may however be prolonged by a decision of the Assembly of the States' Parties taken by simple majority.
2) A declaration under Article 1 of this Protocol shall remain valid and effective for the duration of this Protocol, but may be withdrawn at any time.

3) A State Party accepting this Protocol shall have the right, notwithstanding Article 115, paragraph 1, of the Statute, to withdraw from the Statute with immediate effect on the expiry of this Protocol.

Annex 2

Informal counter-proposal elaborated by the German side on 16 July, in Rome

Statute for the International Criminal Court

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Article 7

Option 1 as contained in L. 59

Article 7 bis
Acceptance of jurisdiction

A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with the respect to the crimes referred to in Articles 5 *bis*, 5 *ter* and 5 *quater*.

. . . . .

Article 109
Reservations

Without prejudice to the provisions of the additional protocol annexed to this Statute, no reservations may be made to this Statute.

Additional Protocol

Article 1

With regard to the crimes referred to in Article 5 *quater* of the State, a State Party to this protocol may, at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary, declare that, where a situation has been referred to the Court by a State Party or where the prosecutor has initiated an investigation, the Court shall not be exercise jurisdiction if that State Party is the State of nationality of the accused or the suspect, unless that State Party has consented to the exercise of the jurisdiction of the Court with respect to the situation in question.

Article 2

Any such declaration may apply to Article 5 *quater* as a whole or be limited to one or more of the crimes listed therein.

Article 3

1. Any such declaration shall remain in force for a period of three years from the date of entry into force of the Statute for that State Party and may not be renewed.
2. At the end of that period, that State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from the Statute. The withdrawal shall take effect one year after the date of receipt of the notification. Pending the withdrawal, the declaration shall remain in force.

Article 4

1. This additional protocol shall be open for signature to all State Parties of the Statute for the International Criminal Court.
2. It is subject to ratification, acceptance or approval by signatory States.
3. It shall be open to accession to all State Parties to the Statute.
4. It shall enter into force upon the entry into force of the Statute.

This informal paper is based on the understanding that

– Article 12 option 1 as contained in L. 59 is retained;
– States party to the additional protocol shall have all obligations under the Statute;
– No grounds for refusal of cooperation shall be allowed in Part 9; and
– No challenges to the admissibility of a case may be made before a national court after the Court has ruled on the issue.

End Annex 2