

**United Nations Diplomatic Conference of Plenipotentiaries
on the Establishment of an International Criminal Court**

Rome, Italy
15 June - 17 July 1998

Documents of the Committee of the Whole

Extract from Volume III of the *Official Records of the United Nations Diplomatic
Conference of Plenipotentiaries on the Establishment of an International
Criminal Court (Reports and other documents)*

F. Documents of the Committee of the Whole¹

1. Preamble

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.54/REV.2

Coordinator's rolling text regarding the preamble and part 13

[Original: English]
[10 July 1998]

As at 7.00 p.m., Friday, 10 July 1998, still subject to further consultations.

PREAMBLE

[The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are woven together in a shared heritage, a delicate tapestry that may at any time be rent asunder by unimaginable atrocities threatening the peace, security and well-being of our world,

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

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

Emphasizing that the International Criminal Court established under this Statute shall be complementary to [and would have no bearing on] national criminal jurisdictions,

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

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

Reaffirming the purposes and principles of the Charter of the United Nations,

Determined, to these ends and for the sake of present and future generations, to establish a permanent International Criminal Court in relation[ship] with the United Nations

system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

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

Have agreed as follows:]

PART 13. FINAL CLAUSES

Article 108

Settlement of disputes

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to resolve the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 109

Reservations

Option 1

No reservations may be made to this Statute.

Option 2

1. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

alternatively

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State, the Court shall be competent to decide the admissibility of such reservations.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

¹ A limited number of delegations submitted documents to the plenary with respect to the draft Statute. These documents are reproduced in section F.

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.²

Option 4

No article on reservations.

*Article 110
Amendments*

1. After the expiration of [5] [10] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the [Secretary-General of the United Nations], who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple [two-thirds] majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a [two-thirds] [three-fourths] [five-sixths] [seven-eighths] majority of [all States Parties] [those present and voting, representing an absolute majority of all States Parties].

4. Except as provided in paragraph 5, an amendment shall enter into force for [all] States Parties one year after instruments of ratification or acceptance have been deposited with the [Secretary-General of the United Nations] by [five-sixths] [seven-eighths] of them [, including at least ..³ States Parties].

[5. Any amendment to article 5 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [five-sixths] [seven-eighths] of them]].

6. If an amendment has been accepted by [five-sixths] [seven-eighths] of States Parties in accordance with paragraphs 4 or 5, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding article 115, paragraph 1, but subject to article 115, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

² This paragraph may be redundant in that it restates existing law.

³ Same number as in article 114.

7. [The Secretary-General of the United Nations] shall circulate any amendment adopted at a meeting of the Assembly of States Parties or a Review Conference to all States Parties.

*Article 110 bis
Amendments to provisions of an institutional nature*

1. Amendments to provisions of the Statute which are of an exclusively institutional nature, namely, article 36, article 37 [, excluding paragraphs 1 and 2, or 3 to 7, or 1 to 7], article 38, [article 39, paragraph 3, article 40, article 43, paragraphs 2 to 4 , 8 and 9, article 44, paragraphs 1 to 3, article 45], article 50 and [article 72] may be proposed [at any time] [after the Statute has been in force for ...], notwithstanding article 110, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the [Secretary-General of the United Nations] who shall promptly circulate it to all States Parties.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a [two-thirds] [three-fourths] majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

*Article 111
Review of the Statute*

1. [Five] [Ten] years after the entry into force of this Statute the [Secretary-General of the United Nations] shall convene a Review Conference to consider any amendments to this Statute. Such review may include but is not limited to the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the [Secretary-General of the United Nations] shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 110, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment of the Statute considered at a Review Conference.

*Article 112
Signature, ratification, acceptance, approval or accession*

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on [17 July 1998]. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until [17 October 1998]. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113]

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts which would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the first day of the month after the 60th day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the [Secretary-General of the United Nations].

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Nor shall the withdrawal affect any cooperation with the Court in connection with criminal investigations and proceedings [in relation to which the withdrawing State had a duty to cooperate] prior to the date at which the withdrawal became effective; nor shall it prejudice in

any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal became effective.

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.61

[incorporating document A/CONF.183/C.1/L.61/Corr.1 of 14 July 1998]

Recommendations of the Coordinator regarding the preamble and part 13

*[Original: English]
[11 July 1998]*

1. At its 20th meeting, on 30 June 1998, the Committee of the Whole entrusted Mr. Tuiloma Neroni Slade (Samoa) with the task of coordinating informal consultations on the text for the preamble to the Statute and part 13 on final clauses.

2. As a result of the informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text:

PREAMBLE

[The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are woven together in a shared heritage, a delicate tapestry that may at any time be rent asunder by unimaginable atrocities threatening the peace, security and well-being of our world,

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

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

Emphasizing that the International Criminal Court established under this Statute shall be complementary to [and would have no bearing on] national criminal jurisdictions,

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

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

Reaffirming the purposes and principles of the Charter of the United Nations,

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

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

Have agreed as follows:]

PART 13. FINAL CLAUSES

Article 108

Settlement of disputes

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to resolve the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

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alternatively

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a

State, the Court shall be competent to decide the admissibility of such reservations.

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1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.²

Option 4

No article on reservations.

Article 110

Amendments

1. After the expiration of [5] [10] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties, who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple [two-thirds] majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a [two-thirds] [three-fourths] [five-sixths] [seven-eighths] majority of [all States Parties] [those present and voting, representing an absolute majority of all States Parties].

4. Except as provided in paragraph 5, an amendment shall enter into force for [all] States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by [five-sixths] [seven-eighths] of them [, including at least ...³ States Parties].

[5. Any amendment to article 5 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [five-sixths] [seven-eighths] of them]].

6. If an amendment has been accepted by [five-sixths] [seven-eighths] of States Parties in accordance with paragraph 4 or 5, any State Party which has not accepted the amendment

may withdraw from the Statute with immediate effect, notwithstanding article 115, paragraph 1, but subject to article 115, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate any amendment adopted at a meeting of the Assembly of States Parties or a Review Conference to all States Parties.

Article 110 bis

Amendments to provisions of an institutional nature

1. Amendments to provisions of the Statute which are of an exclusively institutional nature, namely, article 36, article 37, paragraphs 8 and 9, article 38, article 39, paragraphs 1 [first two sentences⁴], 2 and 4, article 40, article 43, paragraphs 4 to 9, article 44, paragraphs 2 and 3, article 45, article 47, article 48 and article 50 may be proposed [at any time] [after the Statute has been in force for ...], notwithstanding article 110, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a [two-thirds] [three-fourths] majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 111

Review of the Statute

1. [Five] [Ten] years after the entry into force of this Statute the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties shall convene a Review Conference to consider any amendments to this Statute. Such review may include but is not limited to the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations or such other person designated by the Assembly shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 110, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment of the Statute considered at a Review Conference.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113]

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts which would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the first day of the month after the 60th day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the

⁴ It is recommended that the Drafting Committee break paragraph 1 of article 39 into two paragraphs, the first paragraph to contain the first two sentences and the second paragraph the rest of paragraph 1.

date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Nor shall the withdrawal affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date at which the withdrawal became effective; nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal became effective.

Article 116
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998

DOCUMENT A/CONF.183/C.1/L.73

**Recommendations of the Coordinator regarding
the preamble**

[Original: English]
[14 July 1998]

As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text for the preamble.

"PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are pieced together in a shared heritage, a delicate mosaic that may at any time be pulled apart by unimaginable atrocities threatening the peace, security and well-being of our world,

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

Affirming that serious crimes of concern to the international community as a whole must not go unpunished, and to that end their effective prosecution must be ensured both

by measures taken at the national level and by enhancing international cooperation,

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

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

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

Reaffirming the purposes and principles of the Charter of the United Nations,

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

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

Have agreed as follows:"

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.22

Spain: proposal regarding the preamble

[Original: Spanish]
[26 June 1998]

Word the preamble as follows:

"The States Parties to this Statute,

Conscious that during this century millions of persons have been victims of grave crimes affecting the international community as a whole,

Recognizing that the prevention and suppression of such crimes requires more effective international cooperation, and wishing therefore to promote and enhance international cooperation in the prosecution and punishment of crimes of international concern,

Determined, to that end, to establish a permanent International Criminal Court within the United Nations system, with jurisdiction over the most serious crimes affecting the international community as a whole,

Considering that the International Criminal Court will be complementary to national criminal justice systems.

Taking into account the purposes and principles of the Charter of the United Nations, in particular those relating to the

maintenance of international peace and security and to respect for universal human rights,

Mindful that this Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and the powers of the organs of the United Nations,

Affirming that the relevant norms of general international law will continue to govern those questions not expressly regulated in this Statute,

Have agreed as follows:"

DOCUMENT A/CONF.183/C.1/L.32

Andorra: proposal regarding the preamble

[Original: English]
[30 June 1998]

NOTE. The present text could constitute the beginning of the preamble to the Statute, *before* any of the current proposals, and would give a possible appropriate tone and framework to the document. Indeed the establishment of the International Criminal Court is a moment of unprecedented historical significance which merits the inclusion of some kind of inspiring yet focused language in the preamble, around a basic statement of purpose, in a style similar to the one we find, to take one example, at the beginning of the Charter of the United Nations. This would also facilitate the dissemination of the Statute and its goals among the peoples of the world.

We propose that the beginning of the preamble, before any of the current proposals, be worded as follows:

"The States Parties to this Statute,

"Convinced that all peoples are united by a common bond, and that our cultures are woven together in a shared history, a delicate tapestry that may at any moment be rent and torn asunder by unspeakable acts of brutality and ignorance that threaten the well-being of our world,

"We, at the turning of the new millennium, as an act of political will, renounce for all further generations those stains on the human spirit that have haunted us for centuries, and ..."

DOCUMENT A/CONF.183/C.1/L.52

Dominican Republic: proposal regarding the preamble

[Original: English]
[8 July 1998]

Word the preamble as follows:

"The States Parties to this Statute,

Considering that the century now ending will have witnessed crimes the extreme gravity and extent of which deeply affect the conscience of humankind,

Convinced that, for the sake of future generations, it is necessary to put an end to the impunity with which such acts are committed and to prevent such attacks on dignity and life,

Emphasizing that each State still has the duty to exercise its penal jurisdiction over individuals responsible for crimes of international significance,

Determined to remain united in the effort to punish such violations of the universally accepted principles of international law,

Resolved, at the dawn of the third millennium, to guarantee the lasting enforcement of and respect for justice,

Noting that no permanent international criminal court currently exists,

Being prepared to strengthen the United Nations system harmoniously with a permanent international criminal court which, complementary to national jurisdictions, will have jurisdiction over those crimes which are of concern to international society as a whole,

Insisting on the fact that the advent of justice is an indispensable prerequisite for the attainment of peace,

Have agreed as follows:"

2. Part 1. Establishment of the Court

Notes contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 1 and 3 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 19 June 1998⁵

Article 1
The Court

NOTE

Article 1 is transmitted to the Drafting Committee on the understanding that: (a) the term "persons" must be considered following the conclusion of the consideration of part 3 on "General principles of criminal law"; and (b) the phrase "bring persons to justice" must be aligned in all language versions.

⁵ The transmittal letter containing the notes was reproduced in document A/CONF.183/DC/R.2. In normal practice, restricted documents are not published in the Official Records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Article 3
Seat of the Court

NOTE

Article 3, paragraph 3, is transmitted to the Drafting Committee on the understanding that: (a) the term “special agreement” means an agreement between the Court and the State concerned; and (b) the Drafting Committee should consider the question of the placement of this paragraph.

3. Part 2. Jurisdiction, admissibility and applicable law

(a) Documents submitted by the Bureau

(i) Discussion paper

DOCUMENT A/CONF.183/C.1/L.53

Bureau: discussion paper regarding part 2

[Original: English]
[6 July 1998]

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) *Option 1*

The crime of aggression;

Option 2

No such provision;

- (e) *Option 1*

Treaty crimes (terrorism, drug trafficking, crimes against United Nations and associated personnel);

Option 2

No such provision.

Genocide

The definition of the crime of genocide is literally taken from the 1948 Genocide Convention.

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) **Further discussion needed;**

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

- (i) Enforced disappearance of persons;
- (i bis) The crime of apartheid;

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

Other proposals have been made on the topics of terrorism and economic embargoes, and further discussion may be required.

2. For the purpose of paragraph 1:

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

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

(a ter) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the deprivation of physical liberty in the course of trafficking in persons, in particular women and children for the purpose of sexual exploitation;

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

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

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

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

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

War crimes

Option 1

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

Option 2

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

Option 3

No such provision.

For the purpose of the present Statute, "war crimes" means:

A. Grave breaches of the Geneva Conventions of 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) Wilful killing;

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

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

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

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

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

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

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

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

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

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

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

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

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

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

(g) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable

purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

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

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) *Option 1*

Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering:

- (i) Poison or poisoned weapons;
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;
- (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;
- (vi) Such other weapons or weapons systems as become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties, in accordance with the procedure laid down in article 111 of this Statute;

Option 2

Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate:

- (i) Poison or poisoned weapons;
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;
- (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;
- (vi) Nuclear weapons;
- (vii) Anti-personnel mines;
- (viii) Blinding laser weapons;
- (ix) Such other weapons or weapons systems as become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties, in accordance with the procedure laid down in article 111 of this Statute;

Option 3

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, in violation of international humanitarian law;

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

(p bis) **(drafting subject to further discussion)**

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

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

(r bis) **(on United Nations personnel) (drafting subject to further discussion)**

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

(t) (definition still under discussion)

Sections C and D of this article apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Option 1

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

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

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

(c) Taking of hostages;

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

Option 2

No section C.

Option 1

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

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

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

(b bis) (on United Nations personnel) (drafting subject to further discussion)

(c) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, hospitals and places where the

sick and wounded are collected, provided they are not military objectives;

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

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

(e bis) (definition still under discussion)

(f) (definition still under discussion)

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

(h) Killing or wounding treacherously a combatant adversary;

(i) Declaring that no quarter will be given;

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

(k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l) (subject to further discussion).

Option 2

No section D.

Article Y

Drafting subject to further discussion.

Elements of crimes may be elaborated after the Rome Conference by the Preparatory Commission, which will also elaborate the draft Rules of Procedure and Evidence. In the Statute, a provision may be needed to refer to these elements.

Aggression

Option 1

1. For the purpose of the present Statute and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

(a) initiating, or

(b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

2. Where an attack under paragraph 1 has been committed, the

- (a) planning,
- (b) preparing, or
- (c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.

Option 2

No such provision.

Discussions are still ongoing as to the inclusion of the crime of aggression and on the definition. In particular, elements from General Assembly resolution 3314 (XXIX) may be inserted in the definition.

Treaty crimes

Proposals include terrorist crimes, drug crimes and crimes against United Nations personnel (for the latter crime, see also the definition of war crimes, section B, paragraph bis).

Article 6

Exercise of jurisdiction

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

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;

(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

Option 1

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12.

Option 2

No subparagraph (c).

Article 7

Acceptance of jurisdiction

Paragraph 1 governs preconditions to the exercise of jurisdiction (the need for acceptance by States).

NB: If the Statute were to provide for automatic jurisdiction for some crimes but an “opt-in” or “State-consent” regime for other crimes, then consequential amendments to paragraph 1 would be required, and the placement of the following provisions would be reconsidered.

1. *Option 1*

In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute, or have accepted jurisdiction in accordance with article 7 ter:

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

(b) The State that has custody of the suspect with respect to the crime;

(c) The State of which the accused of the crime is a national; or

(d) The State of which the victim is a national.

Option 2

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the State on the territory of which the act or omission in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft, is a Party to the Statute or has accepted jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter.

Option 3

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the following States are Parties to the Statute or have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter:

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

(b) The State that has custody of the suspect with respect to the crime.

Option 4

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the State of nationality of the accused/suspect is a Party to the Statute or has accepted jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter.

Modes of acceptance (automatic jurisdiction, opt-in, State-consent). Several options are available with respect to acceptance of jurisdiction, including automatic jurisdiction over all core crimes, opt-in mechanisms for all core crimes or a combination of the two (automatic jurisdiction for some crimes and opt-in for others). A further option would be to adopt a "State-consent" mechanism for some crimes.

Automatic jurisdiction

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

Article 7 bis

Opt-in for treaty crimes and possibly for one or more core crimes

1. A State Party to this Statute may:

(a) At the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) At a later time, by declaration lodged with the Registrar,

accept the jurisdiction of the Court with respect to such of the crimes of ... referred to in article 5 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to one or more of the crimes referred to in article 5.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. A declaration may not contain other limitations than those mentioned in paragraphs 1 to 3.

Article 7 ter

Acceptance by non-States Parties

If the acceptance of a State that is not a Party to this Statute is required under article 7, paragraph 1, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

Article 8

Temporal jurisdiction and non-retroactivity

1. A person shall not be criminally responsible under this Statute for conduct prior to its entry into force.

1 bis. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction in accordance with article 7, paragraph 1, only with respect to conduct constituting a crime within the jurisdiction of the Court which occurred after the entry into force of this Statute for that State, unless that State has made a declaration under article 7 ter.

2. If the law as it appeared at the commission of the crimes is changed prior to final judgement in the case, the law more favourable to the accused shall be applied.

Article 8 combines current articles 8 and 22; placement could be considered.

Article 9

(Deleted)

Article 10

Role of the Security Council

Aggression

1. *Option 1*

The Court may not exercise its jurisdiction with respect to a crime of aggression unless the Security Council has first determined under Chapter VII of the Charter of the United Nations that the State concerned has committed an act of aggression. A determination by the Security Council shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of any person concerned.

Option 2

No such provision.

Deferral

2. Option 1

No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, acting 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.

Option 2

(A revised version of option 1)

Option 3

No such provision.

Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

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

3. Option 1

The Prosecutor shall notify the Security Council of all situations referred under this article.

Option 2

No paragraph 3.

Article 12

Prosecutor

Option 1

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on alleged crimes within the jurisdiction of the Court obtained from States, organs of the United Nations, international intergovernmental and non-governmental organizations, victims, associations on their behalf, or any other reliable source.

2. Upon receipt of information relating to the commission of a crime within the jurisdiction of the Court, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, international intergovernmental or non-governmental organizations, victims or their representatives or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the accompanying 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, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction of the case pursuant to article 17.

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

6. If, after the preliminary examination referred to in paragraphs 1 to 3, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.

Option 2

No such article.

Article 13

Information submitted to the Prosecutor

(Deleted)

Article 14

Duty of the Court as to jurisdiction

(Further consultations)

Article 15

Issues of admissibility

1. Having regard to the third paragraph of the preamble, 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 18, paragraph 3;

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

2. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

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

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

(c) The proceedings were not or are not being conducted independently or impartially *in accordance with the norms of due process recognized by international law* and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

Article 16

Option 1

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by notification to all States Parties and any non-States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis where necessary to protect persons or prevent destruction of evidence.

2. Within one month of the receipt of such notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor, applying the criteria set out in article 15 and/or article 18, determines that the State is unwilling or unable genuinely to carry out the investigation of the matter and obtains a preliminary ruling from the Pre-Trial Chamber confirming that determination.

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

4. A preliminary ruling of the Pre-Trial Chamber regarding the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned or by the Prosecutor. At the request of either party, such appeal shall be heard on an expedited basis. The Appeals Chamber may authorize the Prosecutor to proceed with an investigation while the appeal is pending.

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

6. Pending a preliminary ruling by the Pre-Trial Chamber under paragraph 2, or at any time where the Prosecutor has deferred an investigation under this article, the Prosecutor may, in exceptional circumstances, seek specific authority from the Pre-Trial Chamber to pursue investigative steps where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence will not be subsequently available.

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17.

(Subject to further discussion, including with respect to article 17)

Option 2

No such article.

Article 17

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

(Further consultations)

Article 18

Ne bis in idem

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

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

3. No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:

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

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

Article 19

(Deleted)

Article 20

Applicable law

1. The Court shall apply:

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

(b) If necessary, applicable treaties and the principles and rules of general international law, including the established principles of the law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.

(ii) Proposal

DOCUMENT A/CONF.183/C.1/L.59

[incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998]

Bureau: proposal regarding part 2

*[Original: English]
[10 July 1998]*

This proposal is not final, as it contains some options and certain provisions require further drafting. It will be adjusted in the light of discussions which follow.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes.

The crime of aggression and one or more of the treaty crimes (terrorism, drug trafficking and crimes against United Nations personnel) may be inserted in the draft Statute if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July. If this is not possible, the Bureau will propose that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference.

*Article 5 bis
Genocide*

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

*Article 5 ter
Crimes against humanity*

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

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

(f) Torture;

(g) **(Crimes of sexual violence) Drafting requires further discussion;**

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

(i) Enforced disappearance of persons;

(i bis) The crime of apartheid;

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

Other proposals have been made on the topics of terrorism and economic embargoes, and further discussion may be required.

2. For the purpose of paragraph 1:

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

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

(a ter) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the deprivation of physical liberty in the course of trafficking in persons, in particular women and children for the purpose of sexual exploitation;

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

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

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

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

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

*Article 5 quater
War crimes*

Option 1

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

Option 2

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

For the purpose of the present Statute, "war crimes" means:

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

(a) Wilful killing;

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

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

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

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

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

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

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

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

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

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

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

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

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

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

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

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

(h) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned

nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international humanitarian law:

(i) Poison or poisoned weapons;

(ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

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

(iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict;

(v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;

(vi) Such other weapons or weapons systems as become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties, in accordance with the procedure laid down in article 111 of this Statute; **(Drafting subject to further discussion)**

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

(p bis) **(Crimes of sexual violence) (Drafting requires further discussion);**

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

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

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

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

Section C of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

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

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

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

(c) Taking of hostages;

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

Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

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

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

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

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

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

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

(e) **(Deleted) (Covered in section C)**

(e bis) **(Crimes of sexual violence) (Drafting requires further discussion);**

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

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

(h) Killing or wounding treacherously a combatant adversary;

(i) Declaring that no quarter will be given;

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

(k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Nothing in sections C and D shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all means consistent with international law.

Article xx
Elements of crimes

1. Elements of crimes shall be formulated, interpreted and applied in a manner consistent with the terms of articles 5 bis, 5 ter, 5 quater and 21, paragraph 2.
2. Elements of crimes shall be adopted by the Assembly of States Parties⁶ in accordance with its Rules of Procedure, and shall be an annex to this Statute.
3. Elements of crimes may be amended in accordance with ...⁷
4. Elements of crimes shall be adopted before the Prosecutor commences an investigation.

Article Y

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

Article 6
Exercise of jurisdiction

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

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;
- (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 12. **(Drafting of this provision may be changed if option 2 in article 12 is adopted.)**

Article 7
Preconditions to the exercise of jurisdiction

Preconditions for genocide

1. In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to the crime of genocide if one or more of the following States have accepted jurisdiction in accordance with article 7 bis or ter:

⁶ Elements of crimes shall be formulated by the Preparatory Commission in accordance with a mandate to be included in the Final Act.

⁷ Awaiting the outcome of discussions on article 110, and in particular the paragraph on amendments to article 5.

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

(b) The State that has custody of the accused/suspect with respect to the crime;

(c) The State of which the accused/suspect of the crime is a national; or

(d) The State of which the victim is a national.

Preconditions for crimes against humanity and war crimes

2. Option 1

In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to a crime referred to in articles 5 ter and 5 quater if one or more of the following States have accepted jurisdiction in accordance with article 7 bis or ter:

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

(b) The State that has custody of the accused/suspect with respect to the crime;

(c) The State of which the accused/suspect of the crime is a national; or

(d) The State of which the victim is a national.

Option 2

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in articles 5 ter and 5 quater provided that the following States have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 bis or ter:

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

(b) The State that has custody of the accused/suspect with respect to the crime.

Option 3

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in articles 5 ter and 5 quater provided that the State of nationality of the accused/suspect has accepted jurisdiction of the Court with respect to the crime in question in accordance with article 7 bis or ter.

Article 7 bis
Acceptance of jurisdiction

Option I

Automatic jurisdiction over all three core crimes

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

Option II

Automatic jurisdiction for genocide and opt-in for crimes against humanity and war crimes

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crime of genocide.

2. With regard to the crimes referred to in articles 5 ter and 5 quater, a State Party to this Statute may:

(a) At the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) At a later time, by declaration lodged with the Registrar,

accept the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

3. A declaration may be of general application, or may be limited to one or more of the crimes referred to in articles 5 ter and 5 quater.

4. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

5. A declaration may not contain limitations other than those mentioned in paragraphs 2 to 4.

Article 7 ter

Acceptance by non-States Parties

If the acceptance of a State that is not a Party to this Statute is required under article 7, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

Article 8
Temporal jurisdiction and non-retroactivity

1. A person shall not be criminally responsible under this Statute for conduct prior to its entry into force.

1 bis. If a State becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction in accordance with article 7 only with respect to conduct constituting a crime within the jurisdiction of the Court which occurred after the entry into force of this Statute for that State, unless that State has made a declaration under article 7 ter.

2. If the law as it appeared at the commission of the crimes is changed prior to final judgement in the case, the law more favourable to the accused shall be applied.

Article 8 combines current articles 8 and 22; placement could be considered.

Article 9

(Deleted)

Article 10
Role of the Security Council

Option 1

No investigation or prosecution may be commenced or proceeded with under the 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.

NB: The question of the need for preservation of evidence requires further discussion.

Option 2

In the event that the Court is requested by the Security Council, acting by resolution adopted under Chapter VII of the Charter of the United Nations, to suspend its investigation or prosecution of a situation for a specified period of time, then the Court shall suspend such activity for such a period of time; that request may be renewed by the Security Council under the same conditions.

Option 3

No such provision.

Article 11
Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

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

Article 12
Prosecutor

Option 1

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on alleged crimes within the jurisdiction of the Court obtained from States, organs of the United Nations, international intergovernmental and non-governmental organizations, victims, associations on their behalf, or any other reliable source.

2. Upon receipt of information relating to the commission of a crime within the jurisdiction of the Court, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, international intergovernmental or non-governmental organizations, victims or their representatives or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the accompanying 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, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction of the case pursuant to article 17.

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

6. If, after the preliminary examination referred to in paragraphs 1 to 3, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.

Option 2

A provision for additional safeguards before the Prosecutor can act.

Article 13

Information submitted to the Prosecutor

(Deleted)

Article 14

Duty of the Court as to jurisdiction

(Further consultations)

Article 15

Issues of admissibility

1. Having regard to the third paragraph of the preamble, 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 18, paragraph 3;

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

2. In order to determine unwillingness in a particular case, the Court shall consider whether one or more of the following exist, as applicable:

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

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

(c) The proceedings were not or are not being conducted independently or impartially in accordance with the norms of due process recognized by international law and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

Article 16

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 6 (a) or the Prosecutor initiates an investigation pursuant to article 6 (c) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, the Prosecutor shall notify all States Parties and, where applicable, any non-States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of the receipt of such notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts that may constitute offences described in article 5 and that relate to the information provided in the notification to States. The Prosecutor may proceed with the investigation until such time as a State informs the Prosecutor of that State's investigation. At the request of a State which has been notified by the Prosecutor, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor seeks a ruling of the Pre-Trial Chamber and a determination is made pursuant to article 15. In the case of a State that has jurisdiction and was not notified by the Prosecutor or if the State was notified but failed to inform the Prosecutor of its investigation within one month of the notification, the Prosecutor may defer to the State's investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation, in which case the Prosecutor shall seek a ruling of the Pre-Trial Chamber and a determination is made pursuant to article 15.

4. A ruling of the Pre-Trial Chamber pursuant to paragraphs 2 and 3 may be appealed to the Appeals Chamber by the State concerned or by the Prosecutor. At the request of either party, such appeal shall be heard on an expedited basis. The Appeals Chamber may authorize the Prosecutor to proceed with an investigation while the appeal is pending.

5. When the Prosecutor has deferred an investigation pursuant to paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay. Where States fail to provide information on the progress of its investigations and any subsequent prosecutions, the Prosecutor may seek a ruling of the Pre-Trial Chamber pursuant to article 15.

6. Pending a preliminary ruling by the Pre-Trial Chamber under paragraph 2, or at any time where the Prosecutor has deferred an investigation under this article, the Prosecutor may, in exceptional circumstances, seek specific authority from the Pre-Trial Chamber to pursue investigative steps where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence will not be subsequently available.

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17 based on significant additional facts or change of circumstances.

Article 17

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

(Further discussion needed)

Article 18

Ne bis in idem

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

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

3. No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court unless the proceedings in the other court:

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

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

Article 19

(Deleted)

Article 20

Applicable law

Drafting subject to further discussion in the Working Group.

(b) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.60/REV.1

Coordinator's working paper on article 17

[Original: English]

[14 July 1998]

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

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.⁸ The Court may, on its own motion, determine the admissibility of a case pursuant to article 15.

2. Challenges to the admissibility of the case, on the grounds referred to in article 15, or challenges to the jurisdiction of the Court may be made by:

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

(b) A State⁹ 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 consent is required under article 7 bis.]¹⁰

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those having referred a situation under article 6, as well as victims, may also submit observations to the Court.

3.¹¹ The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. However, in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

⁸ Some delegates held the view that the issue achieved in this sentence should be dealt with in a separate article 14.

⁹ A number of delegations accepted subparagraph (b) with the proviso that a State non-Party which challenged the admissibility of a case under article 17 should assume the obligations of a State Party in accordance with the provisions of articles 15 and 16 and of part 9.

¹⁰ The final wording of subparagraphs (b) and (c) will depend upon the content of articles 7 bis and 15.

¹¹ It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court may be based only on article 15, paragraph 1 (c).¹²

4. A State referred to in paragraphs 2 (b) and (c) of this article shall make a challenge at the earliest opportunity.

5. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber, under article 81.

6. If a challenge is made by a State pursuant to paragraphs 2 (b) and (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 15.

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

(a) Pursue necessary investigative steps of the kind referred to in article 16, paragraph 6;

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

(c) Prevent, in cooperation with the relevant State(s), the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

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

8. If the Court has decided that a case is inadmissible under article 15, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 15.

9. In the event that the Prosecutor, having regard to the matters referred to in article 15, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. Such information shall, at the request of the State concerned, be confidential.

If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.¹³

¹² The final wording of this subparagraph will depend on the content of article 15.

¹³ This provision reflects the text of article 56.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.44

[incorporating document A/CONF.183/C.1/L.44/Corr.1 of 7 July 1998]

Recommendations of the Coordinator regarding article 5

[Original: English]
[7 July 1998]

Article 5

Crimes within the jurisdiction of the Court

1. At its 3rd and 4th meetings, on 17 June 1998, the Committee of the whole considered article 5 entitled "Crimes within the jurisdiction of the Court". The Committee entrusted Mr. Waleed Sadi (Jordan) with the task of coordinating informal consultations on the text of the definition of "Crimes against humanity".

2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text:

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape or other violent sexual acts, or enforced prostitution [, or enforced pregnancy];¹⁴
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender¹⁵ or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (i bis) The crime of apartheid;

(j) Other inhumane acts of a similar character intentionally¹⁶ causing great suffering, or serious injury to body or to mental or physical health.¹⁷

[(j bis) Act of terrorism.]¹⁸

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts¹⁹ referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of²⁰ a State or organizational policy to commit such attack;

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

(a ter) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the deprivation of physical liberty in the course of trafficking in persons, in particular women and children for the purpose of sexual exploitation;

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

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

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

(d bis) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1 above, committed in the context of an

¹⁴ The formulation of this subparagraph should be reconsidered in the light of the relevant discussions in the context of the definition of war crimes.

¹⁵ "Gender" refers to male or female.

¹⁶ The need for the reference to intention requires further discussion in the light of part 3 entitled "General principles of criminal law".

¹⁷ An additional proposal on this subject is contained in document A/CONF.183/C.1/L.17.

¹⁸ Several delegations supported this proposal while others did not. There was no consensus on this matter.

¹⁹ One delegation expressed reservations with regard to the expression "multiple commission of acts".

²⁰ Some delegations favoured the insertion of the term "knowingly" before the expression "in furtherance of".

institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

[(f) "Act of terrorism" means:

- (i) An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime;
- (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.]

(c) Documents of the Working Group on Applicable Law

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGAL/L.1²¹
Working paper on article 20

[Original: English]
[8 July 1998]

Applicable law

1. The Court shall apply:

²¹ This document was initially circulated as a document of the Working Group on General Principles of Criminal Law on 4 July 1998 under the symbol A/CONF.183/C.1/WGGP/L.11, before the establishment of the Working Group on Applicable Law.

(a) In the first place, this Statute and its Rules of Procedure and Evidence;²²

(b) If necessary, applicable treaties and the principles and rules of general international law, including the established principles of the law of armed conflict;

(c)

*Option 1*²³

Failing that, general principles of law derived by the Court from national laws of legal systems of the world, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

*Option 2*²³

Failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

- (i) The national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;
- (ii) If the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or
- (iii) If the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights,²⁴ which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.

²² Subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not.

²³ Most delegations favoured option 1, but some still favour option 2. A view was expressed that the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options could be combined.

²⁴ Some delegations were of the view that this paragraph should end after the words "human rights".

DOCUMENT A/CONF.183/C.1/WGAL/L.3

Working paper on article 20, paragraph 3

[Original: English]
[13 July 1998]

Applicable Law

Possible presidential statement to be included in the official records of the Conference:

It was understood that the term "gender" is to be interpreted in this Statute in the same manner as set out in annex IV, paragraphs 2 and 3, of the 1995 Beijing Declaration and Platform for Action:

"2. Having considered the issue thoroughly, the contact group noted that: (1) the word 'gender' had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action.

"3. Accordingly the contact group reaffirmed that the word 'gender' as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage ...".

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGAL/L.2

[incorporating documents A/CONF.183/C.1/WGAL/L.2/Add.1 and Add.1/Corr.1 of 14 July 1998]

Report of the Working Group on Applicable Law

[Original: English]
[11 July 1998]

I. Introduction

1. At its 26th meeting, on 8 July 1998, the Committee of the Whole decided to refer to the Working Group on Applicable Law, under the chairmanship of Mr. Per Saland (Sweden), article 20 (Applicable law).

2. The Working Group held two meetings, on 10 and 11 July 1998, to consider article 20 of part 2. The Working Group herewith transmits provisions of that article to the Committee of the Whole for its consideration.

3. The Working Group held one additional meeting, on 14 July 1998, to consider article 20 of part 2. The Working Group herewith transmits the following articles to the Committee of the Whole for its consideration: the addition to the definition of persecution under crimes against humanity in article [5]; and article 20, paragraph 3.

4. The Working Group has thereby concluded its consideration of article 20.

II. Text of draft articles

Article 20
Applicable law

1. The Court shall apply:

(a) In the first place, this Statute and its Rules of Procedure and Evidence;²⁵

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law,²⁶ including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate,²⁷ the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.²⁸

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights,²⁹ and be without any adverse distinction founded on grounds such as gender, as defined in article [5 ter], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 5 ter

Insert the following language after the definition of "persecution" under crimes against humanity as paragraph 3 of article 5 ter:

"For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within

²⁵ Subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not. If a decision is taken to include elements of crimes, this will be reflected accordingly in paragraph 1 (a).

²⁶ It is understood that the term "international law" means public international law.

²⁷ Some delegations were of the view that the phrase "including, as appropriate" should be replaced by the word "especially".

²⁸ Some delegations express the view that, as a matter of principle, no reference to any national laws of States should be made. The Court ought to derive its principles from a general survey of legal systems and their respective national laws.

²⁹ Some delegations were of the view that this paragraph should end after the words "internationally recognized human rights".

the context of society. The term 'gender' does not indicate any meaning different from above."

NOTE

Whenever the word "gender" appears subsequently in the Statute, it shall be accompanied by the following words: "as defined in article [5 ter]."

(d) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 5, 22, X (former article 26) and 29 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 22 June 1998³⁰

NOTE

This document is reproduced under part 3.

Note regarding article 20 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 13 July 1998³¹

*Article 20
Applicable law*

NOTE

Understanding of the Committee of the Whole with respect to part 2:

The wording of article 20, paragraph 1 (a), is subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not. If a decision is taken to include elements of crimes, this will be reflected accordingly in that paragraph.

³⁰ The transmittal letter containing the notes was reproduced in document A/CONF.183/DC/R.8. In normal practice, restricted documents are not published in the official records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

³¹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.182. In normal practice, restricted documents are not published in the official records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Note regarding article 5 ter (definition of the term "gender" for the purpose of the Rome Statute) contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 15 July 1998³²

*Article [5 ter]
Crimes against humanity*

NOTE

Understanding of the Committee of the Whole:

Whenever the word "gender" appears subsequently in the Statute, it shall be accompanied by the following text: "as defined in article [5 ter]."

(e) Documents submitted by delegations

DOCUMENT A/CONF.183/INF/9

Information conveyed by New Zealand

*[Original: English]
[13 July 1998]*

INTERNATIONAL COMMITTEE OF THE RED CROSS: CONCERNS ON JURISDICTION OF THE COURT RELATING TO THE BUREAU PROPOSAL IN DOCUMENT A/CONF.183/C.1/L.59 AND CORR.1

It is essential that the International Criminal Court have automatic jurisdiction over war crimes and crimes against humanity, and not only over genocide. If it is to serve as an effective complement to national courts, the Court must be competent to try such cases as soon as a State becomes party to the treaty. By virtue of the principle of universal jurisdiction, every State has the right, and in many instances the duty, under international law to prosecute or extradite suspected war criminals. This principle reaffirms the fundamental rule that war criminals are not immune from prosecution, wherever they have committed their crimes and whatever their nationality. Any form of additional consent, such as an opt-in precondition for the exercise of the Court's jurisdiction, gives the impression that States can lawfully protect war criminals from prosecution. This would be a retrograde step for international law and would severely limit the Court's effectiveness.

³² The transmittal letter containing the note was not reproduced as a document owing to time constraints. In normal practice, letters that are not issued as documents are not published in the official records of a conference. However, this letter constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the letter are published as part of the Official Records of the Conference.

NOTE

Further details on the legal basis of this position are to be found in the International Committee of the Red Cross kit already distributed. More copies are available upon request.

DOCUMENT A/CONF.183/INF/10

Information conveyed by New Zealand

[Original: English]
[13 July 1998]

INTERNATIONAL COMMITTEE OF THE RED CROSS: STATEMENT
OF 8 JULY 1998 RELATING TO THE BUREAU DISCUSSION PAPER
IN DOCUMENT A/CONF.183/C.1/L.53

The comments of the International Committee of the Red Cross (ICRC) herein are limited to the part of article 5 dealing with war crimes and are given by ICRC in its capacity as an expert of international humanitarian law which has the task of ensuring that existing law is not weakened.

1. With regard to the possible threshold for war crimes, ICRC has already indicated that no such threshold exists in humanitarian law: every serious violation of the law is a war crime which States have the obligation to repress. Nevertheless, if there is a fear that the Court might be overloaded with cases, ICRC understands the wish of a number of nations to accept option 2 of the draft, on the understanding that isolated cases will be prosecuted at the national level.

2. On the list of war crimes in section B, we would like to raise several points:

Subparagraph (b): The addition of the words "clearly" and "overall" in this provision relating to proportionality in attacks must be understood as not changing existing law. The word "overall" could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word 'overall' is redundant;

Subparagraph (c): The purpose of this rule is to prohibit the bombardment of towns that are immediately open to occupation and it is hoped that the addition of the words "and which are not military objectives" does not change this customary rule;

Subparagraph (e): This rule should read "making improper use ...". As far as emblems are concerned, the notion of perfidy only relates to the misuse of those to which humanitarian law gives a special protection and which may not be attacked. Such protection is given to persons who are not, or are no longer taking part in hostilities. Humanitarian law gives no special protection to military uniforms, nor to United Nations uniforms when used by combatants. It is therefore inappropriate to use the word "perfidious" in this context;

Subparagraph (o): ICRC expressed its preference of option 3 as this accurately reflects existing international law. However, if a list is chosen, subparagraph (vi) becomes of extreme importance as it is essential that the use of other weapons prohibited by international law be added to the list. If option 1 is chosen, the chapeau must include the words "or which are inherently indiscriminate" which reflects a fundamental rule of humanitarian law, recently reaffirmed by the International Court of Justice, and which led to the prohibition of some of the weapons in this list.

3. War crimes committed in non-international armed conflicts

ICRC considers it essential that these be included in the Statute and urges States to consider carefully the actual acts that are criminal, without reference to which treaty these may appear in. In particular, whether certain States are party or not to Additional Protocol II can be of no importance to this list as it must include actions which are violations of customary law and which are generally recognized by the international community as prohibited heinous acts.

Several States have mentioned certain concerns, which can be met. First, with regard to the threshold, that is, which situations amount to armed conflicts and which fall below this threshold, this is relevant for the implementation of article 3 common to the Geneva Conventions, to which 188 States are party. It is generally understood that for a situation to be an armed conflict it needs to involve armed confrontation of a military nature between two or more armed groups. Acts such as riots and demonstrations do not amount to armed conflicts.

Secondly, a concern was indicated relating to the primary responsibility of the Government of a State to deal with these situations and with any violations of international humanitarian law. Of this there is no doubt: ICRC has stressed time and again the importance of complementarity between national jurisdictions and the International Criminal Court, so that the latter will only have a role to play if the former does not do so.

4. Article Y

This is of critical importance. It is essential that the Statute of the Court indicate that it in no way affects existing international humanitarian law nor impede its development. The

list of war crimes contained in the current draft Statute is incomplete owing to the necessity to attain an agreement in time. Mention may be made, for example, of the use of prohibited weapons, indiscriminate attacks, the starvation of civilians as a method of warfare and the 130-year' old prohibition of the use of bullets that explode in the human body (Declaration of St. Petersburg, 1868) in armed conflicts. The fact that a certain rule is not included under the jurisdiction of the Court can in no way mean that it does not reflect serious violations under international customary law.

5. Definitional elements of the crimes

If such a document is drafted, it is of imperative importance that it be done with extreme care. A great deal of existing law is to be found in detailed treaty provisions and in both international and national case law that interprets international humanitarian law provisions. Any inaccuracy could create the danger of such a document amounting to unintended international legislation rather than a reflection of existing law. The experience of ICRC in its Advisory Service work (which helps governments incorporate humanitarian law into their domestic legislation) is that national legal systems, concepts and vocabulary vary widely. Care should be taken, therefore, in this international document intended for the Court, to avoid approaching such elements from a primarily domestic law perspective but rather to concentrate on international law and practice.

DOCUMENT A/CONF.183/INF/11

Information conveyed by New Zealand

[Original: English]
[13 July 1998]

INTERNATIONAL COMMITTEE OF THE RED CROSS: CONCERNS
ON THRESHOLD FOR WAR CRIMES COMMITTED IN NON-
INTERNATIONAL ARMED CONFLICTS AS CONTAINED IN THE
BUREAU PROPOSAL IN DOCUMENT A/CONF.183/C.1/L.59 AND
CORR.1

Under section D of the Bureau proposal, a threshold has been added restricting the types of non-international armed conflicts the Court would be able to deal with. The International Committee of the Red Cross (ICRC) understands that the threshold that has been added stems from article 1 of Protocol II Additional to the 1949 Geneva Conventions. However, it is essential to stress that many of the crimes listed under section D find their legal basis under general international law, and are not only provided for in Protocol II.

Clear examples of this are: directing attacks against the civilian population; directing attacks at units, transports or personnel lawfully using the emblems of the Geneva Conventions; recruiting children into the armed forces or using children to participate actively in hostilities; forcing the displacement of the civilian population; perfidy and pillage.

This new requirement under section D means that only such conflicts involving armed forces of a State and dissident armed forces or other organized armed groups are covered, thus excluding dissident armed forces fighting against one another. In addition, these dissident armed forces or armed groups would have to:

- (a) Be under responsible command;
- (b) Exercise such control over a part of the territory of a State as to enable them to carry out sustained and concerted military operations; and
- (c) Be able to implement international humanitarian law.

The reality is that more and more States are confronted with non-international armed conflicts taking place on their territory involving a number of dissident armed groups fighting against one another, or armed groups fighting against the established Government which either does not control part of the territory or does not have a proper chain of command. These types of non-international armed conflicts **must** also fall under the jurisdiction of the Court.

A threshold such as that found in the Bureau proposal not only would represent a step back from existing law but would also be so restrictive that it would prevent the Court from dealing with the type of atrocities in conflicts which the world has witnessed over the past years.

DOCUMENT A/CONF.183/C.1/L.1

[incorporating document A/CONF.183/C.1/L.1/Corr.1 of 24 June 1998]

Spain: proposal regarding article 5

[Original: Spanish]
[17 June 1998]

Amend to read:

"Article 5

Crimes within the jurisdiction of the Court

"1. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of aggression, as defined in article 5 bis;
- (b) The crime of genocide, as defined in article 5 ter;
- (c) Crimes against humanity, as defined in article 5 quater;
- (d) War crimes, as defined in article 5 quinquies.

"2. The crimes within the jurisdiction of the Court are crimes under international law as such, whether or not they are punishable under national law."

Article 5 bis
Crime of aggression

...

Article 5 ter
Crime of genocide

...

Article 5 quater
Crimes against humanity

...

Article 5 quinquies
War crimes

A. Delete the part in brackets entitled "Crimes against United Nations and associated personnel.

B. Insert the following provision in the appropriate place in sections B and D of the part entitled "War crimes":

"Intentionally directing attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter."

DOCUMENT A/CONF.183/C.1/L.4

Spain: proposal regarding article 5

[Original: Spanish]
[17 June 1998])

War crimes

Section B, subparagraph (g)

Amend to read:

"(g) ... attacks against internationally protected cultural property ... (remainder of the text unchanged);"

Section B, subparagraph (r)

Add the following:

"as well as against personnel of the Protecting Power or its substitute and impartial humanitarian organizations carrying out activities to protect and assist the victims of an armed conflict in accordance with the Geneva Conventions;"

Section D, subparagraph (b)

Add the following:

"as well as against personnel of impartial humanitarian organizations carrying out activities to protect and assist the victims of the conflict;"

DOCUMENT A/CONF.183/C.1/L.5

China: proposal regarding article 5

[Original: English]
[18 June 1998]

War crimes

Section B

1. In subparagraph (a), at the end of option 1, add the words "and causing death or serious injury to body or health".

2. In subparagraph (a bis), at the end of option 1, add the words "and causing death or serious injury to body or health".

3. In subparagraph (c), option 2, add the word "intentionally" at the beginning, and add the words "and causing death or serious injury to body or health" at the end.

4. In subparagraph (e), replace "making improper use" by "the perfidious use".

5. In subparagraph (f), in option 2, add the words "which is not justified by the security of the population or imperative military reasons" after "into the territory it occupies".

DOCUMENT A/CONF.183/C.1/L.6

Republic of Korea: proposal regarding articles 6 [9], 7 [6] and 8 [7]³³

[Original: English]
[18 June 1998]

Acceptance and exercise of jurisdiction of the Court

1. The acceptance and exercise of jurisdiction is one of the cardinal issues to be resolved in the establishment of the International Criminal Court. During the debate in the Preparatory Committee, there emerged two conflicting schools of thought on this issue: one preferred to confer on the Court inherent jurisdiction, while the other adhered to the State consent regime at each stage.

2. In our view, both schools have their respective shortcomings. Those who favour the concept of inherent jurisdiction overlook the fact that the proposed Court is a treaty body to be created through the consent of States. It is State consent that justifies the jurisdictional link between the States Parties to the Statute and the Court. Foregoing any precondition to the exercise of jurisdiction would run a risk of rendering the

³³ The numbers within brackets indicate the numbering of the corresponding articles in document A/CONF.183/2/Add.1 and Corr.1.

acceptance of the Court's jurisdiction meaningless. In such a case, the Court would likely exercise its jurisdiction over the offenders of the crimes under the Statute, irrespective of whether the interested States had accepted the Court's jurisdiction. Furthermore, the rationale behind the rule of complementarity makes the jurisdictional link based on State consent indispensable.

3. On the other hand, the adherents of the State consent regime also fail to recognize that the requirement of State consent at two distinct stages - acceptance and exercise - would render the Court ineffective owing to this jurisdictional hazard. For the Court to be as effective as possible, State consent should be called for once, when a State becomes a party to the Statute. 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. Thus, State consent to the acceptance and exercise of jurisdiction should be integrated into a single act.

4. The Republic of Korea believes that an appropriate compromise formula on the jurisdiction of the Court should be sought, whereby the merits of the two ends of the spectrum could be combined. The core elements of a potentially viable compromise are as follows:

(a) 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. In this sense, it would be apt to regard the Court's jurisdiction as *automatic* rather than *inherent*;

(b) 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, in accordance with (a) above, 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 the nationality of the victim. Unless one of the four categories of interested States is a party to the Statute, the Court is not able to exercise its jurisdiction over a case in which that State has jurisdictional nexus. Hence, the requirement here is not cumulative, but selective.

5. Based on these two core elements, the Republic of Korea is putting forward a compromise proposal on the jurisdiction of the Court (see annex). The proposal is intended to address the concerns of both those eager to ensure the effective functioning of the Court and those wary of possible encroachment by the Court on the State consent regime.

6. The approach the Republic of Korea proposal has taken is similar to that of the United Kingdom proposal, contained in

A/AC.249/WG.3/DP.1. However, there are two fundamental differences between the two proposals:

(a) Essentially, while the United Kingdom proposal requires the cumulative consent of the territorial State and the custodial State, the Republic of Korea proposal requires only the consent of one of the four categories of interested States, which is selective. This will give the Court a wider window of opportunity to exercise its jurisdiction;

(b) The second difference is a conceptual one. The United Kingdom proposal rests on the premise that the Court has universal jurisdiction over the core crimes, while the Republic of Korea proposal presupposes that jurisdiction is conferred upon the Court based on State consent pursuant to the provisions of the Statute. This difference is to be reflected in the approach to a non-State party becoming engaged in the functioning of the Court.

7. The delegation of the Republic of Korea hopes that the present proposal would be used as a basis for resolving existing differences over the jurisdiction of the Court at the Diplomatic Conference. The delegation also welcomes any comments or suggestions thereto.

Annex

Article 6 [9]

Acceptance of the jurisdiction of the Court

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

[2. Subject to the provisions of the Statute and the conditions of the Rules of Procedure and Evidence, a State that is not a Party to the Statute may, by declaration lodged with the Registrar, accept the jurisdiction of the Court in respect of a particular case, if the acceptance of jurisdiction by that State is required for the exercise of jurisdiction by the Court under article 8.]

Article 7 [6]

Exercise of jurisdiction

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

(a) A case in which such a crime appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;

(b) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12; or

(c) 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 in accordance with article 10.

Article 8 [7]

Preconditions to the exercise of jurisdiction

In the case of article 7, subparagraph (a) or (b), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute [, or have accepted jurisdiction in accordance with article 6, paragraph 2]:

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

(b) The State that has custody of the suspect with respect to the crime;

(c) The State of which the accused of the crime is a national; or

(d) The State of which the victim is a national.

DOCUMENT A/CONF.183/C.1/L.7

Belgium: proposal regarding article 10

[Original: English]
[19 June 1998]

Role of the Security Council

Paragraph 2

Add the following sentence at the end of the paragraph:

“Without prejudice to article 86, paragraph 4, such request shall not affect the right of the Prosecutor to take the necessary measures to preserve evidence.”

DOCUMENT A/CONF.183/C.1/L.8

United States of America: proposal regarding article 5

[Original: English]
[19 June 1998]

Crimes within the jurisdiction of the Court

At the end of the “Crimes within the jurisdiction of the Court” section, add the following language:

“Definitional elements for these crimes, contained in annex xxx, shall be an integral part of this Statute, and shall be applied by the Court in conjunction with the general provisions of criminal law, in its determinations.”

DOCUMENT A/CONF.183/C.1/L.9

United States of America: proposal regarding article 20

[Original: English]
[19 June 1998]

Applicable law

Paragraph 1 (a)

Replace the words “and its Rules of Procedure and Evidence” with the words “including its annexes”.

DOCUMENT A/CONF.183/C.1/L.10

United States of America: proposal regarding an annex on definitional elements for part 2 crimes

[Original: English]
[19 June 1998]

A. Genocide

(a) *Part 2 offence:* Any of several acts “committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such”.

(b) *Elements:*

(i) That the accused intentionally committed one or more of the following acts against a person in a national, ethnical, racial, or religious group, because of that person’s membership that group.

a. Killing;

b. Causing serious bodily or mental harm;

c. Inflicting conditions of life intended to bring about physical destruction of the group in whole or in part;

d. Imposing measures intended to prevent births within the group; or

e. Forcibly transferring children of the group to another group;

(ii) That when the accused committed such act, there existed a plan to destroy such group in whole or in part;

(iii) That when the accused committed such act, the accused had intent to take part in or had knowledge of the plan to destroy such group in whole or in part.

B. Crimes against humanity

1. *General comments*

The following comments apply to all of part B:

(a) In contrast to war crimes, crimes against humanity need not take place during an armed conflict and the

relevant acts must be accompanied by an intent to take part in, or knowledge of, a widespread [or/and] systematic attack. The accused need not be personally responsible for the widespread or systematic attack;

(b) For purposes of the section, "attack" means any activity intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military conduct;

(c) "Widespread" means the attack is massive in nature and directed against a large number of persons. It excludes isolated offences;

(d) "Systematic" means the attack constitutes or is part of, or in furtherance of, a preconceived plan or policy, or repeated practice over a period of time. It excludes isolated offences.

2. *Murder*

(a) *Part 2 offence:* Murder.

(b) *Elements:*

- (i) That the accused intended to kill or cause death to one or more persons;
- (ii) That the accused killed or caused the death of one or more persons;
- (iii) That the killing was without lawful justification or excuse; and
- (iv) That the killing was carried out in conscious furtherance of a widespread [or/and] systematic attack.

(c) *Comment:* The "without lawful justification or excuse" requirement means that lawful acts of war would be excluded.

3. *Extermination*

(a) *Part 2 offence:* Extermination.

(b) *Elements:*

- (i) That the accused intended to kill or cause the death of a population, or a large portion of a population;
- (ii) That the accused killed or caused the death of a population, or a large portion of a population;
- (iii) That the killing was without lawful justification or excuse; and
- (iv) That the killing was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) *Comments:*

(i) "Caused to be killed" can include an intentional failure to provide essential food, shelter and/or medical care when under custody or control of the accused;

(ii) The third element in this offence would mean, for example, that a siege or an embargo would not result in culpability with respect to this offence;

(iii) Extermination is distinguished from genocide in that it does not require the targeting of the population to be based solely on nationality, race, ethnicity, or religion. It is distinguished from murder in that it involves an intent to kill, and killing of, a population, or a large portion of a population, as opposed to one person.

4. *Enslavement*

(a) *Part 2 offence:* Enslavement.

(b) *Elements:*

- (i) That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;
- (ii) That one or more persons was deprived of all essential individual rights or forced to do labour without any compensation;
- (iii) That the deprivation or forced labour was without lawful justification or excuse; and
- (iv) That the enslavement was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) *Comment:* The "without lawful justification or excuse" requirement would mean, for example, that the detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, would not result in culpability with respect to this offence.

5. *Unlawful imprisonment*

(a) *Part 2 offence:* Imprisonment in flagrant violation of international law or fundamental legal norms.

(b) *Elements:*

- (i) That the accused intended to imprison or cause to be imprisoned a group of people, a population, or part of a population, with the knowledge that such imprisonment was unlawful;
- (ii) That the accused unlawfully imprisoned or caused to be imprisoned such persons;

- (iii) That in carrying out the imprisonment, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and
- (iv) That the imprisonment was carried out with conscious participation in a widespread [or/and] systematic attack.
- (c) *Comments.*
- (i) *Imprisonment.* The term “imprisonment” means all forms of physical detention or confinement to a particular place;
- (ii) The “unlawful” requirement means, for example, that the following cases do not constitute an offence: the lawful detention of persons by a competent court after conviction or pursuant to a probable cause determination by a pre-trial chamber; the lawful arrest or detention of persons for non-compliance with the lawful order of a court or in order to secure fulfilment of any obligation prescribed by law; or the lawful detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety.

6. Torture

- (a) *Part 2 offence:* Torture.
- (b) *Elements:*
- (i) That the accused intended to inflict severe physical or mental pain or suffering to one or more persons;
- (ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;
- (iii) That the acts did not arise from or were not inherent in or incidental to lawful sanctions; and
- (iv) That the acts were carried out with conscious participation in a widespread [or/and] systematic attack.

7. Deportation

- (a) *Part 2 offence:* Deportation or forcible transfer of population.
- (b) *Elements:*
- (i) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;

- (ii) That the accused knew of the lawful residence of the population or group in the place from which the accused expelled them;
- (iii) That the accused caused the population or group to be forcibly deported or transferred;
- (iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and
- (v) That the forcible movement was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) *Comment:* The requirement that the act be without justification precludes prosecutions for justified movements such as: any movement of a population consistent with article 49 of the Fourth Geneva Convention of 1949; any movement in case of an emergency or calamity threatening the life or well-being of the population; any service of punishment lawfully imposed; and any movement required as a necessary adjunct of a lawful internment.

8. Rape, sexual abuse or enforced prostitution

(a) *Part 2 offence:* Rape or other sexual abuse of comparable gravity, or enforced prostitution.

(b) *Elements:*

- (i) That the accused intended to attack a person or persons through acts of a sexual nature;
- (ii) That the accused committed or caused to be committed one of the following acts by force:
 - a. Rape;
 - b. Sexual abuse; or
 - c. Enforced prostitution; and
- (iii) That the acts were committed with conscious participation in a widespread [or/and] systematic attack.

(c) *Comments:*

- (i) *Rape.* The *actus reus* of rape is the forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object;
- (ii) *Sexual abuse.* The *actus reus* of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual

mutilation, enforced pregnancy and enforced sterilization;

- (iii) *Enforced prostitution.* The *actus reus* of enforced prostitution is enslavement of a sexual nature wherein the “forcible” element need not be present for each individual sex act, but is generally present regarding a mandated activity that involves acts of a sexual nature;
- (iv) *Committed by force* means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either expressed or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent *may* negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

9. *Persecution*

(a) *Part 2 offence:* Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds and in connection with other crimes within the jurisdiction of the Court.

(b) *Elements:*

- (i) That the accused intended to deprive an identifiable group of persons of life, liberty or security of person because of the target group’s political, racial, national, ethnic, cultural or religious affiliation;
- (ii) That the accused unlawfully deprived one or more members of the group of life, liberty or security of person;
- (iii) That the deprivation caused death or serious bodily or mental harm or complete loss of human dignity; and
- (iv) That the deprivation was carried out in conjunction with one or more of the other crimes described in this Statute and with conscious participation in a widespread [or/and] systematic attack.

C. *War crimes*

1. *General comments:* The following comments apply to all of part C:

(a) *Military necessity.* The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy;

(b) *Military purpose.* The term “military purpose” means any function that makes an effective contribution to military action or offers a military benefit;

(c) *Collateral damage.* Collateral damage includes that incidental injury or additional damage that was not intended by an attack or course of action. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of *proportionality*, however, may prohibit some attacks on legitimate military objectives that would cause collateral damage or injury which is clearly excessive in the light of the overall military advantage anticipated;

(d) *Proportionality.* The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be clearly excessive in relation to the overall military advantage anticipated;

(e) *Military objective.* A military objective is any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage;

(f) *Civilian object.* A civilian object is any object which is not a military objective;

(g) All war crimes contain an element that the act in question took place in the course of armed conflict. This means that the offence must have been associated with the conduct of military operations during the course of hostilities in which the scope, duration and intensity of the use of force amounted to that of an armed conflict. For example, larceny or murder that take place among troops within a unit would not be war crimes merely because the offences occurred during a time period when armed conflict was taking place;

(h) In several cases, there is a particular *mens rea* requirement for war crimes which involves a level of knowledge of the commander or other accused. Decisions by military commanders and others responsible for planning, deciding upon or executing attacks can only be judged on the basis of their assessment of the information reasonably available to them under the circumstances at the relevant time.

2. *Murder*

(a) *Part 2 offences:* Wilful killing, killing or wounding a combatant who, having laid down his arms or having no longer a means of defence, has surrendered at discretion; violence to life and person, in particular murder of all kinds.

(b) *Elements:*

- (i) That the act or omission took place in the course of armed conflict;
- (ii) That the accused intended to kill or cause death to one or more persons taking no active part in hostilities; and
- (iii) That the accused killed or caused death to one or more persons taking no active part in hostilities.

(c) *Comments:* This crime encompasses faults of omission. If death is the foreseeable consequence of such omission, intent can be inferred. Examples include withholding food rations to prisoners of war or medical care to wounded enemy combatants in order to cause death.

3. *Torture*

(a) *Part 2 offences:* Torture; violence to life and person, in particular cruel treatment and torture; wilfully causing great suffering, or serious injury to body or health.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to inflict severe physical or mental pain or suffering upon one or more persons;
- (iii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons; and
- (iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions.

4. *Inhumane treatment*

(a) *Part 2 offences:* Wilfully causing great suffering or serious injury to body or health; violence to life and person, in particular mutilation; inhuman treatment, including biological experimentation; subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and that causes death to or seriously endangers the health of such person or persons; committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused committed an act against a certain person or subjected that person to a particular medical or biological procedure or treatment;
- (iii) (*for inhuman treatment*) That the act was intended to and did, in fact, subject the victim to mutilation, extreme suffering grossly out of proportion to the treatment expected of one human being from another or grave injury to the victim's human dignity; or
- (iv) (*for biological experimentation*) That the intent of the procedure or treatment was non-therapeutic and was neither justified by medical reason nor carried out in the victim's interest; and
- (v) (*for both inhuman treatment and biological experimentation*) That the act or treatment caused death or serious bodily or mental harm.

5. *Extensive destruction or unlawful appropriation*

(a) *Part 2 offences:* Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; pillaging a town or place, even when taken by assault.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to unlawfully destroy, damage or appropriate certain real or personal property;
- (iii) That the accused destroyed, damaged or appropriated that property;
- (iv) That the destruction, damage or appropriation was without lawful justification or excuse, including military necessity; and
- (v) That the amount of destruction, damage or appropriation was extensive and was carried out in a manner devoid of concern for the consequences to the rights of the victim(s).

(c) *Comment:* Causing collateral damage cannot constitute this offence. Likewise, destruction or appropriation justified by military necessity is not unlawful.

6. *Compelling hostile acts*

(a) *Part 2 offences:* Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused coerced a certain person, by act or threat, to engage in hostile acts against that person's own country;
- (iii) That the person coerced was a prisoner of war or a civilian national of the hostile power; and
- (iv) That the accused knew of the nationality or prisoner of war status of the coerced person.

(c) *Comment:* Implicit in the second element is the fact that the acts compelled cannot be constituted by lawful prisoner of war or civilian labour as defined by articles 49 to 57 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, and articles 51 and 52 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

7. *Denying judicial guarantees*

(a) *Part 2 offences:* Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused caused judicial proceedings to be concluded which resulted in some punishment of a certain prisoner of war or civilian;
- (iii) That the accused intended to deprive the person of a fair and regular trial; and
- (iv) *(for international armed conflicts)* That such act was performed without according the person a fair and regular trial as defined by the third and fourth Geneva Conventions of 1949; or

- (v) *(for non-international armed conflicts)* That such act was performed without judgement by a regularly constituted court or without according indispensable judicial guarantees.

(c) *Comment:* For international armed conflicts, the substance of this offence is the violation of one or more of the penal provisions of articles 82 to 88 and 99 to 108 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; and articles 64 to 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949. For non-international armed conflicts, the elements of the offence are only met when the combined violations of penal provisions rise to the level of denying indispensable judicial guarantees recognized by all civilized peoples.

8. *Deportation*

(a) *Part 2 offences:* Unlawful deportation or transfer; ordering the displacement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.

(b) *Elements:*

- (i) That the act took place in the course of an armed conflict;
- (ii) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;
- (iii) That the accused caused a population or group to be forcibly deported or transferred; and
- (iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and
- (v) *(for international armed conflicts)* That the population or group of people deported or transferred were persons protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949.

(c) *Comment:* States are authorized, for reasons of security, to intern civilians in some situations in accordance with articles 41 to 43, 68 and 78 to 104 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949. It is the Prosecutor's burden to prove that internment of civilians was not undertaken for security purposes once a prima facie case is made for that defence.

9. *Unlawful confinement*

- (a) *Part 2 offence:* Unlawful confinement.

(b) *Elements:*

- (i) That the act took place in the course of an international armed conflict;
- (ii) That the accused intended to confine or cause to be confined a group of people, a population or part of a population, with the knowledge that such confinement was unlawful;
- (iii) That the accused unlawfully confined, or caused to be confined, such persons;
- (iv) That in carrying out the confinement, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and
- (v) That the confinement was, and the accused knew at the time the confinement was, unlawful.

(c) *Comment: Confinement.* The term “confinement” means all forms of detention that substantially interfere with a person’s liberty.

10. *Taking hostages*

(a) *Part 2 offence:* Taking of hostages.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intentionally seized, detained or otherwise held hostage a certain person without lawful justification or excuse;
- (iii) That the accused threatened to injure, kill or continue to detain such person; and
- (iv) That the act was performed with the intent to compel a State, an international inter-governmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.

11. *Attacking of civilians*

(a) *Part 2 offence:* Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intentionally directed an attack against a civilian population as such;

(iii) That none of the civilians against whom the attack was directed were taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated;

(iv) That the accused knew the object of the attack to be a civilian population, as such, not taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated; and

(v) That the attack resulted in death or serious injury to civilians.

(c) *Comment:* Causing incidental injury or collateral damage does not constitute attacking civilians, as the intent and knowledge requirements would not be satisfied.

12. *Causing unnecessary damage*

(a) *Part 2 offence:* Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally launched an attack;
- (iii) That the attack resulted in collateral damage or incidental injury;
- (iv) That the use of force causing collateral damage was not justified by military necessity; and
- (v) That the accused knew that such use of force was not justified by military necessity.

(c) *Comment:* The knowledge element is key to military necessity analysis for this offence. Since the military necessity evaluation is necessarily subjective, the analysis must be based upon the perspective of the accused prior to the attack and incorporate consideration of the exigent circumstances.

12 (alternative). *Causing disproportionate damage*

(a) *Part 2 offence:* Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread long-term and severe damage to the natural environment that would be excessive in relation to the concrete and direct overall military advantage anticipated.

(b) *Elements:*

- (i) That the act took place in the course of an international armed conflict;
- (ii) That the accused intentionally launched an attack;
- (iii) That the attack resulted in collateral damage or incidental injury;
- (iv) That the collateral damage or incidental injury was clearly excessive in relation to the overall military advantage anticipated; and
- (v) That the accused knew that such collateral injury or damage would be disproportionate to the military advantage gained.

(c) *Comment:* The knowledge element is key to proportionality analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused prior to the attack.

13. *Attacking an undefended town*

(a) *Part 2 offence:* Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally launched an attack against a certain town, village, dwelling or building;
- (iii) That the object of the attack was open for immediate, unresisted occupation;
- (iv) That the accused knew that the object of the attack was open for immediate, unresisted occupation; and
- (v) That the attack was not justified by military necessity.

13 (alternative). *Attacking a non-defended locality*

(a) *Part 2 offence:* Making [declared] non-defended localities and demilitarized zones the object of attack.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally launched an attack against a certain non-defended locality or within a certain zone;

- (iii) That the attack resulted in death or serious injury to one or more persons;

(for demilitarized zones)

- (iv) That the parties to the conflict conferred on the zone, by agreement, the status of demilitarized zone, and the accused knew that this status had been conferred; and
- (v) That since the demilitarized zone status was conferred, the zone met, and the accused knew the zone met, the following conditions:
 - a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;
 - b. No hostile use had been made of its fixed military installations or establishment;
 - c. No acts of hostility had been committed by its authorities or by its population; and
 - d. Any activity linked to the military effort of the adversary had ceased; or

(for non-defended localities)

- (vi) That the locality was, and the accused knew that the locality was, an inhabited place near or in a zone where forces were in contact which was open for occupation by the forces of the accused, and had been declared to the forces of the accused to be non-defended by the appropriate authorities;
- (vii) That since the declaration of non-defended status, the locality met, and the accused knew that the locality met, the following conditions:
 - a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;
 - b. No hostile use had been made of its fixed military installations or establishments;
 - c. No acts of hostility had been committed by its authorities or by the population; and
 - d. No activities in support of military operations had been undertaken therein.

14. *Attacking protected objects*

(a) *Part 2 offence:* Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intentionally attacked one or more of the following: a building dedicated to religion, art, science or charitable purposes, a historical monument or a hospital or place where the sick and wounded are collected;
- (iii) That the accused intended the object of that attack to be the building, object or place that was attacked;
- (iv) That the object of attack was not being used for a military purpose at the time of the attack; and
- (v) That the accused knew that the object of attack was not being used for a military purpose at the time of the attack.

15. *Perfidy*

(a) *Part 2 offences:* Killing or wounding treacherously individuals belonging to the hostile nation or army; killing or wounding treacherously a combatant adversary, making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions of 1949, resulting in death or serious personal injury.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to kill or cause serious injury to an adversary;
- (iii) That the accused committed an act resulting in the death or serious injury of an adversary;
- (iv) That the accused intended the death or injury to be accomplished by inviting the confidence of an adversary to believe himself to be entitled to, or obliged to accord, protection under the international law of armed conflict, with intent to betray that confidence; and
- (v) That the death or injury occurred as a direct result of such misrepresentations.

(c) *Comments:* The perfidious activity described in element (iv) *could* include improper use of a flag of truce, uniform of the enemy or the United Nations or distinctive emblems of the Geneva Conventions of 1949. However, such uses would not result in culpability if not perfidious as defined by the elements (e.g., if the use of an enemy uniform does not

cause detrimental belief in an obligation or protection). Ruses of war are legitimate so long as they do not involve perfidy.

16. *Denying quarter*

(a) *Part 2 offence:* Declaring that no quarter will be given.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused was a person in command or had authority over certain forces;
- (iii) That the accused made a declaration or gave an order to those subordinate forces to the effect that any bona fide surrender by the enemy be refused, even if it would be reasonable to accept and that all enemy persons proffering surrender be killed;
- (iv) That in so declaring or ordering, the accused intended that his stated intent be executed.

(c) *Comment:* Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

17. *Sexual offences*

(a) *Part 2 offences:* Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach of the Geneva Conventions of 1949.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to commit a certain sexual act upon a certain person or forced that person to engage in a certain sexual act;
- (iii) That the accused committed or caused to be committed one of the following acts by force:

a. Rape;

b. Sexual abuse; or

c. Enforced prostitution.

(c) *Comments:*

- (i) *Rape.* The *actus reus* of rape is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ,

- or forcible penetration, however slight, of the anal or genital opening of another by any object;
- (ii) *Sexual abuse.* The *actus reus* of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy and enforced sterilization;
- (iii) *Enforced prostitution.* The *actus reus* of enforced prostitution is enslavement of a sexual nature wherein the "forcible" element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature;
- (iv) *Committed by force* means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm or where the victim is unable to resist because of the lack of mental or physical faculties.

18. *Immunizing an area with protected persons*

- (a) *Part 2 offence:* Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.
- (b) *Elements:*
 - (i) That the act took place in the course of international armed conflict;
 - (ii) That at the time of the offence, the accused was defending a military objective from likely attack;
 - (iii) That the accused caused either the military objective, one or more civilian persons or one or more persons protected under one of the Geneva Conventions of 1949 to be moved so that the military objective and the civilian personnel or protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or protected persons; and

- (iv) That the accused's actions were intended to shield the military objective from attack, to shield, favour or impede military operations, or to otherwise undermine the adversary's will to attack or continue an attack.

19. *Attacking objects displaying a protective emblem*

- (a) *Part 2 offence:* Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions of 1949.
- (b) *Elements:*
 - (i) That the act took place in the course of armed conflict;
 - (ii) That the accused intentionally attacked a building, an object, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions of 1949;
 - (iii) That the accused intended the object of the attack to be the person or object attacked and knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions of 1949; and
 - (iv) That the object of attack was not, and the accused knew it was not, being used for a military purpose at the time of the attack.

20. *Starvation*

- (a) *Part 2 offence:* Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions of 1949.
- (b) *Elements:*
 - (i) That the act or omission took place in the course of international armed conflict;
 - (ii) That the accused engaged in an act or omission to attack, destroy, remove or render useless objects indispensable to the nourishment and survival of the civilian population of an adverse party;
 - (iii) That the accused's act or omission was intended for the specific purpose of denying nourishment necessary for the survival of the civilian population of an adverse party; and
 - (iv) That as a result of the accused's acts, one or more persons died from starvation.

(c) *Comment:* An omission can only constitute this offence if the accused omitted to fulfil a lawful duty, for example, feeding prisoners under his care.

21. *Using illegal weapons*

(a) *Part 2 offence:* Employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering: (i) poison or poisoned weapons; (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict; (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally attacked an adversary in that armed conflict with:
 - a. Bullets which expand or flatten easily in the human body;
 - b. Bacteriological agents or toxins; or
 - c. Chemical weapons; and
- (iii) That at the time of the offence, the accused was aware of the nature of the weapon he or she was using and its prohibited status under international law.

(c) *Comments:*

- (i) *Chemical weapons* means chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. It does not include riot control agents as they are defined in that Convention. Use of chemical weapons against a civilian population might also constitute one or more crimes against humanity regardless of the context.
- (ii) *Bacteriological agents or toxins* means any microbial or other biological agent or toxin, whatever its origin or method of production.

DOCUMENT A/CONF.183/C.1/L.11

Slovenia: proposal regarding article 5

[Original: English]
[19 June 1998]

War crimes

Section B, subparagraph (c)

Option 2

After the words “demilitarized zones”, add the words “and United Nations-declared safe areas”, so that the subparagraph would read:

“making non-defended localities, demilitarized zones and United Nations-declared safe areas the objects of attack;”

DOCUMENT A/CONF.183/C.1/L.12

Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago and United Republic of Tanzania: proposal regarding article 5

[Original: English]
[22 June 1998]

Crimes against humanity

After paragraph 1 (i), insert a new subparagraph as follows:

“(i bis) Institutionalized racial discrimination, including the practices of apartheid;”.

DOCUMENT A/CONF.183/C.1/L.13

Lesotho, Malawi, Namibia, South Africa, Swaziland and United Republic of Tanzania: proposal regarding article 5

[Original: English]
[22 June 1998]

War crimes

Section D, subparagraph (e)

At the end of the paragraph, insert the words:

“as well as the practices of apartheid and other inhumane and degrading practices involving outrage upon personal dignity based on racial discrimination”.

DOCUMENT A/CONF.183/C.1/L.14/REV.1

**Mexico: revised proposals regarding articles 12 bis, 15,
and 108**

[Original: Spanish]
[24 June 1998]

Article 12 bis³⁴

1. When the Prosecutor, upon receipt of the information referred to in article 12, concludes that there is sufficient basis to initiate an investigation, he or she shall notify the interested States of his or her decision.
2. Before deciding to proceed with the investigation, the Prosecutor shall hear and take into account the views of the interested States.
3. If the Prosecutor decides to proceed with the investigation, he or she shall proceed in accordance with article 13, paragraph 1, of this Statute. When making its determination, the Pre-Trial Chamber shall take into account the views referred to in paragraph 2 above.
4. The application of the present article is without prejudice to the right of the interested States to challenge the admissibility of a case in accordance with the procedure provided for in this Statute.

*Article 15
Issues of admissibility*

1. Paragraph 2 (b)
For undue delay, *read* unjustified delay.
2. Paragraph 2 (c)
After impartially *add* in accordance with the norms of due process recognized by international law.
3. Paragraph 3
In the second line, *for* partial *read* substantial, so that the phrase will now read "due to a total or substantial collapse or unavailability of its national judicial system ..."

*Article 108
Settlement of disputes*

Any dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months, shall be settled by one of the means of settlement of disputes chosen by the parties to the controversy, and if this is not possible also within three months, it shall be sent to the International Court of Justice for consideration in accordance with this Statute.

DOCUMENT A/CONF.183/C.1/L.15

China: proposal regarding article 15

[Original: English]
[23 June 1998]

Issues of admissibility

- Paragraph 2 (a)
After made *insert* in violation of its national law
- Paragraph 2 (b)
After with *insert* its national rules of proceedings and
- Paragraph 2 (c)
After with *insert* the general applicable standards of its national rules of proceedings and

DOCUMENT A/CONF.183/C.1/L.17

Cuba: proposal regarding article 5

[Original: Spanish]
[23 June 1998]

Crimes against humanity

- Paragraph 1
- (j) Other inhumane acts, such as economic, financial and commercial blockades intentionally causing great suffering or seriously injuring physical integrity or mental or physical health.

DOCUMENT A/CONF.183/C.1/L.18

Japan: proposal regarding article 18

[Original: English]
[24 June 1998]

Ne bis in idem

- Paragraph 3, chapeau
After "by the Court" *add* "for the same conduct", so that the chapeau of the paragraph would read:
- "No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court for the same conduct unless the proceedings in the other court:"

³⁴ The placement of this article may be decided at a later stage.

DOCUMENT A/CONF.183/C.1/L.20

Spain: proposal regarding article 10

[Original: Spanish]
[25 June 1998]

Role of the Security Council

A. Word the provision in paragraph 7 (at present between brackets) as follows:

“1. Where the Security Council is actively dealing with a dispute or a situation affecting international peace and security and a matter related directly to that dispute or situation is referred to the Court, the Council, acting under Chapter VII of the Charter, may call on the Court to desist from commencing or continuing the corresponding proceedings for a specified period not exceeding 12 months.

2. Upon the expiry of the initial period for which the Security Council has called for the proceedings before the Court to be suspended, the Council may similarly call for an extension of the suspension for a further period not exceeding 12 months, in order to enable it to continue its action for the maintenance of international peace and security.

3. Both in the case of the initial request and in that of any subsequent request by the Security Council, the Court [the Pre-Trial Chamber], having heard the Prosecutor and any interested State Party, shall decide to suspend the proceedings and concurrently shall take all necessary measures for the preservation of the evidence and any other precautionary measures in the interests of justice.

4. If the Court [the Pre-Trial Chamber] decides to suspend the proceedings for a specified period in order to accede to the request of the Security Council, and the Council, during that period, does not take measures under Chapter VII of the Charter in connection with the dispute or situation in question, the Court may, at the end of the period, continue its consideration of the case.”

B. Place this provision in a separate article.

NB: This proposal also applies to the provision in article 10, paragraph 2, of the “Further option for articles 6, 7, 10 and 11”.

DOCUMENT A/CONF.183/C.1/L.23

Uruguay: proposal regarding article 15

[Original: Spanish]
[26 June 1998]

Issues of admissibility

Paragraph 1 (a)

After unwilling add unjustifiably

Paragraph 2 (a)

Before purpose add unjustified

DOCUMENT A/CONF.183/C.1/L.25

United States of America: proposal regarding article 16

[Original: English]
[29 June 1998]

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by *notification to all States Parties and any non States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis where necessary to protect persons or prevent destruction of evidence.*

2.³⁵ Within *one month* of the receipt of such notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor, *applying the criteria set out in article 15 and/or article 18, determines that the State is unwilling or unable genuinely to carry out the investigation of the matter and obtains a preliminary ruling from the Pre-Trial Chamber confirming that determination.*

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor *six months* after the date of the deferral or *at any time when there has been a significant change of circumstances indicating that the State has become unwilling or unable to genuinely carry out the investigation.*

4. A preliminary ruling of the Pre-Trial Chamber regarding the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned or by the Prosecutor. *At the request of either party, such appeal shall be heard on an expedited basis. The Appeals Chamber may authorize the Prosecutor to proceed with an investigation while the appeal is pending.*

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

³⁵ We have simplified paragraph 2 somewhat and split it into a paragraph 2 and new paragraph 3, for purposes of clarity.

6. Pending a preliminary ruling by the Pre-Trial Chamber under paragraph 2, or at any time where the Prosecutor has deferred an investigation under this article, the Prosecutor may, in exceptional cases, seek specific authority from the Pre-Trial Chamber to pursue investigative steps where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence will not be subsequently available.

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17 [or withhold its consent to the exercise of jurisdiction under article 7].

DOCUMENT A/CONF.183/C.1/L.26

Iraq: proposal regarding article 5

[Original: Arabic]
[29 June 1998]

War crimes

Section B, subparagraph (o)

Option 4, subparagraph vi (bis):

Weapons containing depleted uranium.

DOCUMENT A/CONF.183/C.1/L.27/REV.1

India, Sri Lanka and Turkey: proposal regarding article 5

[Original: English]
[6 July 1998]

Crimes against humanity

1. Add a paragraph 1 (j) bis reading:

act of terrorism

2. Add a paragraph 2 (f) reading:

act of terrorism

- (i) an act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime.

- (ii) this crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.

DOCUMENT A/CONF.183/C.1/L.30

Cuba: proposal regarding article 5

[Original: Spanish]
[29 June 1998]

Crimes against humanity

Paragraph 2, chapeau and subparagraph (a)

2. For the purpose of paragraph 1:

(a) extermination includes the infliction of conditions of life, inter alia, deprivation of access to foodstuffs and medicines, calculated to bring about the destruction of a population.

DOCUMENT A/CONF.183/C.1/L.33

Ukraine: proposal regarding article 5

[Original: Russian]
[30 June 1998]

War crimes

STATEMENT BY THE DELEGATION OF UKRAINE CONCERNING
THE ILLEGALITY OF THE USE OF NUCLEAR WEAPONS

1. Ukraine firmly believes that article 5, section B, subparagraph (o) (War crimes) should state directly that the use in international armed conflicts of weapons such as nuclear weapons is an act subject to criminal prosecution in accordance with the statute of the International Criminal Court.

2. In the opinion of the Ukrainian delegation, a decision to that effect would not create a new rule of international law, but would be an affirmation by States parties to the statute of the future court that, as was confirmed by the International Court of Justice in its advisory opinion of 8 July 1996,³⁶ the use of nuclear weapons is a breach of contemporary international humanitarian law and of the laws and customs of international armed conflicts.

3. Because of their indiscriminate effect on members of armed forces and on the civilian population and in view of the superfluous injury and unnecessary suffering caused by their use, nuclear weapons must, for the purposes of international justice, be placed on the same footing as chemical,

³⁶ A/51/218, annex; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

bacteriological and other types of weapons that are subject to a comprehensive ban.

4. Ukraine, the first State in the world to have voluntarily renounced nuclear weapons and to have attained non-nuclear status, calls on other delegations to subscribe to its position concerning the illegality of the use of nuclear weapons.

DOCUMENT A/CONF.183/C.1/L.34

Republic of Korea: proposal regarding articles 13 and 13 bis

[Original: English]
[30 June 1998]

Articles 13

Information submitted to the Prosecutor

1. Upon receipt of information on alleged crimes under article 5, provided by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall examine the seriousness of the content of the information.

2. For the purpose of examination, the Prosecutor may request additional information from States, organs of the United Nations, regional or international governmental organizations or other sources that he or she may deem appropriate, and may receive written or oral testimony at the seat of the Court.

3. After the examination in accordance with paragraphs 1 and 2,

(a) If the Prosecutor considers that there is a reasonable ground to initiate an investigation, he or she may decide to do so in accordance with article 13 bis; or

(b) If the Prosecutor considers that the information provided is manifestly unfounded, he or she shall decide not to initiate an investigation and shall inform those who provided the information. Such a decision shall not preclude a subsequent provision of information to the Prosecutor based on new facts or evidence.

Article 13 bis

Challenges to ex officio investigation of the Prosecutor

1. If the Prosecutor decides to initiate an investigation in accordance with article 12 or article 13, paragraph 3 (a), he or she shall notify all States Parties of such a decision. Any interested State Party set out in article 8 may lodge with the Pre-Trial Chamber a challenge to the Prosecutor's decision to investigate within [thirty] days of notification, after which no challenge will be allowed. After the hearing, the Pre-Trial Chamber shall make a ruling on the admissibility of the challenge.

2. Within [thirty] days after the notification or pending a ruling of the Pre-Trial Chamber under paragraph 1, the Prosecutor shall not commence the investigation.

3. If the Pre-Trial Chamber decides that there is a reasonable ground to initiate an investigation, and the case appears to constitute one within the jurisdiction of the Court, taking into account article 15, the Prosecutor may commence investigation. The dismissal of challenge shall not affect the subsequent determinations by the Court of its jurisdiction or the admissibility of the case pursuant to article 17.

4. If the Pre-Trial Chamber decides that a challenge is manifestly well-founded, the Prosecutor shall not initiate an investigation of the case in question.

5. The acceptance of a challenge by the Pre-Trial Chamber under paragraph 4 shall not preclude the initiation of a subsequent investigation by the Prosecutor based on new facts or evidence.

DOCUMENT A/CONF.183/C.1/L.35

Nepal: proposal regarding article 5

[Original: English]
[30 June 1998]

Crimes against humanity

Paragraph 2 (b)

“deportation or forcible transfer of population” means the expulsion or displacement otherwise of a population or a group of populations from the area in which it is habitually resident for any purpose carried out on political, philosophical, racial, ethnic, religious or any other similar grounds contrary to the recognized principles of human rights or humanitarian law”.

DOCUMENT A/CONF.183/C.1/L.37

[incorporating document A/CONF.183/C.1/L.37/Corr.1 of 10 July 1998]

Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal regarding article 5

[Original: English]
[1 July 1998]

Crime of aggression

Option 2, paragraph 1

Rephrase the paragraph to read as follows:

“1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions in his State, against another State, or of depriving other peoples of their rights to self-determination, freedom and independence. in

contravention of the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.”

The remainder of the option should remain as it is.

DOCUMENT A/CONF.183/C.1/L.38
Armenia: proposal regarding article 5

[Original: English]
[1 July 1998]

Crime of aggression

NOTE: The following amendments are proposed for consideration in order to contribute to the clarity of the definition of the crime of aggression in article 5 of the draft Statute.

Option 2

Paragraph 1

- Delete the square brackets.

After political independence of that State insert

“except when this is required by the principle of equal rights and self-determination of peoples³⁷ and the rights of individual or collective self-defence.³⁸”

Paragraph 2 (c)

Delete the words “of the ports or coasts”.

DOCUMENT A/CONF.183/C.1/L.39
Cameroon: proposal regarding articles 5 and 10

[Original: French]
[2 July 1998]

Article 5
Crimes within the jurisdiction of the Court

Proposals aimed at specifying the manner in which the crime of aggression (article 5) might fall within the jurisdiction of the Court, with the consequent reformulation of the relationship between the Court and the Security Council (article 10).

Crime of aggression

Option A

1. For the purpose of the present Statute, the crime of aggression is one of the following acts committed by an

³⁷ Article 1, paragraph 2, of the Charter of the United Nations.

³⁸ Article 51 of the Charter of the United Nations.

individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when this use of force is in manifest contravention of the Charter of the United Nations.

2. The Court shall prosecute and punish the crime of aggression as defined in paragraph 1 of this article without prejudice to the powers exercised by the Security Council in regard to aggression under Chapter VII of the Charter of the United Nations.

Option B

1. For the purpose of the present Statute, and subject to the role performed by the Security Council in regard to aggression in accordance with article 10 of the present Statute, the crime of aggression is one of the following acts committed by an individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when that use of armed force is in manifest contravention of the Charter of the United Nations.

NB: Since of necessity this definition of the crime of aggression involves the relationship between the Court and the Security Council, a new formulation for article 10 appears to be necessary.

Article 10

Relationship between the Security Council and the Court

1. The Security Council shall determine the existence of aggression in accordance with the pertinent provisions of the Charter of the United Nations before any proceedings take place in the Court in regard to a crime of aggression.
2. The Security Council may determine the existence of aggression in accordance with paragraph 1 of this article:

- (a) On its own initiative;
- (b) At the request of a State which considers itself the victim of aggression;
- (c) At the request of the Court when a complaint relating to a crime of aggression has been submitted to it;
- (d) At the request of any other organ of the United Nations which, under the Charter, is able to draw the attention of the Security Council to a situation likely to endanger the maintenance of international peace and security.

3. The Court, when a complaint relating to a crime of aggression has been submitted to it, shall suspend its deliberation and refer the matter to the Security Council for a declaration, in accordance with the pertinent provisions of the Charter, that the aggression does or does not exist. A letter from the President of the Security Council shall convey the Security Council's finding to the Prosecutor of the Court, accompanied by all supporting material available to the Council in regard to the aggression whose existence it has determined (NB: This sentence is a repetition of article 10, paragraph 2).

4. Notwithstanding the provisions of paragraph 1 of this article, the Court may commence an investigation for the purpose of establishing whether a crime of aggression within the meaning of the present Statute exists, if the Security Council, having had the matter referred to it by the Court under paragraph 3 of the present article, does not reply within a reasonable time.

5. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed. (NB: This reproduces article 10, paragraph 3.)

6. The Court may request the assistance of the Security Council in conducting investigations into cases submitted to it, in arresting persons who are being prosecuted or have escaped from custody, or in enforcing its decisions.

DOCUMENT A/CONF.183/C.1/L.40

New Zealand: proposal regarding article 5

[Original: English]
[2 July 1998]

Definition of war crimes

Section B, subparagraph (b), option 2

Delete the word "overall" and add at the end of the subparagraph the words "from the attack considered as a whole".

Section B, subparagraph (b), option 2, would therefore read:

"intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated from the attack considered as a whole".

DOCUMENT A/CONF.183/C.1/L.46

[incorporating document A/CONF.183/C.1/L.46/Corr.1 of 7 July 1998]

Comoros and Madagascar: proposal regarding article 5

[Original: French]
[3 July 1998]

Crime of mercenarism

1. For the purpose of the present Statute, the crime of mercenarism is committed by a person who either recruits, uses, finances or trains mercenaries, or engages in mercenary activities with the aim of opposing by armed violence a process of self-determination or the stability or the territorial integrity of a State.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State in whose territory the act is undertaken.

DOCUMENT A/CONF.183/C.1/L.48

**Barbados, Dominica, Jamaica and Trinidad and Tobago:
proposal regarding article 5**

[Original: English]
[3 July 1998]

*Crimes involving the illicit traffic in narcotic drugs and
psychotropic substances*

For the purposes of the present Statute, crimes involving the illicit traffic in narcotic drugs and psychotropic substances are those crimes set out in article 3, paragraphs 1 and 2, of the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 when committed:

(a) On a large scale (and) (or) in a transboundary context;

(b) Within the framework of an organized and hierarchical structure;

(c) With the use of violence and intimidation against private persons, juridical persons or other institutions, or members of the legislative, executive or judicial arms of government, (thereby) creating fear or insecurity within a State or disrupting its economic, social, political or security structures or with other consequences of a similar nature; or

(d) In a context in which corrupt influence is exerted over the public, the media and public institutions.

DOCUMENT A/CONF.183/C.1/L.50

Turkey: proposal regarding article 19

[Original: French]
[6 July 1998]

Delete [article 19].

DOCUMENT A/CONF.183/C.1/L.51

Uruguay: proposal regarding article 13³⁹

[Original: Spanish]
[6 July 1998]

[Article 13

Information submitted to the Prosecutor

The following wording is suggested:

1. As in existing text.

2. Before deciding on the Prosecutor's request to proceed with an investigation, the Pre-Trial Chamber shall hear the State or States concerned with a view to taking their opinions into account, and must expressly pronounce on the opinions voiced by the said State or States.

3. If the Pre-Trial Chamber, upon examination of the request, the accompanying material and the opinions voiced by the State or States concerned, considers that there is a reasonable basis to proceed ... (continue with existing text to end of paragraph 2).

4. For the purposes of the decision referred to in paragraph 3 above, the membership of the Pre-Trial Chamber shall rotate so that successive requests to proceed with an investigation shall be ruled upon by Chambers with different members chosen by lot.

5. The State or States concerned may appeal against the decision to proceed with an investigation as provided in articles 81 and thereafter, the appeal not having suspensive effect unless the Appeals Chamber so rules at the request of the State or States concerned.

6. As in existing paragraph 5.]

DOCUMENT A/CONF.183/C.1/L.56

[incorporating document A/CONF.183/C.1/L.56/Corr.1 of 9 July 1998]

**Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait,
Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi
Arabia, Sudan, Syrian Arab Republic, United Arab
Emirates and Yemen: proposal regarding article 5**

[Original: Arabic]
[8 July 1998]

Crime of aggression

Option 2

Paragraphs 1 and 2 should read as follows:

³⁹ This is an attempt to move towards a compromise solution, establishing additional safeguards for the States concerned.

"1. For the purpose of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State against another State, or of depriving other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.

"2. Acts constituting aggression include the following:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State of the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

DOCUMENT A/CONF.183/C.1/L.62

Sierra Leone: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

*[Original: English]
[13 July 1998]*

Article 5 quater

Introductory paragraph to Section D, second sentence

Replace the sentence with the following:

"It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The word "Party" has been deleted, and the word "violence" has been changed to "conflict."

DOCUMENT A/CONF.183/C.1/L.69

United States of America: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

*[Original: English]
[14 July 1998]*

*Article xx
Elements of crimes*

1. Elements of crimes shall be formulated, interpreted and applied in a manner consistent with the terms of articles 5 bis, 5 ter, 5 quater and article 21, paragraph 2. They shall be applied by the Court in reaching determinations as to guilt.

2. Elements of crimes shall be adopted by the Preparatory Commission in accordance with its rules of procedure, and shall be an annex to this Statute.

3. Elements of crimes may be amended in accordance with the provisions of article 110 that concern amendments to articles 5 bis, 5 ter and 5 quater.

4. Elements of crimes shall be adopted before the Prosecutor commences an investigation.

DOCUMENT A/CONF.183/C.1/L.70

United States of America: proposal regarding article 7

*[Original: English]
[14 July 1998]*

Article 7

Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation,] the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the following States have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 bis or ter:

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

(b) The State of nationality of the accused/suspect with respect to the crime.

DOCUMENT A/CONF.183/C.1/L.71

Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey: proposal regarding article 5 and the draft Final Act

[Original: English]
[14 July 1998]

Crimes of terrorism and drug crimes

1. Insert the crimes of terrorism and drug crimes as article 5 (d) and (e).
2. Insert the following as article 5 *quinquies*:

“The definition and element of the crimes of terrorism and drug crimes shall be elaborated by the Preparatory Commission.”⁴⁰

DOCUMENT A/CONF.183/C.1/L.72

India: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr. 1

[Original: English]
[15 July 1998]

Article 5 quater

Section B, subparagraph (o)

Add a new subparagraph (vi) as follows:

“Nuclear weapons.”

Consequently, current subparagraph (vi) is renumbered as (vii).

DOCUMENT A/CONF.183/C.1/L.74

Indonesia, Philippines, Thailand and Viet Nam: proposal regarding article 5 quater

[Original: English]
[14 July 1998]

War crimes

Sections C and D

The following provision is proposed to be included as the last paragraph of sections C and D.

“The provisions of the sections C and D shall not apply if there is any foreign interference in the situation of armed conflict not of an international character.”

DOCUMENT A/CONF.183/C.1/L.75

Movement of Non-Aligned Countries: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[14 July 1998]

1. Add a new subparagraph (d) to article 5, as follows:

(d) The crime of aggression.

2. Add a new article 5 *quinquies*, reading:

The Preparatory Commission shall elaborate the definition and elements of the crime of aggression and recommend its adoption to the Assembly of States Parties. The International Criminal Court shall not exercise its jurisdiction with regard to this crime until such a definition has been adopted. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the Statute.

DOCUMENT A/CONF.183/C.1/L.77

Republic of Korea: proposal regarding article 7 ter

[Original: English]
[15 July 1998]

With respect to the case in question over which that State has accepted jurisdiction, the accepting State shall comply with obligations under this Statute, in particular, the obligation to cooperate with the Court without any delay or exception in accordance with part 9.

DOCUMENT A/CONF.183/C.1/L.79

India: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[15 July 1998]

Article 6

Delete subparagraph (b).

Article 7

(a) In the chapeau of paragraph 1, delete the opening phrase “In the case of article 6 (a) or (c)”.

(b) In the chapeau of paragraph 2, option 1, delete the opening phrase “In the case of article 6 (a) or (c)”.

⁴⁰ The mandate for the Preparatory Commission to elaborate the definition and elements will be included in the Final Act.

(c) In paragraph 2, options 2 and 3, delete the opening phrase "Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation".

Article 10

Delete the article.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

In any article of the draft Statute in which the words "the Security Council" are used, replace them by the words "the relevant principal organ of the United Nations".

DOCUMENT A/CONF.183/C.1/L.89

Group of African States: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[16 July 1998]

Article 5 quater

Section B, subparagraph (o):

Delete the subparagraph and replace it with the following:

"Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate."

DOCUMENT A/CONF.183/C.1/L.90

United States of America: proposal regarding article 7 ter⁴¹

[Original: English]
[16 July 1998]

Article 7 ter

1. With respect to States not Party to the Statute, the Court shall have jurisdiction over acts committed in the territory of a State not Party, or committed by officials or agents of a State not Party in the course of official duties and acknowledged by the State as such, only if the State or States in question have accepted jurisdiction in accordance with this article.

2. If the acceptance of a State that is not a Party to this Statute is required under article 7, that State may, by declaration

lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

POSSIBLE PROTOCOL FOR OPT-IN

Article 7 bis – Option 1

Article X

1. The Protocol annexed to this Statute shall be open for acceptance by any State at the time it becomes Party to the Statute.

2. The application of this Statute with respect 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

1. A State accepting this Protocol may make a declaration, at the time of its acceptance, that it does not accept the application of article 7 with respect to a crime referred to in article 5 ter or 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, before the Court may exercise its jurisdiction over the cases referred to in that paragraph.

2. A State Party to this Protocol shall not be able to refer a situation in accordance with article 11, except with respect to the crime of genocide.

[3. In the event that any additional crimes or category of crimes is added to this Statute, while this Protocol is in force, a State accepting this Protocol may make a further declaration with the same effect as the declaration referred to in paragraph 1 with respect to that additional crime or category of crimes.]
[NOTE: This could be superfluous if article 110, paragraph 5, is adopted without the bracketed text on applicability of new crimes to all States Parties.]

Article 2

1. This Protocol shall enter into force with the Statute and shall remain in force thereafter for a period of 10 years, and may not be amended. Its duration may, however, be prolonged by the normal procedures for an amendment to the Statute pursuant to article 110.

2. A declaration under article 1 of this Protocol shall remain valid and effective for the duration of this Protocol, but may be withdrawn in whole or in part 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.

⁴¹ To be read together with A/CONF.183/C.1/L.70

DOCUMENT A/CONF.183/C.1/L.94

India: proposed amendments to the draft Statute in document A/CONF.183/C.1/L.76/Add.2 and Corr.1⁴²

[Original: English]
[17 July 1998]

Article 8 [5]⁴³

Article 8 [5 quater], paragraph 2 (b)

Before subparagraph (xx) [q], add a new subparagraph reading:

“Employing weapons of mass destruction, i.e. nuclear, chemical and biological weapons.”

In subparagraph (xx) [q] delete “the” after “employing” in the first line; replace with “other”.

DOCUMENT A/CONF.183/C.1/L.95

India: proposed amendments to the draft Statute in document A/CONF.183/C.1/L.76/Add.2 and Corr.1⁴²

[Original: English]
[17 July 1998]

Articles 12 [7], 13 [6] and 16 [10]³³

Article 12 [7, 7 bis, 7 ter]

In paragraph 2, *delete* “In the case of article 13 [6], paragraph (a) or (c)”

Article 13 [6]

Delete paragraph (b)

Article 16 [10]

Delete the article

DOCUMENT A/CONF.183/C.1/WGAL/L.4

Guatemala: proposal regarding article 20

[Original: Spanish]
[14 July 1998]

Applicable law

Paragraph 3:

Option 1:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.

Option 2:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights. The principle of non-discrimination shall be applied to men, women and children.

4. Part. 3. General principles of criminal law

(a) Documents of the Working Group on General Principles of Criminal Law

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGGP/L.1

Chairman’s suggestion for articles 21, 26 and 28

[Original: English]
[15 June 1998]

Article 21

Nullum crimen sine lege

Option 1 (jurisdiction only over the core crimes plus crimes against the integrity of the Court)

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime defined in this Statute.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy or be interpreted as proscribing conduct not clearly criminal under it.

3. Paragraph 1 shall not affect the character of such conduct as being criminal under international law apart from this Statute.

Option 2 (jurisdiction also over one or more treaty crimes)

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime defined in this Statute.

1 bis. With respect to a crime referred to in article 5, paragraph(s) (...), the treaty in question must be applicable to the conduct of the person at the time that the conduct occurred.

2. (same as option 1)

3. (same as option 1)

NB: The *nullum crimen* principle should extend to all crimes within the Court’s jurisdiction, including any treaty crimes and the crimes against the integrity of the Court. Since definitions have also been proposed for treaty crimes, the principle of treaty applicability has been reformulated.

⁴² This document is reproduced in the report of the Committee of the Whole (Part one, sect. C.)

⁴³ The number within brackets indicates the numbering of the corresponding article in document A/CONF.183/2/Add.1 and Corr.1.

Article 26
Age of responsibility

Option 1

A person under the age of 18 at the time of the alleged commission of a crime shall not be criminally responsible under this Statute.

Option 2 (article to be placed in part 2)

The Court shall have no jurisdiction over persons who were under the age of 18 at the time of the alleged commission of a crime (which would otherwise come within the jurisdiction of the Court).

Option 3

1. A person under the age of 15 at the time of the alleged commission of a crime shall not be criminally responsible under this Statute.

2. A person who is between the ages of 15 and 18 at the time of the alleged commission of a crime shall be evaluated by the Court as to his or her maturity to determine whether the person shall be deemed to be criminally responsible.

Article 28
Actus reus

1. Conduct for which a person can be criminally responsible under this Statute can constitute either an act or an omission or a combination thereof.

2. Unless otherwise provided, a person can only be criminally responsible for an omission under paragraph 1 where:

(a) The omission is part of the definition of the crime either expressly or by necessary implication; or

(b) That person has failed to perform an act that he has an obligation to perform in order to prevent the resulting crime.

NB: A third paragraph on causation could be added but seems unnecessary.

Another option could be to have no article dealing with omission. It seems that the substantive content of paragraph 2 (a) is largely covered by whatever is stated in the definitions of the crimes, and paragraph 2 (b) would to some extent be covered by article 25 on command responsibility at least if the approach is taken to state this as a responsibility rather than non-immunity.

DOCUMENT A/CONF.183/C.1/WGGP/L.8/REV.1

Chairman's suggestion for article 31, paragraph 1 (b)

[Original: English]
[25 June 1998]

Option 3

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law. However, if the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, the commission by him or her of conduct constituting a crime under the jurisdiction of the Court was likely to occur, the person shall remain criminally responsible.

DOCUMENT A/CONF.183/C.1/WGGP/L.3

[incorporating document A/CONF.183/C.1/WGGP/L.3/Corr.1 of 9 July 1998]

Working paper on article 23, paragraph 7 (e)

[Original: English]
[18 June 1998]

Paragraph (7) (e)

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

- (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) be made in the knowledge of the intention of the group to commit the crime.

DOCUMENT A/CONF.183/C.1/WGGP/L.5/REV.2

Working paper on article 23, paragraphs 5 and 6

[Original: English]
[3 July 1998]

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute,⁴⁴ the Court may also have jurisdiction over a juridical person for a crime under this Statute.

⁴⁴ This new phrase was inserted to replace former paragraph 6 of article 23 (A/CONF.183/2/Add.1 and Corr.1): "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons ..."

Charges may be filed by the Prosecutor⁴⁵ against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, "juridical person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body⁴⁶ or an organization registered under the national law of a State as a non-profit organization.

6. The proceedings⁴⁷ with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.⁴⁸

If convicted, the juridical person may incur the penalties referred to in article 76.⁴⁹ These penalties shall be enforced in accordance with the provisions of article 99.⁴⁹

⁴⁵ Language will have to be consistent with the eventual language in part 5.

⁴⁶ The applicable law under this Statute is defined in article 20.

⁴⁷ Footnote 50 of CONF.183/2 states: "The term 'proceedings' covers both investigations and prosecutions."

⁴⁸ The Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (United Nations document IT/32/Rev.9 of 5 July 1996) include rule 48, Joinder of accused: "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Rule 82 A reads: "In joint trials, each accused shall be accorded the same rights as if he were being tried separately."

⁴⁹ Once there is final agreement on articles 76 and 99, references to these articles could be deleted.

DOCUMENT A/CONF.183/C.1/WGCP/L.6

Working paper on article 31

[Original: English]
[22 June 1998]

Grounds for excluding criminal responsibility

Paragraph 1 (d)

(d) the conduct, which is alleged to constitute a crime within the jurisdiction of the Court, is in response to duress resulting from:

- (i) A threat made by other persons, or
- (ii) Circumstances beyond that person's control that constitute a threat of imminent death or serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause either death or a greater harm than the one sought to be avoided. [However, in the case of subparagraph (i), if the person has voluntarily exposed himself or herself to a situation which was likely to lead to the threat, the person shall remain responsible.]

A/CONF.183/C.1/WGCP/L.7/REV.1

Working paper on article 25

[Original: English]
[25 June 1998]

Responsibility of commanders and superiors⁵⁰

In addition to the other forms of responsibility for crimes under this Statute:

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

- (i) That person either knew or, owing to the circumstances at the time should have known, that the forces were committing or about to commit such crimes; and
- (ii) That person failed to take all necessary and reasonable measures within his or her power to

⁵⁰ The Working Group draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior is criminally responsible for crimes under this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise properly control where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

DOCUMENT A/CONF.183/C.1/WGPP/L.9/REV.1

[incorporating document A/CONF.183/C.1/WGPP/L.9/Rev.1/Corr.1 of 9 July 1998]

Working paper on article 32

[Original: English]
[25 June 1998]

Superior orders and prescription of law

1. The fact that a crime referred to in article 5 has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the perpetrator of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question; and
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.⁵¹

⁵¹ Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an appropriately high level of *mens rea*, including knowledge of the gravity and scale of the offence.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPP/L.4

[incorporating documents A/CONF.183/C.1/WGPP/L.4/Corr.1 of 19 June 1998, and Add.1/Rev.1 of 2 July 1998 and Add.1/Rev.1/Corr.1 of 9 July 1998, Add.2 of 2 July 1998 and Add.2/Corr.1 of 4 July 1998 and Add.3 of 7 July 1998]

Report of the Working Group on General Principles of Criminal Law

[Original: English]
[18 June 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on General Principles of Criminal Law, under the chairmanship of Mr. Per Saland (Sweden), the following articles of part 3:

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21. *Nullum crimen sine lege*

Article 22. Non-retroactivity

Article 23. Individual criminal responsibility

Article 24. Irrelevance of official position, paragraph 2

Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates]

Article 26. Age of responsibility

Article 27. Statute of limitations

Article 28. *Actus reus* (act and/or omission)

Article 29. *Mens rea* (mental elements), paragraph 4

Article 30. Mistake of fact or of law

Article 31. Grounds for excluding criminal responsibility

Article 32. Superior orders and prescription of law

Article 33. Possible grounds for excluding criminal responsibility specifically referring to war crimes and

Article 34. Other grounds for excluding criminal responsibility.

2. The Working Group held 6 meetings to consider these articles, from 17 to 19 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7; article 24, paragraph 2; article X (former article 26); and article 27.

3. The Working Group held two additional meetings, on 29 June and on 2 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: articles 25, 30 and 31. The Working Group also

notes the deletion of article 23, paragraph 7 (c), [article 28], [article 33] and article 34.

4. The Working Group held three additional meetings, on 30 June, 2 and 4 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following article for its consideration: article 32.

5. The Working Group held one additional meeting, on 7 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following article for its consideration: article 31, paragraph 1 (c). The Working Group notes the deletion of article 23, [paragraphs 5 and 6].

6. The Working Group thereby has concluded its work.

II. Text of draft articles

Article 21⁵²

Nullum crimen sine lege

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

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, it shall be interpreted in favour of the person being investigated or prosecuted.⁵³

3. Paragraph 1 shall not affect the character of such conduct as being criminal under international law apart from this Statute.

Article 22

Non-retroactivity

1. A person shall not be criminally responsible under this Statute for conduct prior to its entry into force.⁵⁴

⁵² The Working Group may need to consider the inclusion of an additional paragraph if treaty crimes are included within the jurisdiction of the Court. Such a provision could read as follows:

“1 bis. With respect to a crime referred to in article 5, paragraph(s) (...), the treaty in question must be applicable to the conduct of the person at the time that the conduct occurred.”

However, this is more of a jurisdictional issue and should perhaps better be dealt with in part 2.

⁵³ Attention was drawn to the use of the phrase “the person being investigated or prosecuted” in article 21, paragraph 2, and the phrase “the accused” in article 22, paragraph 2. It was suggested that it may be useful for the Drafting Committee to consider this matter.

⁵⁴ This paragraph may have to be revisited depending upon the outcome of the discussion of other articles.

2. If the law as it appeared at the commission of the crime is changed prior to the final judgement in the case, the law more favourable to the accused shall be applied.⁵³

Article 23

Individual criminal responsibility

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

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

3. (Deleted)

4. The fact that this Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5.] (Deleted)

[6.] (Deleted)

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

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

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

(c) (Deleted)

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

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

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

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

(f) In respect of the crime of genocide, directly and publicly incites others to commit genocide.⁵⁵

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

Article 24
Irrelevance of official position

...

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.

Article 25
Responsibility of commanders and superiors^{56,57}

In addition to the other forms of responsibility for crimes under this statute:

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

- (i) That person either knew or, owing to the circumstances at the time should have known, that the forces were committing or about to commit such crimes; and
- (ii) That person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior is

criminally responsible for crimes under this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise properly control, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

*Article X (former article 26)*⁵⁸
Non-jurisdiction over minors (provisional title)

The Court shall have no jurisdiction over persons who were under the age of eighteen at the time of the alleged commission of a crime.

Article 27
Statute of limitations

There is no statute of limitations for the crimes within the jurisdiction of the Court.⁵⁹

*[Article 28]*⁶⁰
Actus reus (act and/or omission)

(Deleted)

Article 29
Mens rea (mental elements)

...

4. **(Deleted).**

⁵⁵ The second paragraph of the definition of the crime of genocide in article 5 which appears between square brackets should be deleted.

⁵⁶ The Working Group draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

⁵⁷ The Working Group draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

⁵⁸ This article should be transferred to part 2.

⁵⁹ Two delegations were of the view that there should be a statute of limitations for war crimes. One delegation agreed to the above text in a show of flexibility, but stressed that there should be a possibility not to proceed if, due to the time that has passed, a fair trial cannot be guaranteed. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the Court would still be able to exercise jurisdiction.

⁶⁰ Some delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time.

Article 30⁶¹
Mistake of fact or of law

A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. Mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court is not a ground for excluding criminal responsibility. However, a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime, or as provided in this part.⁶²

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:⁶³

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;⁶⁴

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to commit conduct constituting a crime within the jurisdiction of the Court;⁶⁵

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission,⁶⁶ against an imminent⁶⁷ and unlawful use of

force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.^{68,69,70}

(d) The conduct, which is alleged to constitute a crime within the jurisdiction of the Court, has been caused by duress resulting from:

- (i) A threat made by other persons; or
- (ii) Other circumstances beyond that person's control that constitute a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.⁷¹

2. The Court may determine the applicability of the grounds for exclusion of criminal responsibility permitted by this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 20. The procedures relating to the consideration of such ground shall be provided for in the Rules of Procedure and Evidence.⁷²

Article 32
Superior orders and prescription of law

1. The fact that a crime referred to in article 5 has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the perpetrator of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question; and
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

⁶¹ For mitigation of punishment, see article 77.

⁶² Some delegations were of the view that mistake of fact or mistake of law does not relieve an individual of criminal responsibility for the crimes within the jurisdiction of the Court.

⁶³ Some delegations stressed that the chapeau of paragraph 1 should be read in conjunction with paragraph 2.

⁶⁴ The word "Law" has the meaning attributed to it by article 20.

⁶⁵ Some delegations have doubts about accepting voluntary intoxication as a ground for excluding criminal responsibility. It was the understanding that voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes. One delegation was of the view that one should not differentiate between different types of crimes.

⁶⁶ This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law.

⁶⁷ This provision is not intended to apply to international rules applicable to the use of force by States.

⁶⁸ Some delegations were of the view that this was applicable only in the context of a lawful operation.

⁶⁹ The Working Group draws the attention of the Drafting Committee to the fact that the text of this provision was the subject of extensive negotiations and represents quite delicate compromises.

⁷⁰ Cases of voluntary exposure are understood to be dealt with under paragraph 2 and are not understood to constitute a basis for applying this ground for excluding criminal responsibility.

⁷¹ One delegation considered that a threat in subparagraph (d) (i) means a threat that is illegal under international law.

⁷² Some delegations expressed the view that this paragraph gave too much latitude to the Court.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.⁷³

[Article 33]

Possible grounds for excluding criminal responsibility specifically referring to war crimes

(Deleted)⁷⁴

Article 34

Other grounds for excluding criminal responsibility

(Deleted)⁷⁴

(b) Documents of the Working Group on Penalties

(i) Working document

DOCUMENT A/CONF.183/C.1/WGP/L.8/REV.1

Chairman's working paper on article 21 bis

[Original: English]

[6 July 1998]

NOTE

The following text is proposed for consideration. It is suggested that it be included in part 3 of the draft Statute as article 21 bis.

Article 21 bis

Nulla poena sine lege

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

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGP/L.14

Report of the Working Group on Penalties

[Original: English]

[4 July 1998]

NOTE

This document is reproduced under part 7.

(c) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 5, 22, X (former article 26) and 29 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 22 June 1998³⁰

Article 22

Non-retroactivity

NOTE

The Drafting Committee is requested to consider the question of the use of the phrase "the person being investigated or prosecuted" in article 21, paragraph 2, and the phrase "the accused" in article 22, paragraph 2.

Article X (former article 26)

Non-jurisdiction over minors (provisional title)

NOTE

Article X is transmitted to the Drafting Committee on the understanding that the article should be transferred to part 2 and that the Drafting Committee should consider the question of its placement in that part as well as its title.

Article 5. Crime of genocide

Article 29. Mens rea (mental elements)

NOTE

The Committee of the Whole further decided to delete the text which appears between brackets in the definition of the crime of genocide (article 5) and article 29, paragraph 4 (*Mens rea* (mental elements)).

Note regarding article 25 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 3 July 1998⁷⁵

Article 25

Responsibility of commanders and superiors

NOTE

The Committee of the Whole transmits the above articles to the Drafting Committee on the following understandings with respect to article 25:

⁷³ Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an appropriately high level of *mens rea*, including knowledge of the gravity and scale of the offence.

⁷⁴ This matter is addressed in article 31, paragraph 3.

⁷⁵ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.76. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

It draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text now before the Drafting Committee. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

It draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

Note regarding articles 21 bis and 31 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 21 bis
Nulla poena sine lege

Article 31
Grounds for excluding criminal responsibility

NOTE

Understandings of the Committee of the Whole with respect to part 3:

The Drafting Committee may consider the possibility of including the provision in article 21 bis as a separate article or as a provision of article 21.

The text of article 31, paragraph 1 (c), was the subject of extensive negotiations and represents quite delicate compromises.

(d) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.2

United States of America: proposal regarding article 25

[Original: English]
[16 June 1998]

In addition to other forms of responsibility for crimes under this Statute,

(a) A commander is criminally responsible for crimes under this Statute committed by forces under his or her command and effective control as a result of the commander's failure to exercise properly this control where:

- (i) The commander either knew or, owing to the circumstances at the time, should have known, that the forces were committing or intending to commit such crimes; and
- (ii) The commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof];
- (b) A civilian superior is criminally responsible for crimes under this Statute committed by subordinates under his or her authority where:
 - (i) The superior knew that the subordinates were committing or intending to commit a crime or crimes under this Statute;
 - (ii) The crimes concerned activities that were within the official responsibility of the superior;
 - (iii) The superior had the ability to prevent or repress the crime or crimes; and
 - (iv) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission.

DOCUMENT A/CONF.183/C.1/L.3

France: proposal regarding article 23

[Original: English and French]
[16 June 1998]

Individual criminal responsibility

Legal persons

Paragraphs 5 and 6 (criminal organizations)

[5. When the crime was committed by a natural person on behalf of or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.

6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in article 76, and the relevant provision of articles 73 and 79 are applicable.

In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State Party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it.]

[Article 76

Penalties applicable to criminal organizations

A criminal organization shall incur one or more of the following penalties.

⁷⁶ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.119. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

- (i) Fines;
- (ii) (Deleted)
- (iii) (Deleted)
- (iv) (Deleted)
- (v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
- [(vi) Appropriate forms of reparation].]

DOCUMENT A/CONF.183/C.1/WGGP/L.2

United States of America: proposal regarding a single provision covering issues currently governed by articles 31 to 34

[Original: English]
[16 June 1998]

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:⁷⁷

(a) [Retain current text of article 31, paragraph 1 (a)];

(b) The person acts reasonably to defend himself or herself or another person or property against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or property protected;

(c) The person was a member of forces acting pursuant to the order of a Government or of a military commander, unless the person knew the order to be unlawful or that the order was manifestly unlawful.⁷⁸

2. The Court may determine the applicability of the grounds for exclusion of criminal responsibility permitted by this Statute [to the case before it].

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 20. The procedures relating to the assertion and application of such ground shall be provided for in the Rules of Procedure and Evidence.⁷⁹

DOCUMENT A/CONF.183/C.1/WGGP/L.10

Letter dated 2 July 1998 from Arab delegations to the Chairman of the Working Group on General Principles of Criminal Law

[Original: Arabic]
[2 July 1998]

The Arab delegations which have signed the present letter have the honour to inform you that, in document A/CONF.183/C.1/WGGP/L.4/Add.1, adopted on 2 July 1998, the Arabic version of article 31, paragraph 1 (c), differs from the English version.

Since the Arab delegations approved the above text in the form in which it appears in the document in Arabic, they would be grateful if you could kindly resubmit the paragraph in question for reconsideration so that it can be approved in a new Arabic version which takes account of all the changes which have been made and is in conformity with the English version.

**LIST OF ARAB DELEGATIONS WHICH SIGNED THE LETTER
RELATING TO DOCUMENT A/CONF.183/C.1/WGGP/L.4/ADD.1
DATED 2 JULY 1998**

Syrian Arab Republic
(Signed)

Republic of Yemen
(Signed)

Republic of Iraq
(Signed)

Sultanate of Oman
(Signed)

Libyan Arab Jamahiriya
(Signed)

State of Qatar
(Signed)

Kingdom of Saudi Arabia
(Signed)

Kingdom of Morocco
(Signed)

People's Democratic Republic of Algeria
(Signed)

United Arab Emirates
(Signed)

Republic of the Sudan
(Signed)

State of Kuwait
(Signed)

Arab Republic of Egypt
(Signed)

⁷⁷ The text of current article 31, paragraphs 1 (b), (d) and (e) and article 33 would be deleted.

⁷⁸ This paragraph is derived from the text of current article 32.

⁷⁹ This paragraph is derived from the text of current article 34.

DOCUMENT A/CONF.183/C.1/WGP/L.4

Mexico: proposal regarding article 21 bis or article 74 bis

[Original: English]
[1 July 1998]

Article 21 bis
Nullum crimen sine lege

or

Article 74 bis
Sentencing

No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in this Statute and is applicable to the crime in question.

5. Part 4. Composition and administration of the Court

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.31/REV.1

[incorporating documents A/CONF.183/C.1/L.31/Rev.1/Add.1 and
Add.1/Corr.1 of 1 July 1998]

**Coordinator's rolling text on cluster 1 of part 4
(articles 35 (b), 36, 37 and 40)**

[Original: English]
[30 June 1998]

Article 35
Organs of the Court

...

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

...

Article 36⁸⁰
Judges serving on a full-time basis

All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected. The Presidency may, in consultation with the

members of the Court, decide from time to time, on the basis of the workload of the Court, to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50.

Article 37

Qualification, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be:

Option 1:

17 judges of the Court.

Option 2:

19 judges of the Court.

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

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

(c) (i) Once a proposal for an increase in the number of judges is adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 7 and article 38, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges on the Court, provided that in no case may the proposal be to reduce the number of judges below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges on the Court shall be progressively decreased as the terms of

⁸⁰ This article was recognized to have a close connection with the independence of the judges (article 41) and the financial arrangements for salaries, allowances and expenses (article 50).

office of serving judges expire, until the necessary number has been reached.

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

(b) Every candidate for election to the Court shall:

Option 1:

- (i) Have established competence in the field of criminal law and procedure or in relevant areas of international law such as international humanitarian law and the law of human rights;
- (ii) Have extensive experience, which may be as judge, prosecutor or advocate or in some other professional capacity of relevance to the judicial work of the Court;

Option 2:

- (i) Have established competence in criminal law and procedure, and extensive trial experience as judge, prosecutor or advocate; or
- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of the Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b)

Option 1:

Each State Party may put forward one candidate for any given election

Option a: Who need not necessarily possess its own nationality.

Option b: Who need not necessarily possess its own nationality but shall in any case be a national of a State Party.

Option 2:

Each State Party may put forward for election one candidate who possesses the qualifications referred to in paragraph 3 (b) (i) and one candidate who possesses the qualifications referred to in paragraph 3 (b) (ii). The candidates need not necessarily possess the nationality of that State.

- (c) (i) The Assembly of States Parties may establish an Advisory Committee. The Committee's composition and rules of procedure shall be laid down by the Assembly of States Parties;
- (ii) The States Parties members of the Advisory Committee are encouraged to designate as their representative a senior judicial figure, preferably from within its criminal justice system;
- (iii) No later than two months before any election to the Court, the members of the Advisory Committee shall be informed of all nominations received under subparagraph (a) together with the supporting documentation referred to in that subparagraph. The Committee shall within the following thirty days communicate to the States Parties, through the Registrar, its observations on the list of candidates. The Committee may for this purpose seek supplementary information from any nominated candidate;
- (iv) In making its observations under subparagraph (iii), the Advisory Committee shall take into account, in addition to the terms of paragraphs 3, 4 (b), 6 and 7, the requirement that the trial and pre-trial functions of the Court shall be carried out by judges with the necessary practical and professional experience.

Additional paragraph:

4 bis. For the purpose of the election there shall be two lists of candidates: one containing the names of candidates with qualifications in the field of criminal law and procedure and one containing the names of candidates with qualifications in relevant areas of international law. [12] [13] judges shall be elected from the first list, and [5] [6] judges shall be elected from the second.

5. (a) The judges of the Court shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article [...]. The [17] [19]

candidates receiving the highest number of votes shall be declared elected, subject to the proviso that no candidate shall be considered elected who has not received the votes of two thirds of the States Parties present and voting and subject also to paragraph 6.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

6. No two judges may be nationals of the same State. A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which that person ordinarily exercises civil and political rights.

7. The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (a) (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical distribution; and
- (iii) A balance of female and male judges.

(b) States Parties shall also take into account the need to include judges with expertise on issues related to sexual and gender violence, violence against children and other similar matters.

8. (a) Judges shall hold office for a term of nine years and, subject to subparagraph (b) and to article 38, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges [on each of the lists referred to in paragraph 4 bis] elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

9. Notwithstanding paragraph 8, a judge assigned to a Trial or Appeals Chamber as specified in article 40 shall continue in office to complete any trial or appeal the hearing of which has already begun before that Chamber.

*Article 40
Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35. The Appeals Division shall be composed of the President and

Option 1:

four other judges,

Option 2:

six other judges,

the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law.⁸¹

2. (a) The judicial business of the Court shall be carried out in each division by Chambers.

- (b) (i) The Appeals Chamber shall be composed of all of the judges of the Appeals Division;
- (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
- (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division as set out in the Rules of Procedure and Evidence;
- (iv) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter for the completion of any case the hearing of which has already commenced in the division concerned. Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges of the Appeals Division shall serve in that division alone. Nothing in this article shall however preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient conduct of the Court's workload so requires, provided that in no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

⁸¹ Several delegations wished that the Trial and Pre-Trial Divisions should be composed predominantly of judges with criminal trial experience.

(ii) Recommendation/Report

DOCUMENT A/CONF.183/C.1/L.45

[incorporating documents A/CONF.183/C.1/L.45/Corr.1 and 2 of 6 July 1998, Corr.3 of 9 July 1998 and Add.1 of 7 July 1998, Add.2 of 9 July 1998 and Add.2/Corr.1 of 10 July 1998 and Add.3 of 11 July 1998]

Recommendations of the Coordinator

*[Original: English]
[4 July 1998]*

I. Introduction

1. At its 14th and 15th meetings, on 24 June 1998, the Committee of the Whole considered part 4 entitled "Composition and administration of the Court" and entrusted Mr. Medard R. Rwelamira (South Africa) with the task of coordinating informal consultations on the following articles of part 4:

PART 4. COMPOSITION and ADMINISTRATION OF THE COURT

Article 35. Organs of the Court (subparagraph (b))

Article 36. Judges serving on a full-time basis

Article 37. Qualification and election of judges

Article 38. Judicial vacancies

Article 39. The Presidency (paragraphs 3 and 4)

Article 40. Chambers

Article 42. Excusing and disqualification of judges

Article 43. The Office of the Prosecutor

Article 44. The Registry

Article 45. Staff (paragraphs 3 and 4)

Article 47. Removal from office

Article 48. Disciplinary measures

Article 49. Privileges and immunities

Article 51. Working languages

Article 52. Rules of Procedure and Evidence

Article 53. Regulations of the Court

2. As a result of the informal consultations, the Coordinator for part 4 submits to the Committee of the Whole the following articles for its consideration: article 35 (b); article 36; article 37, paragraphs 2, 3 (a) and (c), 5, 6, 8 and 9; article 38; article 39, paragraphs 3 and 4; article 40, paragraphs 2 to 4; article 42; article 43, paragraphs 1 and 3 to 9; article 44; article 45, paragraph 3; article 47; article 48; article 49, paragraphs 2 to 5; article 51; article 52, paragraphs 2 and 4; and article 53.

3. As a result of further informal consultations, the Coordinator for part 4 herewith submits to the Committee of the Whole the following articles for its consideration: article 43, paragraph 2; article 45, paragraph 4; and article 52, paragraphs 1, 3 and 4 bis.

4. As a result of still further informal consultations, the Coordinator for part 4 herewith submits to the Committee of the Whole the following articles for its consideration: article 37, paragraphs 1, 3 (b), 4, 4 bis and 7; and article 40, paragraph 1.

5. As a result of yet further informal consultations, the Coordinator for part 4 submits to the Committee of the Whole the following article for its consideration: article 49, paragraph 1.

6. The Coordinator has thereby concluded his informal consultations on part 4.

II. Text of draft articles

Article 35

Organs of the Court

...

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

...

Article 36⁸⁰

Judges serving on a full-time basis

All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected. The Presidency may, in consultation with the members of the Court, decide from time to time, on the basis of the workload of the Court, to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50.

Article 37

Qualification, nomination and election of judges

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

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

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

- (c) (i) Once a proposal for an increase in the number of judges is adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 7 and article 38, paragraph 2;
- (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges on the Court, provided that in no case may the proposal be to reduce the number of judges below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges on the Court shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached;

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

- (b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of the Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily possess its own nationality but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be laid down by the Assembly of States Parties.

4 bis. For the purpose of the election there shall be two lists of candidates: list A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and list B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii). A candidate with sufficient qualifications may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

5. (a) The judges of the Court shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article [...]. The 18 candidates receiving the highest number of votes shall be declared elected, subject to the proviso that no candidate shall be considered elected who has not received the votes of two thirds of the States Parties present and voting and subject also to paragraph 6.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

6. No two judges may be nationals of the same State. A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which that person ordinarily exercises civil and political rights.

7. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(b) States Parties shall take into account the need to include judges with legal expertise on specific issues, including but not limited to, violence against women or children.

8. (a) Judges shall hold office for a term of nine years and, subject to subparagraph (b) and to article 38, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges [on each of the lists referred to in paragraph 4 bis] elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

9. Notwithstanding paragraph 8, a judge assigned to a Trial or Appeals Chamber as specified in article 40 shall continue in office to complete any trial or appeal the hearing of which has already begun before that Chamber.

*Article 38
Judicial vacancies*

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 37.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and, if that period is less than three years, is eligible for re-election for a further term.

*Article 39
The Presidency*

...

3. The President and the First and Second Vice-Presidents shall constitute the Presidency, which shall be responsible for:

(a) The due administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred on it by this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

*Article 40
Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35. The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and

procedure and in international law. The Trial and Pre-Trial Divisions⁸² shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial business of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all of the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division as set out in the Rules of Procedure and Evidence;

(iv) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter for the completion of any case the hearing of which has already commenced in the division concerned.

Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges of the Appeals Division shall serve in that division alone. Nothing in this article shall however preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient conduct of the Court's workload so requires, provided that in no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

*Article 42
Excusing and disqualification of judges*

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. Judges shall not participate in any case in which their impartiality might reasonably be doubted on any ground. A judge shall be excluded from a case in accordance with this paragraph if, inter alia, he or she previously has been involved

⁸² Some delegations expressed the view that the predominance of judges with criminal trial experience should be reflected in the composition of the Chambers.

in any capacity in that case before the Court or in a related criminal case involving the accused at the national level. A judge may also be excluded on such other grounds for disqualification as provided in the Rules of Procedure and Evidence.⁸³

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges of the Court. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [...],⁸⁴ for examining them and for conducting investigations and prosecutions before the Court. A member of the Office of the Prosecutor shall not seek or act on instructions from any external source.

2. The Office of the Prosecutor shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution [or trial]⁸⁵ of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each Deputy Prosecutor position to be filled. Unless a shorter term is otherwise decided on at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and not be eligible for re-election.

5. The Prosecutor and the Deputy Prosecutor shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at his or her request from acting in a particular case.

7. Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be excluded from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level.⁸⁶

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber. The accused may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this paragraph. The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

10. (Deleted)

Article 44

The Registry

1. Subject to article 43, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.

2. The judges shall by an absolute majority by secret ballot elect a Registrar, who, under the authority of the President of the Court,⁸⁷ shall be the principal administrative officer of the Court. They shall take into account any recommendation by the Assembly of States Parties. They may in the same manner,

⁸³ Some delegations were of the view that "nationality grounds" should be included in the Rules of Procedure and Evidence (i.e. a national of a complainant State, of the State on whose territory the offence is alleged to have been committed or of a State of which the accused is a national). Other delegations were opposed to the inclusion of nationality grounds. The view was also expressed that the first sentence in this paragraph was sufficient, and that the grounds in the Rules of Procedure and Evidence should not be exhaustive.

⁸⁴ The options contained in the draft Statute in this place refer to the questions of trigger mechanism. They will be re-examined in the light of the outcome of discussions on these issues.

⁸⁵ There was an emerging consensus among the delegations present at the informal meeting that trial experience - whether as a judge or as a defence counsel - should be also considered as practical experience for the purposes of this article and that the brackets should be dropped. However, as the proposing delegation was not present, the brackets were kept for the time being.

⁸⁶ Further grounds for disqualifications might be set out in the Rules of Procedure and Evidence.

⁸⁷ It was decided that this was the proper place for such language and that the corresponding provision in article 39 should be dropped.

upon the recommendation of the Registrar, elect a Deputy Registrar, if the need arises.⁸⁸

3. The Registrar shall hold office for a term of five years, is eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar is willing to serve as required. The Registrar and the Deputy Registrar shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and for others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.⁸⁹

Article 45
Staff

...

3. The Staff Regulations, including the terms and conditions upon which the staff of the Court shall be appointed, remunerated or dismissed shall be proposed by the Registrar with the agreement of the Presidency and Prosecutor. Such Staff Regulations and terms and conditions shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer for the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.⁹⁰

Article 47
*Removal from office*⁹¹

1. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who is found to have committed serious

misconduct or a serious breach of his or her duties under this Statute, as provided in the Rules of Procedure and Evidence, or to be unable to exercise the functions required by this Statute, shall cease to hold office if a decision to this effect is made in accordance with paragraph 2.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties further to a recommendation adopted by a two-thirds majority of the other judges of the Court;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of States Parties upon the recommendation of the Prosecutor;

(d) In the case of the Registrar or Deputy Registrar, by an absolute majority of the judges.

3. The judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability otherwise to hold office is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence, but shall not otherwise participate in the consideration of the matter.

Article 48
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 47, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 49
*Privileges and Immunities*⁹²

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.⁹³

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged in, or with respect to, the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their term of office, continue to be accorded immunity from legal process of every kind in respect of words

⁸⁸ Some delegations felt that the Registrar should appoint his own Deputy, but this concern might now be addressed by the insertion of the requirement of a recommendation.

⁸⁹ The language of this paragraph should be brought in line with that of article 68, paragraph 5.

⁹⁰ Some delegations suggested that this paragraph should take into account the discussion on article 105, dealing with the funding of the Court.

⁹¹ The view was expressed that a provision dealing with resignation should be contained in either the Rules of Procedure and Evidence or the Regulations of the Court.

⁹² A reference may need to be included in article 86, paragraph 4, concerning the relevant privileges and immunities to be accorded by non-states Parties.

⁹³ This paragraph is based on the assumption that the question of a Privileges and Immunities Agreement will be dealt with in the Final Act and that such Agreement will thus be drafted by the Preparatory Commission.

spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions,⁹⁴ in accordance with the Rules of Procedure and Evidence.⁹⁵

4. Counsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the Rules of Procedure and Evidence.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 51

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court as well as intermediary decisions resolving fundamental issues before the Court shall be published in the official languages. The Presidency shall, in accordance with the criteria to be established by the Rules of Procedure and Evidence, determine which intermediary decisions may be considered fundamental for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. The Court shall, at the request of any party to a proceeding or a State allowed to intervene in a proceeding, authorize a language other than English or French to be used by such party or State, provided that the Court considers such authorization to be adequately justified.

⁹⁴ This should include, inter alia, immunity from personal arrest and detention and, in respect of words spoken or written and acts performed by them in their official capacity, immunity from legal process of every kind. Immunity from legal process should continue to be accorded notwithstanding that the persons concerned are no longer discharging their official functions.

⁹⁵ The question of the instrument in which the privileges and immunities will be specified is still under discussion.

Article 52

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall come into force upon adoption by a two-thirds majority of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

They shall enter into force upon adoption by a two-thirds majority of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the court, the judges may, by two-thirds majority, draw up Rules to be applied provisionally until adopted, amended or rejected, at the next ordinary or special meeting of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto or any provisional rule, shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules adopted in accordance with paragraph 3 shall not be applied retroactively to the detriment of the person who is being investigated, prosecuted or who has been convicted.

4 bis. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.⁹⁶

Article 53

Regulations of the Court

1. As far as provided in this Statute or the Rules of Procedure and Evidence or otherwise necessary for the routine functioning of the Court, the judges shall by an absolute majority adopt the Regulations of the Court. The Regulations of the Court shall be consistent with the Statute and the Rules of Procedure and Evidence.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect immediately upon adoption by the judges unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments and if within six months there are no objections from a majority of States Parties, they shall remain in force.⁹⁷

⁹⁶ It was suggested that the essence of this paragraph could be included in paragraph 4, in which case this paragraph would fall away. Some delegates also expressed the wish to point out, possibly in the Final Act, the need to ensure that the Rules will be adopted before the Court begins to operate.

⁹⁷ It may be necessary to consider the relevant provisions under article 108 dealing with the settlement of disputes.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding articles 37, 43, 44 and 49 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 37

Qualification, nomination and election of judges

Article 43

The Office of the Prosecutor

Article 44

The Registry

Article 49

Privileges and immunities

NOTE

Understandings of the Committee of the Whole with respect to part 4:

With respect to article 43, paragraph 1, the blanks within square brackets will be examined in the light of the outcome of discussions on the question of trigger mechanism.

The bracketed text in article 43, paragraph 3, will be examined in light of the formulation of article 37, paragraph 3 (b).

The blanks in square brackets in article 37, paragraphs 2 (b) and 5 (a), refer to article 102 on the Assembly of States Parties.

With respect to article 44, the language of paragraph 4 should be brought in line with that of article 68, paragraph 5.

With respect to article 49, it is understood that the question of the instrument in which privileges and immunities will be specified is still under discussion.

Note regarding article 52 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 52

Rules of Procedure and Evidence

NOTE

Understanding of the Committee of the Whole with respect to part 4:

The essence of article 52, paragraph 4 bis, could be included in paragraph 4.

Note regarding article 37 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10 July 1998⁹⁹

Article 37

Qualification, nomination and election of judges

NOTE

Understandings of the Committee of the Whole with respect to part 4:

The opening clause of article 37, paragraph 1, provides for 18 judges. Consequently, paragraph 5 (a), of the same article should be amended.

In light of the text of article 37, paragraph 4 bis, the phrase within square brackets in paragraph 8 (b) of the same article should be deleted.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]

[23 June 1998]

Proposals relating to official and working languages

A. Word article 51 as follows:

⁹⁸ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.87. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

⁹⁹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.145 and Corr.1. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

1 The official languages of the Court shall be those of the United Nations: Arabic, Chinese, English, French, Russian and Spanish.

2 The working languages of the Court shall be English and French, subject to what the Regulations of the Court may determine. The Regulations of the Court shall determine the cases in which another official language or other official languages may be used as working languages.

3 In all cases, the right of a person under investigation to be interrogated and to express himself or herself in his or her own language, without charge whatsoever to that person, shall be preserved.

4 The Court shall authorize parties or interveners, at the request of any one of them, to use a language other than English or French.

5 The decisions of the Court terminating proceedings and, in every case, the judgements of the Court shall be published in the official languages of the United Nations.

B. Amendment to article 102 (Assembly of States Parties).

Add the following paragraph:

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

C. Amendment to the annex (Resolution of the Diplomatic Conference relating to the establishment of a Preparatory Commission)

Add the following paragraph:

3 bis. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations.

DOCUMENT A/CONF.183/C.1/L.19

Japan: proposal regarding article 49

[Original: English]
[25 June 1998]

Privileges and immunities

Paragraph 2

Amend the paragraph to read:

The Registrar, the Deputy Registrar and the staff of the Office of the Prosecutor and the Registry shall enjoy such privileges and immunities as are accorded to officials of the United Nations under article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

DOCUMENT A/CONF.183/C.1/L.21

United Arab Emirates: proposal for the simplification of the text of article 47

[Original: Arabic]
[25 June 1998]

Removal from office

Paragraph 1

Delete the phrases between brackets and replace them by the words "and its annexes".

Paragraph 2

Replace the entire paragraph by the following:

"A decision as to the loss of office under paragraph 1 shall be made by secret ballot by the same authority and in the same manner as was employed to fill the office."

DOCUMENT A/CONF.183/C.1/L.24

Switzerland: proposal regarding article 37 (Qualification and election of judges), article 110 (Amendments), and article 111 (Review of the Statute)

[Original: English]
[29 June 1998]

Replace article 37, paragraph 2, and articles 110 and 111 of the draft of the Preparatory Committee by the following:

*Article 110
Amendments*

1. Any State Party may propose amendments to the present Statute. Amendment proposals shall be submitted to the depositary, who shall promptly notify all States Parties of them. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a special Review Conference if the issue involved so warrants.

2. The adoption of an amendment at a meeting of the Assembly of States Parties shall require a majority of three quarters of the States Parties present and voting, representing an absolute majority of all States Parties.

3. When adopting an amendment, the Assembly of States Parties shall decide whether the amendment shall enter into force for all States Parties once it has been accepted by [five sixths] of them or whether it shall enter into force only with regard to States Parties which have accepted it. In the latter case, the Assembly may also specify how many States Parties must have accepted the amendment before it enters into force for any of them.

4. If an amendment enters into force for all States Parties, any State Party which has not accepted it may withdraw from the Statute with immediate effect, notwithstanding paragraph 1 of article 115, by giving notice no later than one year after the entry into force of such amendment.

Article 111

Amendments to provisions of an institutional nature

1. Amendments to provisions of an exclusively institutional nature of the present Statute [or enumeration of the relevant provisions] may be proposed by any State Party or by the President of the Court acting on behalf of the latter. Proposals falling under the present paragraph shall be processed in accordance with article 110, paragraph 1.

2. Amendments under the present article shall be adopted by a majority of [three quarters] of the States Parties present and voting. They shall enter into force for all States Parties [six] months after their adoption by the Assembly of States Parties.

[3. Disputes on the interpretation or application of the present article shall be settled by the International Court of Justice upon the request of any State Party.]

DOCUMENT A/CONF.183/C.1/L.42

**Ukraine: proposed amendment to article 37, paragraph 7,
as reproduced in document
A/CONF.183/C.1/L.31/Rev.1/Add.1**

[Original: Russian]
[3 July 1998]

Article 37

Qualification and election of judges

Paragraph 7

7. The States Parties shall, in the election¹⁰⁰ of judges, take into account the need, within the membership of the Court, for:

- (a) (i) ...
- (ii) Equitable representation of each geographical group, as defined by the General Assembly of the United Nations;¹⁰¹
- (iii) ...
- (b) ...

¹⁰⁰ It is important to stipulate equitable geographical representation at the stage when judges are being elected, and not when candidates are put forward or at other stages in advance of the elections.

¹⁰¹ Specific quantitative criteria to give expression to the principle of equitable geographical representation should in this case be determined in a special resolution to be adopted by the Conference.

DOCUMENT A/CONF.183/C.1/L.43

Republic of Congo and Niger: proposal regarding article 44

[Original: English and French]
[3 July 1998]

The Registry

Paragraph 4

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. The Unit shall act in accordance with article 68. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

6. Part 5. Investigation and prosecution

**(a) Documents of the Working Group on
Procedural Matters**

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGPM/L.1

Working paper on article 54

[Original: English]
[18 June 1998]

Article 54

Initiation of an investigation

1. The Prosecutor shall initiate an investigation upon ...,¹⁰² unless he or she determines there is no reasonable basis for a prosecution under this Statute. In making such a determination, the Prosecutor shall consider whether:

¹⁰² This draft does not attempt to prejudge the resolution of the number of proposals to be considered by the Committee of the Whole regarding the starting point for the Prosecutor's investigative authority. These include, among others, referrals by States, referrals by the Security Council, *proprio motu* authority and *proprio motu* authority subject to approval by the Pre-Trial Chamber. In the event the last proposal is among those accepted, the text might read "... shall initiate an investigation upon ... or shall seek the approval of the Pre-Trial Chamber to initiate an investigation in a case under article 13, unless ..."

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

[(c) A prosecution under this Statute would be in the interests of justice, taking into account the interests of victims; and]

[(d) An investigation would be consistent with the terms of any Security Council decision].

[2. RESERVED.¹⁰³]

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

[(c) A prosecution is not in the interests of justice, having taken into account the interests of victims,]

he or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1] of his or her decision and the reasons for the decision. [At the request of such State [or the Security Council], the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or this paragraph and may request the Prosecutor to reconsider that decision. [In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed based solely on paragraph 1 (c) or 3 (c), in which case the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.]]

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 bis

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor may:

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect and examine evidence;

(c) Seek the cooperation of any State or intergovernmental organization [or, subject to its mandate, any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

(d) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization, or person;

(e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take the necessary measures to ensure the confidentiality of information or the protection of any person.

[1 bis. The Prosecutor may conduct investigations on the territory of a State.

(a) In accordance with the provisions set forth in part 9;¹⁰⁴ or

(b) As authorized by the Pre-Trial Chamber under article 57 (x).]¹⁰⁵

2. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate equally incriminating and exonerating circumstances;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, shall respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute and the Rules of Procedure and Evidence.

¹⁰³ This paragraph would address the issues of whether and to whom the Prosecutor should give notice of there being a potential basis for an investigation, and whether and the extent to which he or she should defer initiating an investigation pending responses by States regarding their own investigative activity and possible intent to seek rulings on admissibility. However, these issues are closely related to the questions of the trigger mechanism, the *proprio motu* powers of the Prosecutor and procedures regarding admissibility which arise under articles 15 to 17. Therefore, it is recommended that the Working Group reserve the treatment of these matters until the larger issues are resolved in the Committee of the Whole.

¹⁰⁴ Two issues arise in the text of article 54 regarding investigations on the territory of a State which are better addressed in the context of cooperation of States under article 90. The first is whether the consent of a State is required for such investigations, and the second is whether notice to the State is sufficient for the Prosecutor to conduct such an investigation.

¹⁰⁵ See the proposed amendment to article 57, set forth below.

Article 54 ter

Rights of suspects and other persons during an investigation

1. A person in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under part 9, shall have the right:

(a) Prior to being questioned, to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and of the rights under subparagraphs (b) to (d) hereinafter;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing [, or to have legal assistance assigned by the Court where the interests of justice so require and the person lacks sufficient means to pay for such assistance, and legal assistance has not otherwise been provided by national authorities]; and

[(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.]

2. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

Provisions to be moved to article 57

1. In lieu of the current article 54, paragraph 5, article 57, paragraph 2, would be amended to add the following subparagraph:

"(f) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation."

2. Add to article 57 a procedure by which the Pre-Trial Chamber authorizes the Prosecutor to conduct investigations within the territory of a State outside the cooperative framework of part 9, which might appear as follows:

"The Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a State without having secured the cooperation of that State under part 9 if, having regard whenever possible to the views of the State concerned, it has determined that it is manifestly apparent that the State is unable to execute a request for cooperation due to the total or partial collapse or unavailability of its national judicial system."

If such a provision is incorporated, issues of enforcement will have to be addressed.

3. In lieu of the current article 54, paragraph 13, add to article 57 a provision as follows:

"Upon the request of a person who has been arrested or appeared pursuant to a summons under article 58, the Pre-Trial Chamber may issue such orders or seek cooperation pursuant to part 9 as may be necessary to assist the person in the preparation of his or her defence."

DOCUMENT A/CONF.183/C.1/WGPM/L.5

[incorporating document A/CONF.183/C.1/WGPM/L.5/Corr.1 of 9 July 1998]

Working paper on article 59

*[Original: English]
[24 June 1998]*

Arrest

Paragraph 3

3. The person arrested shall have the right to apply to the competent judicial authority in the custodial State for interim release pending surrender. In reaching a decision on any such application, the authorities in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. In determining an application for interim release, it shall not be open to the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraphs 1 (a) and (b). The Pre-Trial Chamber shall be notified of any requests for interim release and shall make recommendations to the national authorities. The competent judicial authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

DOCUMENT A/CONF.183/C.1/WGPM/L.6

Working paper on article 54 ter

[Original: English]
[24 June 1998]

Investigation of alleged crimes

Paragraph 1 (c)

1. (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.

Footnote to paragraph 2

Some delegations proposed that a provision be inserted into the Rules of Procedure of Evidence granting a person being questioned the opportunity to be medically examined.

DOCUMENT A/CONF.183/C.1/WGPM/L.7

[incorporating document A/CONF.183/C.1/WGPM/L.7/Corr.1 of 9 July 1998]

Working paper on article 58

[Original: English]
[24 June 1998]

*Issuance by the Pre-Trial Chamber of an arrest warrant
or a summons to appear*

Paragraph 6

6. As an alternative to seeking a warrant of arrest, the prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person's appearance,¹⁰⁶ it shall issue the summons, with or without conditions, for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

¹⁰⁶ Some delegations stated that the provision should not be considered to give the Pre-Trial Chamber the power to issue an arrest warrant instead of a summons as applied for by the Prosecutor when it finds a summons insufficient to ensure the presence of the person.

DOCUMENT A/CONF.183/C.1/WGPM/L.9

[incorporating document A/CONF.183/C.1/WGPM/L.9/Corr.1 of 9 July 1998]

Working paper on article 61

[Original: English]
[24 June 1998]

Confirmation of the charges before trial

Paragraph 3

Add the following sentence:

"In case of a withdrawal of proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal."

DOCUMENT A/CONF.183/C.1/WGPM/L.10

[incorporating document A/CONF.183/C.1/WGPM/L.10/Corr.1 of 9 July 1998]

Working paper on article 54 bis

[Original: English]
[24 June 1998]

*Duties and powers of the Prosecutor with respect to
investigations*

Paragraph 1 (f)

(f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information or the protection of any person or the preservation of evidence;

DOCUMENT A/CONF.183/C.1/WGPM/L.38/REV.1

[incorporating documents A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1 and 2 of 7 and 8 July 1998]

**Working paper: new draft proposal for articles 57
and 57 bis**

[Original: English]
[4 July 1998]

Article 57

*Role of the Pre-Trial Chamber in relation to a unique
investigative opportunity*

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall inform the Pre-Trial Chamber and the Pre-Trial Chamber may, upon request of the Prosecutor [or on its own motion],¹⁰⁷ take such measures as may be necessary to ensure

¹⁰⁷ If this bracketed text is retained, paragraph 3 may not be required.

the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(b) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall also inform the person who has been arrested or appeared in response to a summons in connection with the investigation, in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (a) may include the power to:

(a) Make recommendations or orders, in its discretion, regarding procedures to be followed;

(b) Direct that a record be made of the proceedings;

(c) Appoint an expert to assist;

(d) Authorize counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appoint a lawyer to attend and represent the interests of the defence;

(e) Name one of its members or, if necessary, an available judge of the Court, to observe and make recommendations or orders, in its discretion, regarding the collection and preservation of evidence and the questioning of persons;

(f) Take such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures under paragraph 2, but the Pre-Trial Chamber is of the view that such measures are required to preserve evidence it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may act on its own initiative.

(b) A decision of the Pre-Trial Chamber may act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.¹⁰⁸

4. Evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be admitted at trial in accordance with article 69, and given such weight as determined by the Trial Chamber.¹⁰⁹

¹⁰⁸ A decision of the Pre-Trial Chamber to act on its own initiative would become a ground for appeal under article 81, paragraph 1. The provision might appear as follows: "(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3."

¹⁰⁹ From Chairman's text on article 63.

NB: The ability of the arrested or summoned person to use this article would be provided for in article 57 bis, paragraph 3 (b).

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for by this Statute, functions of the Pre-Trial Chamber shall be exercised in accordance with the provisions of this article.¹¹⁰

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis, paragraph 1 bis],¹¹¹ 61, paragraph 6 [and 71] must be concurred in by a majority of its judges.¹¹²

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for under this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders (including measures such as those described in article 57, paragraph 2), or seek such cooperation pursuant to part 9, as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under part 9 if, whenever possible, having regard to the views of the State concerned, it had determined in that case that the State is clearly

¹¹⁰ To assist the reader, a list of potential functions to be exercised by the Pre-Trial Chamber has been issued as a discussion paper in document A/CONF.183/C.1/WGPM/L.40 in the present volume.

¹¹¹ This citation refers to the text of the working paper on article 54 set forth in A/CONF.183/C.1/WGPM/L.1 in the present volume.

¹¹² References in this text to the potential functions conferred on the Pre-Trial Chamber in articles 13, 16, 54 bis, paragraph 1 (b), are without prejudice to the separate discussion regarding the merits of those articles. Should these provisions (or a number of other functions also remaining in brackets; see discussion paper A/CONF.183/C.1/WGPM/L.40) ultimately not be included in the Statute, the text of this subparagraph would have to be adjusted accordingly.

unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under part 9.¹¹³

(e) Having regard to the strength of the evidence, seek the cooperation of States pursuant to article 90 for the purpose of taking protective measures, strictly necessary to preserve the possibility for the Court to order reparations to, or in respect of, victims, in accordance with article 73.¹¹⁴

DOCUMENT A/CONF.183/C.1/WGPM/L.40

Discussion paper: functions of the Pre-Trial Chamber

[Original: English]
[1 July 1998]

NOTE. The following potential functions are listed in the approximate order in which they might be exercised during the course of the Court's proceedings. Where agreement has not been reached in the Statute on whether the Pre-Trial Chamber should be provided with a particular power, this has been reflected through the use of square brackets. No effort has been made in this paper to resolve these substantive issues.

1. Determination of challenges to the jurisdiction of the Court or the admissibility of the case prior to the confirmation of the charges. Articles [16], 17, paragraph 5 and 87, paragraph 5.
- [2. Authorization of an ex officio investigation upon request of the Prosecutor. Article 13.]
3. Review of a decision by the Prosecutor not to initiate or continue an investigation or prosecution. Article 54, paragraph 8.
4. Issuance of warrants requested by the Prosecutor for the purpose of investigation. Article 54, paragraph 5 [also article 54, paragraph 4 (c), option 2 (iii).]
- [5. Issuance of orders, or requests for State cooperation, on behalf of the defence. Article 54, paragraph 13; see also article 67, paragraph 1, chapeau, and article 67, paragraph 1 (i).]
- [6. Involvement in questions of disclosure of national security information. Article 71, options 2 and 3.]

¹¹³ Some delegations expressed the view that, given the absence of enforcement powers, the Prosecutor would, in most cases contemplated by this article, be unable to act upon the authority conferred by the Pre-Trial Chamber. Other delegations expressed the opposite view. It was, moreover, noted that the draft Statute did not confer any authority for the use of military force.

¹¹⁴ In deciding whether to grant protective measures, the Court will have to take into account the interests and rights of the (unconvicted) person(s) in respect of whose property protective measures are sought. The view was expressed that the proposed text did not provide a clear threshold in relation to these measures. The close connection between this proposal and article 73 was also pointed out.

[7. Approval of on-site investigations where no domestic competent authority is available or functioning. Article 54, paragraph 4 (c), option 2 (i) (b) and (ii).]

[8. Involvement in an investigation in relation to unique opportunities. Article 57.]

9. Issuance of warrants for arrest or summons to appear. Article 58.

[10. Issuance of orders for interim release prior to surrender. Article 59, paragraph 3.]

11. Issuance of orders for interim release after surrender. Article 60, paragraph 2.

[12. Determination of lawfulness of arrest pending surrender. Article 59, paragraph 4.]

13. Review of decisions on detention or release after surrender. Article 60, paragraphs 3 and 4.

14. Informing the person about his or her rights. Article 60, paragraph 1.

[15. Appointing counsel prior to trial. Article 54, paragraph 10 (c); see also article 67, paragraph 1 (d).]

16. Confirmation of the charges before trial and issuance of related orders, including for disclosure or amendment of charges.¹¹⁵ Article 61.

[17. Ordering of provisional measures to preserve the Court's ability to order compensation to victims (references to the Court in article 73 may include the Pre-Trial Chamber;¹¹⁶ see also article 61, footnote 33.)]

18. Exercising functions in connection with cooperation under part 9 (depending on the stage of the proceedings and the functions to be performed, references to the "Court" may include the Pre-Trial Chamber).¹¹⁶

[19. Resolving issues referred to it by the Trial Chamber. Article 64, paragraph 7.]

DOCUMENT A/CONF.183/C.1/WGPM/L.43

[incorporating document A/CONF.183/C.1/WGPM/L.43/Corr.1 of 9 July 1998]

Working paper on article 61

[Original: English]
[4 July 1998]

NOTE: This text should be read with the new version of article 64.¹¹⁷

¹¹⁵ These functions could be taken over by the Trial Chamber following confirmation of the charges.

¹¹⁶ It appears that there is no need to distinguish between the different organs of the Court in this article.

¹¹⁷ See document A/CONF.183/C.1/WGPM/L.41 reproduced under part 6.

Notification of the indictment

Paragraph 9

9. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber¹¹⁸ which, subject to paragraph 7 of this article and to article 64 [paragraph 4], shall be responsible for the conduct of subsequent proceedings and may exercise any functions of the Pre-Trial Chamber that are relevant and capable of application in those proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.64

Working paper on article 57 bis

[Original: English]
[9 July 1998]

Functions and powers of the Pre-Trial Chamber

Paragraph 3 (e)

3. (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (f), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.

DOCUMENT A/CONF.183/C.1/WGPM/L.75

Working paper on article 61

[Original: English and French]
[12 July 1998]

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 1 bis, within a reasonable time after the person's surrender of voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.

1 bis. When:

- (a) The person has waived his right to be present; or
- (b) The person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held,

the Pre-Trial Chamber shall hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In this case, the accused may be represented by a counsel of his or her own choosing or appointed by the Court.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPM/L.2

[incorporating documents A/CONF.183/C.1/WGPM/L.2/Corr.1 and 2 of 29 June and 6 July 1998, and Add.1 of 29 June 1998 and Add.1/Corr.1 of 30 June 1998, Add.2 of 4 July 1998 and Add.2/Corr.1 and 2 of 6 and 9 July 1998, Add.3 of 7 July 1998, Add.4 of 8 July 1998, Add.5 of 9 July 1998 and Add.5/Corr.1 of 11 July 1998, Add.6 of 11 July 1998 and Add.6/Corr.1 of 13 July 1998, Add.7 of 13 July 1998 and Add.7/Corr.1 of 14 July 1998 and Add.8 of 15 July 1998 and Add.8/Corr.1 of 17 July 1998]

Report of the Working Group on Procedural Matters

[Original: English]
[24 June 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Procedural Matters, under the chairmanship of Silvia Fernández de Gurmendi (Argentina), the following articles of parts 5, 6 and 8:

PART 5. INVESTIGATION AND PROSECUTION

Article 54. Investigation of alleged crimes

[Article 55]. Information on national investigations or proceedings

[Article 56]. Deferral of an investigation by the Prosecutor

[Article 57]. Functions of the Pre-Trial Chamber in relation with investigation

Article 58. Commencement of prosecution

Article 59. Arrest

Article 60. Pre-trial detention or release

Article 61. Notification of the indictment

PART 6. THE TRIAL

Article 62. Place of trial

Article 63. Trial in presence of the accused

Article 64. Functions and powers of the Trial Chamber

Article 65. Proceedings on an admission of guilt

Article 66. Presumption of innocence

Article 67. Rights of the accused

¹¹⁸ The drafting of this part of this provision will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial Chamber.

Article 68. Protection of the [accused], victims and witnesses [and their participation in the proceedings]

Article 69. Evidence

Article 70. Offences or acts against the integrity of the Court

[Article 71]. Sensitive national security information

Article 72. Quorum and judgement

[Article 73]. Reparations to victims

Article 74. Sentencing

PART 8. APPEAL AND REVIEW

Article 80. Appeal against judgement or sentence

Article 81. Appeal against interlocutory decision

Article 82. Proceedings on appeal

Article 83. Revision of conviction or sentence

[Article 84]. Compensation to a suspect/accused/convicted person

2. The Working Group on Procedural Matters held eight meetings to consider these articles, from 19 to 24 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 54, paragraphs 1 (a) and (b), paragraphs 3 (a) and (b), paragraph 4; article 54 bis, paragraphs 1 (a), (b), (d) and (f), and paragraph 2; article 54 ter, paragraph 1, paragraphs 2 (a), (b), (c) and (d), paragraph 3; article 58, paragraphs 1 to 4; article 59, paragraphs 1 to 5; article 60, paragraphs 1 to 5; article 61, paragraphs 2 to 8.

3. The Working Group held seven additional meetings to consider the remaining articles, from 25 to 29 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54, paragraph 4; article 54 ter, paragraph 3 (d); article 58, paragraph 6; and article 61, paragraph 6 bis. The Working Group also transmits the following articles of part 6: article 62, paragraph 1; article 65; and article 69, paragraphs 2 to 4, 4 bis, 5, 6 and 8.

4. The Working Group held five additional meetings to consider the remaining articles of parts 5, 6 and 8 from 2 to 4 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54 bis, paragraph 1 (e), and article 61, paragraph 9. The Working Group also transmits the following articles of part 6: articles 64, 66; 67, paragraph 1 (b), (c), (d), (e), (g), (h) and (i); and 74. The Working Group further transmits the following articles of part 8: article 80, paragraphs 1, 2, 4 and 5; and article 81, paragraphs 1 (a) and (b) and 2. The Working Group also notes the deletion of article 80, paragraph 1 (c).

5. The Working Group held four additional meetings to consider the remaining articles of parts 5, 6 and 8, on 6 and 7 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 8 for its consideration: article 82, paragraphs 1 to 3, first subparagraph of paragraph 4, and paragraph 5; and article 83, paragraphs 1 and 3. The Working Group also notes the deletion from part 8 of article 83, paragraphs 1 [(d)] and [(e)], paragraph [2] and paragraph [4].

6. The Working Group held two additional meetings to consider the remaining articles of parts 5, 6 and 8, on 8 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 57; and article 57 bis, paragraphs 1, 2, 3 (a), (b), and (c).

7. The Working Group held two additional meetings, on 9 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following article of part 5 for its consideration: article 54 bis, paragraph 1 (c). The Working Group also transmits the following article of part 6: article 72. The Working Group further notes the deletion of the following article of part 6: article 72, paragraph 4.

8. The Working Group held three additional meetings, on 10 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 57 bis, paragraphs 3 (d) and (e); article 58, paragraph 5; and the complete text of article 60, paragraph 2. The Working Group also transmits the following articles of part 6: article 67, paragraphs 1 (a) and (f) and paragraph 2; article 68, paragraphs 3, 4, 5 and 7; and article 69, paragraphs 1 and 4 ter. The Working Group further transmits the following article of part 8: article 81, paragraph 1 (e). The Working Group also notes the deletion of the following articles of part 6: article 68, paragraphs 8 and 9; and article 69, paragraph 7.

9. The Working Group held one additional meeting, on 13 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54, complete text of chapeau of paragraph 1, paragraph 1 (c), second subparagraph of paragraph 1 (d), paragraph 3 (c) and final subparagraph thereof; and paragraph 5. The Working Group also transmits the following articles of part 6: article 70; article 70 bis.; article 72, paragraph 1, second sentence; and article 73. The Working Group further transmits the following articles of part 8: article 81, paragraph 3; article 82, paragraph 4, last two sentences; and article 84. The Working Group also notes the deletion of the following articles: article 73, paragraphs 7 and 8; and article 81, paragraph 1 (d) bis. The Working Group further notes that articles 55 and 56 are being addressed by the Committee of the Whole in relation to article 16.

10. The Working Group held two additional meetings, on 14 and 15 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54 bis, paragraph 1 bis; and article 61, paragraphs 1 and 1 bis. The Working Group also transmits the following articles of part 6: article 63, paragraphs 1 and 2; article 67, paragraph 1 (d), opening phrase; article 68, paragraphs 1 and 2; article 74, paragraph 4, concluding phrase. The Working Group further transmits the following article of part 8: article 81, paragraphs 1 (f) and 1 bis. The Working Group also notes the deletion of the following articles: article 63, paragraph 3; article 68, paragraph 6; and article 80, paragraph 3.

11. The Working Group also refers to the Committee of the Whole the following pending articles: article 54, paragraphs 1 [(d)] and [2]; article 71 and article 71 bis; and article 83, paragraph 1, chapeau, the phrase "...".

12. The Working Group has thereby concluded its consideration of parts 5, 6 and 8.

II. Text of draft articles

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Initiation of an investigation

The complete text of the chapeau of paragraph 1, previously transmitted to the Committee of the Whole with the phrase "investigation upon ...", reads as follows:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15;

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice;¹¹⁹ and

[(d)] (Pending^{120,121})

If the Prosecutor determines that there is no reasonable basis to proceed and his or her detention is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

[2.] (Pending^{122,121})

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crimes, the interests of victims and the age or infirmity of the alleged perpetrator, and his role in the alleged crime.

He or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1,] of his or her conclusion and the reasons for the conclusion.

3 bis. (a) At the request of the State making a referral under article 11 [or the Security Council under article 10¹²³] the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or 3 of this article and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 3 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

¹¹⁹ Some delegates expressed concern regarding the reference to the interests of justice

¹²⁰ Pending decision on trigger mechanism. The proposed text reads as follows:

"[(d) An investigation would be consistent with the terms of any Security Council decision]."

¹²¹ The Working Group referred this pending provision to the Committee of the Whole.

¹²² Pending decision on trigger mechanism. The proposed text reads as follows:

"2. Before initiating an investigation, the Prosecutor shall notify States in accordance with article 16."

¹²³ Pending a decision on trigger mechanism.

Article 54 bis
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor may:

- (a) Request the presence of and question suspects, victims and witnesses;
- (b) Collect and examine evidence;
- (c) Seek the cooperation of any State or inter-governmental organization or arrangement in accordance with their respective competences and/or mandates.
- (d) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
- (e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;¹²⁴ and
- (f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information or the protection of any person or the preservation of evidence.

1 bis. The Prosecutor may conduct investigations on the territory of a State:

- (a) In accordance with the provisions set forth in part 9; or
- (b) As authorized by the Pre-Trial Chamber under article 57 bis, paragraph 3 (d).

2. The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate equally incriminating and exonerating circumstances;
- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, shall respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children; and

- (c) Fully respect the rights of persons arising under this Statute and the Rules of Procedure and Evidence.

Article 54 ter
Rights of suspects and other persons during an investigation

1. A person in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under part 9, shall have the rights set out in paragraph 2 and shall be informed of those rights prior to being questioned.

2. The rights referred to in paragraph 1 are:

- (a) Prior to being questioned, to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
- (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her by the Court in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.¹²⁵
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

3. In respect of an investigation under this Statute, a person

- (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
- (b) Shall not be subjected to any form of coercion, duress or threat, to torture, or to any form of cruel, inhuman or degrading treatment or punishment; and
- (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.
- (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute and the Rules of Procedure and Evidence.

¹²⁴ Some delegations considered that the information provided for under this subparagraph should take into account the rights of the accused.

¹²⁵ Some delegations proposed that a provision be inserted into the Rules of Procedure and Evidence granting a person being questioned the opportunity to be medically examined.

[Article 55]

*Information on national investigations or proceedings*¹²⁶

[Article 56]

*Deferral of an investigation by the Prosecutor*¹²⁶

Article 57

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber and the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(b) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall also inform the person who has been arrested or appeared in response to a summons in connection with the investigation, in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (a) may include the power to:

(a) Make recommendations or orders, in its discretion, regarding procedures to be followed;

(b) Direct that a record be made of the proceedings;

(c) Appoint an expert to assist;

(d) Authorize counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appoint a lawyer to attend and represent the interests of the defence;

(e) Name one of its members or, if necessary, an available judge of the Court, to observe and make recommendations or orders, in its discretion, regarding the collection and preservation of evidence and the questioning of persons;

(f) Take such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures under paragraph 2, but the Pre-Trial Chamber is of the view that such measures are required to preserve evidence it deems would

be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may act on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for by this Statute, functions of the Pre-Trial Chamber shall be exercised in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis, paragraph 1 bis], 61, paragraph 6 [and 71] must be concurred in by a majority of its judges;

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for under this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders (including measures such as those described in article 57, paragraph 2), or seek such cooperation pursuant to part 9, as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under part 9 if, whenever possible having regard to the views of the State concerned, it had determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial

¹²⁶ The Working Group noted that articles 55 and 56 were being addressed by the Committee of the Whole in relation to article 16.

system competent to execute the request for cooperation under part 9;^{127,128}

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (*I*), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.¹²⁹

Article 58

Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear

1. At any time after an investigation has been initiated, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant for the arrest of a person if satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) It appears that the arrest of the person is necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or where applicable to prevent the person from continuing with the commission of that crime or a related crime being committed which is within the jurisdiction of the Court and arises out of the same circumstances.

2. The application shall specify:

(a) The name of the person or persons, and any other relevant identifying information;

(b) The specific crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which form reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes the arrest of the person is necessary.

3. The Pre-Trial Chamber shall examine the application and the evidence or other information submitted by the Prosecutor and, if satisfied that there are reasonable grounds to believe that the person named committed the crimes alleged and that the arrest of the person appears necessary, shall issue a warrant for the arrest of the person. The warrant of arrest shall identify the person to be arrested and the crimes for which the person's arrest is sought, and shall contain a concise statement of the facts which are alleged to constitute those crimes. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

4. Based on the arrest warrant, the Court may request the provisional arrest, or the arrest and [surrender] [extradition] of the person under part 9.¹³⁰

5. The Prosecutor may request that the Pre-Trial Chamber amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe the person committed the modified or additional crimes.

6. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person's appearance,¹³¹ it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.¹³²

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and [surrender] [extradition] shall immediately take steps to arrest the suspect in accordance with its laws and the provisions of part 9.

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall

¹²⁷ Some delegations expressed the view that, given the absence of enforcement powers, the Prosecutor would, in most cases contemplated by this article, be unable to act upon the authority conferred by the Pre-Trial Chamber. Other delegations expressed the opposite view. It was additionally noted that the draft Statute did not confer any authority for the use of military force.

¹²⁸ This provision needs to be read with article 7 ter; article 86, paragraph 5; article 102, and other relevant provisions.

¹²⁹ This provision should be read in connection with article 79.

¹³⁰ The Working Group draws the attention of the Drafting Committee to the need to consider the terms that appear in brackets in various provisions contained in part 5 in the light of part 9.

¹³¹ Some delegations stated that the provision should not be considered to give the Pre-Trial Chamber the power to issue an arrest warrant instead of a summons as applied for by the Prosecutor when it finds a summons insufficient to ensure the presence of the person.

¹³² The Working Group draws the attention of the Drafting Committee to a problem with the Arabic version of this provision.

determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected.

3. The person arrested shall have the right to apply to the competent judicial authority in the custodial State for interim release pending surrender. In reaching a decision on any such application, the authorities in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. In determining an application for interim release, it shall not be open to the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraphs 1 (a) and (b). The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the national authorities. The competent judicial authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

4. (Deleted)

5. Once ordered to be [surrendered] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the [surrender][extradition] of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1,¹³³ are present, the person shall be detained. Otherwise the Pre-Trial Chamber shall release the person, with or without conditions.¹³⁴

¹³³ Some delegations considered that the reference to article 58, paragraph 1 (a), was inapt.

¹³⁴ The Working Group notes that with respect to article 60, paragraph 2, previously referred to the Committee of the Whole with the phrase "conditions set forth in article 58, ...", the reference should be to article 58, paragraph 1.

3. The Pre-Trial Chamber shall periodically review¹³⁵ its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the accused. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period¹³⁵ prior to trial due to unexcusable delay by the Prosecutor. If such delay has occurred, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 1 bis within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.

1 bis. When:

(a) The person has waived his right to be present; or

(b) The person has fled or cannot be found and all reasonable steps have been made to secure his or her appearance before the Court and to inform the person of the proposed charges and that a hearing to confirm those charges will be held, the Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

2. A reasonable time¹³⁵ before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information for purposes of the hearing as may be appropriate under the Statute and the Rules of Procedure and Evidence.

3. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any proposed charges. The accused shall be given reasonable notice before the hearing of any amendment or withdrawal of proposed charges.

¹³⁵ The Working Group noted that this time period should be addressed in the Rules of Procedure and Evidence.

In case of a withdrawal of proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

4. At the hearing, the Prosecutor shall have the burden of presenting, for each charge on which he seeks trial, sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

5. At the hearing, the accused person may object to the proposed charges, challenge the evidence presented by the Prosecutor and present evidence on his or her own behalf.

6. The Pre-Trial Chamber shall determine whether, considering the presentations by both the Prosecutor and the accused, there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determinations, the Pre-Trial Chamber may:

(a) Confirm those proposed charges as to which it has determined there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Refuse to confirm those proposed charges as to which it has determined there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conduct further investigation with respect to a particular charge; or

(ii) Amending a proposed charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

6 bis. The refusal of the Pre-Trial Chamber to confirm a proposed charge shall not preclude the Prosecutor from subsequently asking again for its confirmation, if it is supported by additional evidence.¹³⁶

7. After the charges are confirmed and before the trial has begun, the Prosecutor may amend the charges, but only with the permission of the Pre-Trial Chamber and after notice to the accused. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may withdraw the charges only with the permission of the Trial Chamber. In case of a withdrawal of

proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

8. A previously issued warrant shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

9. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber¹³⁷ which, subject to paragraph 7 of this article and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any functions of the Pre-Trial Chamber that are relevant and capable of application in those proceedings.¹³⁷

PART 6. THE TRIAL¹³⁸

Article 62

Place of trial

1. Unless otherwise decided, the place of the trial will be the seat of the Court.

2. (Deleted)

3. (Deleted)

4. (Deleted)

5. (Deleted)

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and instruct counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

3. (Deleted)

¹³⁶ Nothing precluding the Pre-Trial Chamber from exercising any of its functions and powers in conjunction with that request, including to secure the presence of the accused person

¹³⁷ The drafting of this part of this provision will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial Chamber.

¹³⁸ The Working Group decided that the word "indictment" should be replaced by the word "charges" throughout part 6.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers set out in this article are to be exercised in accordance with the Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial;

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Chamber.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6.¹³⁹ In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 9;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided for in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims;

(f) Rule on any other relevant matters.

¹³⁹ The term "witnesses" includes expert witnesses.

7. The trial shall be held in public. However, the Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.¹⁴⁰

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings in an objective and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence;¹⁴¹

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 64, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) Any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

¹⁴⁰ The view was expressed that the principle in paragraph 7 is sufficiently important for the matter to be dealt with in a separate article.

¹⁴¹ The Working Group draws the attention of the Drafting Committee to the fact that there may be some duplication of article 69, paragraph 4.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided for by this Statute, and shall consider the admission of guilt not to have been made and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided for by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, acceptance of the admission of guilt by the accused or the penalty to be imposed shall not be binding on the Court.

*Article 66
Presumption of innocence*

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the law applicable to it.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond reasonable doubt.

*Article 67
Rights of the accused*

1. In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:

(a) To be informed promptly and in detail in a language the accused fully understands and speaks of the nature, cause and content of the charge;¹⁴²

¹⁴² It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference.

(b) To have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) If any of the proceedings of or documents presented to the Court are not in a language the accused fully understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence;

(i) Not to have imposed on him or her any reverse onus of duty of rebuttal.

2. In addition to any other disclosure provided for under this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

*Article 68
Protection of the victims and witnesses and their participation in the proceedings*

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims¹⁴³ and witnesses. In so doing, the Court shall

¹⁴³ Delegations took the view that the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses. Some delegations did not agree with this.

have regard to all relevant factors, including age, gender¹⁴⁴ and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all of the circumstances, particularly the views of the victim or witness.

3. The Court shall permit the views and concerns of the victims to be presented and considered at stages of the proceedings determined to be appropriate by the Court where their personal interests are affected, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 44, paragraph 4.

5. In respect of any evidence or information to be disclosed pursuant to this Statute, if disclosure of such evidence or information may lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and submit a summary of such evidence or information. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. (Deleted)¹⁴⁵

7. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

8. (Deleted)

9. (Deleted)

*Article 69
Evidence*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.¹⁴⁶

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.¹⁴⁷ These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may call evidence relevant to the case, in accordance with article 64, paragraphs 3 and 6. However, the Court has the authority to call all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Statute and the Rules of Procedure and Evidence.

4 bis. The Court shall address and observe privileges on confidentiality as set forth in the Rules of Procedure and Evidence.¹⁴⁸

4 ter. The Court may rule on the relevance and admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial of an accused or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

6. Evidence obtained by means of a violation of this Statute or internationally recognized human rights and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.

7. (Deleted)

¹⁴⁴ As defined in article [5 ter].

¹⁴⁵ In the exercise of its powers under this article, the Court shall take into consideration the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁴⁶ The Rules of Procedure and Evidence could in some cases exempt persons from giving an undertaking as to the truthfulness of the evidence given.

¹⁴⁷ The Working Group noted that the requirements for the admissibility of recorded testimony should be addressed in the Rules of Procedure and Evidence.

¹⁴⁸ These may include privileges relative to doctor-patient, lawyer-client and priest-penitent relationships and other similar privileges.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be as set forth in the Rules of Procedure and Evidence.¹⁴⁹ The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to acts against the administration of justice committed on its territory, or by one of its nationals.

(b) Upon request by the Court, whenever it deems it proper the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

¹⁴⁹ The Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction misconduct of persons present before it, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures, other than imprisonment, such as temporary or permanent removal from the courtroom, a fine, or other similar measure as set forth in the Rules of Procedure and Evidence.¹⁵⁰

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be set forth in the Rules of Procedure and Evidence.

Article 71¹⁵¹

Protection of national security information

(Pending)

Article 71 bis¹⁵¹

Third-party information or documents pending

(Pending)

Article 72

Requirements for the decision¹⁵²

1. All of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, an alternate judge or judges also to be present at each stage of the trial and replace a member of the Trial Chamber if any of its judges is unable to continue attendance.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges or its amendment, if any. The Court may base its decision only on evidence submitted and discussed before it at the trial.¹⁵³

3. The judges shall attempt to achieve unanimity in their decision, failing which it shall be taken by a majority of the judges.¹⁵⁴

4. **(Deleted)**

¹⁵⁰ The Working Group draws the attention of the Drafting Committee to the need to align the Arabic version to the English version.

¹⁵¹ The Working Group referred articles 71 and 71 bis to the Committee of the Whole.

¹⁵² The Working Group informs the Drafting Committee that the phrase "final decision of acquittal or conviction and sentence" should be used to refer to the final decision of the Trial Chamber throughout the Statute.

¹⁵³ The Working Group informs the Drafting Committee that this paragraph should come after paragraph 5 and before paragraph 6.

¹⁵⁴ The Working Group noted that the Rules of Procedure and Evidence should address the question of how a majority decision is to be achieved.

5. The deliberations of the Trial Chamber shall remain secret.

6. The decision shall be in writing and shall contain a full and reasoned statement of the findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

*Article 73¹⁵⁵
Reparations to victims*

1. The Court shall establish principles relating to reparations to, or in respect of victims,¹⁵⁵ including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.¹⁵⁶

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the trust fund provided for in article 79.

3. Before making an order under the present article, the Court may invite and shall take account of representations from

¹⁵⁵ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors. For the purposes of interpretation of the terms "victims" and "reparations", definitions are contained in the text of article 44, paragraph 4 of the draft Statute, article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17, annex).

¹⁵⁶ Some delegations had the following view:

This provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.

In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative.

It was understood that the Rules of Procedure and Evidence would have to address such issues.

or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under the present article, the Court may, after a person is convicted of a crime under this Statute, determine whether, in order to give effect to an order it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

7. (Deleted)

8. (Deleted)

*Article 74
Sentencing*

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence.

2. Except where article 65 applies, the Trial Chamber may on its own motion, and shall at the request of the Prosecutor or the accused, made before the completion of the trial, hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the Rules of Procedure and Evidence.¹⁵⁷

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the further hearing referred to in paragraph 2, and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, whenever possible, in the presence of the accused.

PART 8. APPEAL AND REVIEW¹⁵⁸

*Article 80
Appeal against decision or sentence*

1. A decision under article 72 may be appealed, in accordance with the Rules of Procedure and Evidence, as provided for below:

(a) The Prosecutor may make such an appeal on the following grounds:

¹⁵⁷ The Working Group noted that notice to the parties should be dealt with under the Rules of Procedure and Evidence.

¹⁵⁸ The Working Group notes that the term "decision" or "sentence", as appropriate, should be used consistently throughout part 8 rather than the term "judgement".

- (i) Procedural error;
- (ii) Error of fact; or
- (iii) Error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make such an appeal on the following grounds:

- (i) Procedural error;
- (ii) Error of fact;
- (iii) Error of law; or
- (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

[(c)] **(Deleted)**

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.

(b) If on an appeal against sentence, the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82.

The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under article 80, paragraph 2 (a).

[3.] **(Deleted)**

4. (a) Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

When his time in custody exceeds the sentence of imprisonment imposed, he shall be released, but if the Prosecutor is also appealing, his release may be subject to the conditions under (b) below.

(b) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under (a) above may be appealed in accordance with the Rules of Procedure and Evidence.

5. Subject to the provisions of paragraph 4 (a), execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.¹⁵⁹

Article 81

Appeal against other decisions

1. Either party¹⁶⁰ may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the defendant;¹⁶¹

[(c)] **(Deleted)**

[(d)] **(Deleted)**

(d bis) **(Deleted)**

(e) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁶²

(f) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3.

1 bis. A decision of the Pre-Trial Chamber under article 57 bis, paragraph 3 (d), may be appealed by the State concerned or the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

2. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the Rules of Procedure and Evidence.

3. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations. To that end, specific provision shall be made in the Rules of Procedure and Evidence.

¹⁵⁹ It was suggested that it would be useful to include the phrase "Subject to article 80, paragraph 5" at the beginning of article 93, paragraph 1.

¹⁶⁰ The Working Group draws the attention of the Drafting Committee to the fact that the word "Parties" should not be capitalized in French.

¹⁶¹ The Working Group notes that the word "defendant" should not appear in the English text.

¹⁶² Subject to the final drafting of article 71, it was suggested to include within this provision a right to appeal orders of the Court related to the disclosure of national security information.

Article 82¹⁶³
Proceedings on appeal

1. For the purposes of proceedings under article 80 and this article, the Appeals Chamber also has all the powers of the Trial Chamber.

2.¹⁶⁴ If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the accused, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with part 7.

4. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court.¹⁶⁵ The decision shall state the reasons on which it is based. When there is no unanimity, the decision of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the accused.

¹⁶³ The Working Group notes that the term "decision" or "sentence", as appropriate, should be used consistently throughout part 8 rather than the term "judgement". The Working Group notes that the term "sentence" should be translated as *pena* in Spanish and the corresponding term in Arabic.

¹⁶⁴ The Working Group notes that the submission of new evidence to the Appeals Chamber should be addressed in the Rules of Procedure and Evidence.

¹⁶⁵ If a decision is taken to include the death penalty, then consideration should be given in the pertinent part of the Statute as to whether a different majority should be required in such cases.

¹⁶⁶ The Working Group agreed that details concerning quorum for parts 5, 6 and 8 could be addressed in the Rules of Procedure and Evidence and that a general provision to that effect should be added to the Statute.

Article 83
Revision of conviction or sentence

1. The convicted person or, after death, ...¹⁶⁷ or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it likely would have resulted in a different verdict;
- (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
- (c) One or more of the judges who participated in conviction or confirmation has committed in that case an act of serious misconduct or serious breach of duty of sufficient gravity to justify their removal from office under article 47.

[(d)] **(Deleted)**

[(e)] **(Deleted)**

[2]: **(Deleted)**

3. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber;
- (b) Constitute a new Trial Chamber; or
- (c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

[4]: **(Deleted)**

Proposed paragraph 5: **(Pending)**

Article 84¹⁶⁸
Compensation to an arrested or convicted person

1. Anyone who has been victim of unlawful arrest or detention shall have an enforceable¹⁶⁹ right to compensation.

¹⁶⁷ The Working Group referred this pending phrase to the Committee of the Whole.

¹⁶⁸ The Working Group draws the attention of the Drafting Committee to the need to follow the wording of the relevant provisions of the International Covenant on Civil and Political Rights in all of the language versions.

¹⁶⁹ The Rules of Procedure and Evidence shall address the procedures for enforcing this right.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,¹⁷⁰ unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation according to the criteria set forth in the Rules of Procedure and Evidence to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.¹⁷⁰

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 5 and articles 54 and 60 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 26 June 1998¹⁷¹

*Article 54
Initiation of an investigation*

*Article 60
Initial proceedings before the Court*

NOTE

The Committee of the Whole transmits the above articles to the Drafting Committee on the following understandings:

The use of terms that appear within square brackets in part 5 should be considered in the light of the use of those terms in part 9.

¹⁷⁰ There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Other delegations considered this text to be too restrictive.

¹⁷¹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.29 and Corr.1. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

The term “indictment” has been replaced by the term “charges”. The term “suspect” should not be used in the Statute.

In article 54, the words “reasonable basis” and “sufficient basis” are used intentionally in different paragraphs.

The structure of the articles of this part should remain unchanged.

The Committee of the Whole will consider the exact reference to article 58 in article 60, paragraph 2 at a later stage.

Note regarding part 6 and articles 61, 64, 67 and 74 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

NOTE

This document is reproduced under part 6.

Note regarding article 58 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 13 July 1998³¹

*Article 58
Issuance by the Pre-Trial Chamber of an arrest warrant
or a summons to appear*

NOTE

Understanding of the Committee of the Whole with respect to part 5:

The reference left pending in article 60, paragraph 2, previously transmitted to the Drafting Committee should be to “article 58, paragraph 1”.

Note regarding article 54 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

*Article 54
Initiation of an investigation*

NOTE

Understanding of the Committee of the Whole with respect to part 5:

The text that appears within brackets in article 54, paragraph 3 (c), should be reviewed in the light of the outcome of the discussions on part 2;

¹⁷² The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.188. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

The complete text of the chapeau of article 54, paragraph 1, previously transmitted to the Drafting Committee with the phrase "investigation upon...", reads as follows:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

*[Original: Spanish]
[15 July 1998]*

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/WGPM/L.3

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 54 quater**

*[Original: English]
[23 June 1998]*

(a) Notwithstanding the Prosecutor's decision to defer an investigation under [article 16] [article 56] or the deferral of investigation pending a challenge under [article 16 or] article 17, the Prosecutor may, with the specific authority of the Pre-Trial Chamber, pursue investigative acts in exceptional circumstances where there exists a unique opportunity to obtain important evidence or where there is a significant risk that such evidence will not be subsequently available if action is not undertaken. These acts may include:

(i) The taking of testimony or a statement from a witness;

(ii) The examination or collection of evidence;

(b) To that end, the Prosecutor may seek the cooperation of any State or intergovernmental organization or, subject to its mandate, any peacekeeping force that may be present in the territory where an investigation is to be undertaken.

DOCUMENT A/CONF.183/C.1/WGPM/L.4

France: working paper regarding article 54

*[Original: French]
[23 June 1998]*

Investigation of alleged crimes

Paragraphs 2 and 3

2. Prior to initiating an investigation the Prosecutor shall:

(a) Notify the States Parties of any complaint or any decision of the Security Council referred to in article 10, paragraph 1, and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission. The content of the notification shall not prejudice the requirements of the investigation or the protection of witnesses and victims.

3. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a), until the final ruling of the Court. The Prosecutor may however take all appropriate measures to ensure the preservation of evidence or to prevent the escape of any person suspected of being involved. To that end, the Prosecutor may seek the cooperation of the States concerned.

DOCUMENT A/CONF.183/C.1/WGPM/L.8

France: proposal regarding article 57

*[Original: English]
[24 June 1998]*

*Functions of the Pre-Trial Chamber in relation with
investigation*

Paragraph 4

4. At the request of victims or in respect of victims, the Pre-Trial Chamber may order protective measures which may be necessary for the purposes of preserving property and assets in order to enable a Trial Chamber, upon a subsequent conviction, to give effect to an award of reparation pursuant to article 73, paragraph 2. For that purpose, the Pre-Trial Chamber may seek the cooperation of the interested States in accordance with part 9 of the Statute. Such provisions shall also apply when the person who has been summoned or against whom a warrant of arrest has been issued in accordance with article 58 has fled or cannot be found.

DOCUMENT A/CONF.183/C.1/WGPM/L.11

France: proposal regarding article 54 ter

*[Original: English]
[24 June 1998]*

Rights of suspects and other persons during an investigation

Paragraph 2

Add a new subparagraph (d), as follows:

"(d) Shall not be subjected to arbitrary arrest or detention, and not be deprived of his or her liberty except on such grounds and in accordance with the Statute and the Rules of Procedure and Evidence."

DOCUMENT A/CONF.183/C.1/WGPM/L.18

[incorporating document A/CONF.183/C.1/WGPM/L.18/Corr.1 of 30 June 1998]

Informal working group composed of the delegations of Argentina, Belgium, Canada, Finland, France, Germany, Israel, Italy, Japan, Malawi, New Zealand, Poland, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America: working paper on article 54, paragraphs 1 (c) and 3 (c)

[Original: English]
[25 June 1998]

Article 54

Initiation of an investigation

1. The Prosecutor shall, *having evaluated the information made available to him*, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to him provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

(c) *Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice;* [and

(d) An investigation would be consistent with the terms of any Security Council decision.]

If the Prosecutor determines that there is no reasonable basis to proceed, he shall inform the Pre-Trial Chamber.

2. ...

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

(c) *A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crimes, the interests of victims and the age or infirmity of the alleged perpetrator, and his role in the alleged crime,*

he or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1,] of his or her conclusion and the reasons for the conclusion.

4. (a) *At the request of the State making a referral under article 11 [or the Security Council under article 10], the*

Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or 3 of this article and may request the Prosecutor to reconsider that decision.

(b) *In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 3 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.*

5. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

DOCUMENT A/CONF.183/C.1/WGPM/L.19

Austria: proposal regarding article 61

[Original: English]
[25 June 1998]

Confirmation of the charges before trial

New paragraph 6 bis

6 bis. The refusal of the Pre-Trial Chamber to confirm a proposed charge shall not preclude the Prosecutor from subsequently asking again for its confirmation, if it is supported by additional evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.20

United Kingdom of Great Britain and Northern Ireland: proposal regarding article 61

[Original: English]
[25 June 1998]

Confirmation of the charges before trial

New paragraph 9

9. Subject to paragraph 7 above, after the Pre-Trial Chamber has confirmed the charges, the Pre-Trial Chamber shall have no further function in relation to the case unless, in accordance with this Statute, the Trial Chamber requests the Pre-Trial Chamber to perform specific functions.

DOCUMENT A/CONF.183/C.1/WGPM/L.31

Poland: proposal to clarify the relationship between article 57, paragraph 3, and 69, paragraph 6

[Original: English]
[29 June 1998]

1. Delete article 57, paragraph 3.

2. Add the following sentence at the end of the current paragraph 6 of article 69:

“The Court may refuse to admit evidence obtained as a result or consequence of a breach of

or non-compliance with an [order] [recommendation][order and recommendation] of the Pre-Trial Chamber.”¹⁷³

DOCUMENT A/CONF.183/C.1/WGPM/L.61

Philippines: proposal regarding article 57 (as set forth in document A/CONF.183/C.1/WGPM/L.38/Rev.1)

[Original: English]
[8 July 1998]

Functions of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. Paragraph 1 (a), line 4, should read:

“the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber and”

2. Paragraph 4, lines 2 and 3, should read:

“the record thereof, may be admitted at trial in accordance with article 69, as determined by the Trial Chamber.”

DOCUMENT A/CONF.183/C.1/WGPM/L.77

France: proposal regarding article 54

[Original: English]
[13 July 1998]

Investigation of alleged crimes

Paragraph 2

Before initiating an investigation, the Prosecutor shall notify States in accordance with article 16.

7. Part 6. The trial

(a) Documents of the Working Group on Procedural Matters

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGPM/L.42

Chairman’s draft proposal for article 67

[Original: English]
[3 July 1998]

Rights of the accused

1. In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of

this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:

(a) To be informed promptly and in detail in a language the accused understands or in his or her own language of the nature, cause and content of the charge;

(b) To have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused’s choosing, in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial to conduct the defence ..., and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) If any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn statement or any other depositions in his or her defence;

[(i)] **(Deleted)**

(f) Not to have imposed on him any reverse onus or duty of rebuttal.

2. The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

¹⁷³ Other consequences of such a breach or non-compliance, affecting the probative value of evidence, may be attached by the Court under its general discretionary powers vis-à-vis assessing and evaluating evidence and, therefore, need not be articulated separately.

DOCUMENT A/CONF.183/C.1/WGPM/L.37

[incorporating document A/CONF.183/C.1/WGPM/L.37/Corr.1 of 9 July 1998]

Working paper on article 66

[Original: English]
[4 July 1998]

*Presumption of innocence*¹⁷⁴

1. Everyone shall be presumed innocent until proved guilty *before the Court* in accordance with the law applicable to it.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond a reasonable doubt.

DOCUMENT A/CONF.183/C.1/WGPM/L.41

[incorporating document A/CONF.183/C.1/WGPM/L.41/Corr.1 of 9 July 1998]

Working paper on article 64

[Original: English]
[4 July 1998]

Functions and powers of the Trial Chamber

1. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules of Procedure and Evidence, with full respect for the rights of the accused, including his/her protection, and due regard for the protection of victims and witnesses.
2. The functions and powers set out in this article are to be exercised in accordance with the Rules of Procedure and Evidence.

NOTE: There was general agreement that this article would be supplemented by a number of more detailed provisions in the Rules of Procedure and Evidence, in particular regarding disclosure of documents and information between the parties. But it was thought unnecessary to repeat the reference to "in accordance with the Rules of Procedure and Evidence"; hence the introduction of the general wording in paragraph 2 above. This is, however, a wider problem which will need to be addressed throughout the procedures parts.

Preparation for trial

NOTE: The sub-headings in this text are included for guidance only. They will be deleted from the final text.

¹⁷⁴ In connection with this text, it was also suggested that the following provision should be added to article 67 or article 69:

"The accused shall have the right to raise defences under the provisions of this Statute, and to present evidence in their support."

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case may:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial;
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge.

5. The Trial Chamber may direct that there be joinder or severance in respect of charges against more than one accused arising out of the same or related factual situations.

Preparation for trial and during the trial

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 9;
 - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - (c) Provide for the protection of confidential information;
 - (d) Order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;
 - (e) Provide for the protection of witnesses and victims;
 - (f) Rule on any other relevant matters.

The trial

7. The trial shall be held in public. However, the Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

NOTE: The view was expressed that the principle in paragraph 7 is sufficiently important for the matter to be dealt with in a separate article.

8. The deliberations of the Court shall remain confidential.

9. (a) At the commencement of the trial, the Trial Chamber shall read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber will satisfy itself that the accused understands the nature of the charges. It will afford the opportunity to the accused to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings. Subject to any directions of the presiding judge, the parties may adduce evidence in accordance with the provisions of this Statute.

NOTE: The provisions of paragraph 9 are subject to the outcome of debate on article 63.

10. The Trial Chamber shall have, inter alia, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence;

(b) Take all necessary steps to maintain order in the course of a hearing.

11. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

DOCUMENT A/CONF.183/C.1/WGPM/L.51

[incorporating document A/CONF.183/C.1/WGPM/L.51/Corr.1 of 9 July 1998]

Working paper on article 63

[Original: English]

[4 July 1998]

Trial in presence of the accused

1. The accused shall be present during the trial.

NB: The accused person's right to legal assistance during the trial is dealt with in articles 64 and 67.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and assist counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Preservation of evidence

No provision would be contained in this article. Instead, a provision along the following lines could be inserted into article 57:

“4. Evidence preserved for trial pursuant to this article, or the record thereof, shall be admitted at trial in accordance with article 69, and given such weight as determined by the Trial Chamber.”

[3.

*Option 1*¹⁷⁵

(a) Notwithstanding paragraph 1, the Trial Chamber may, in exceptional circumstances, order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial, thereafter flees [, after being previously advised that the trial could continue if he or she did so].

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular, that the accused is legally represented, if necessary by a lawyer appointed by the Court.

(c) Where the Trial Chamber has conducted proceedings in accordance with this paragraph, its judgement under article 72 may be appealed in accordance with the provisions of part 8.

*Option 2*¹⁷⁶

NB: The proposals contained in documents A/CONF.183/C.1/WGPM/L.15 and L.17 are abbreviated versions of this option. In substance, the proposal in document L.15 deviates from option 2 only in respect of subparagraphs (a) n exceptional circumstances n and (c).

(a) Notwithstanding paragraph 1, in exceptional circumstances, the Trial Chamber may, in the interests of justice, *proprio motu* or at the request of one of the parties, order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

- (i) Requests to be excused from appearing for reasons of serious ill-health;
- (ii) Does not appear on the day of the hearing; or
- (iii) Under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court.

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this

¹⁷⁵ Option 1 is derived from the original text of article 63, option 2.

¹⁷⁶ Option 2 is in essence the original text of article 63, option 3.

paragraph shall be communicated to the accused and may be appealed.

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular:

- (i) That all reasonable steps have been taken to inform the accused of the charge; and
- (ii) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

(c) When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, *proprio motu* or at the request of one of the parties, order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

(d) When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.]

DOCUMENT A/CONF.183/C.1/WGPM/L.63/REV.1

Working paper on article 73

[Original: English]
[11 July 1998]

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of victims,¹⁷⁷ including restitution,

¹⁷⁷ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors (in French *ayants droit*). For the purposes of interpretation of the terms "victims" and "reparations", definitions are contained in the text of article 44, paragraph 4 of the draft Statute, article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17, annex).

compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate the Court may order that the award for reparations be made through the trust fund provided for in article 79.

3. Before making an order under the present article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under the present article, the Court may, after a person is convicted of a crime under this Statute, determine whether, in order to give effect to an order it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

* * *

In article 81, add the following new paragraph:

"3. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations. To that end, specific provision shall be made in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.67

Working paper on article 63

[Original: English]
[9 July 1998]

Trial in the presence of the accused

1. The accused shall be present during the trial.¹⁷⁸

¹⁷⁸ After having further reflected upon the provisions in articles 64 and 67, it has been concluded that the text of paragraph 1 in document A/CONF.183/C.1/WGPM/L.51 should be retained.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and instruct counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

[3.^{179, 180}

(a) Notwithstanding paragraph 1, the Trial Chamber may, on its own motion, or at the request of one of the parties, order that the trial proceed in the absence of the accused, if it is satisfied that the rights of the accused to a fair trial will not be prejudiced by so proceeding, and if the accused:¹⁸¹

- (i) Having been present at the commencement of the trial, thereafter flees in order to avoid prosecution;¹⁸² or
- (ii) Having been duly informed in person of the opening of the trial, and all reasonable steps having been taken to secure his or her appearance, does not appear on the day of the hearing, and the Trial Chamber, having regard to all surrounding circumstances, has substantial grounds to believe that the person has fled in order to avoid prosecution.

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular, that the accused is legally represented, if necessary by a lawyer appointed by the Court.]

¹⁷⁹ The informal working group could not find provisions in paragraph 3 acceptable to all delegations participating in this work. Therefore, three different alternatives emerge in the text:

- (a) No paragraph 3 (i.e. no trials *in absentia* are possible);
- (b) A trial in the absence of the accused will only be possible under the conditions set out in subparagraph (i); or
- (c) A trial in the absence of the accused will be possible under the conditions set out both in subparagraph (i) and in subparagraph (ii).

Some delegations expressed the view that a prerequisite for accepting trials to be conducted in the absence of the accused, under subparagraph (i) and/or subparagraph (ii), is that sufficient safeguards are provided for in the appeals proceedings or that the accused is given an automatic right to a trial *de novo*. Other delegations, however, questioned the utility of having a trial in the absence of the accused if such an automatic right is provided for.

¹⁸⁰ The accused should be entitled to appeal a judgement rendered after a trial in his or her absence in accordance with the provisions on appeal in Part 8 and, therefore, no reference is needed in this article.

¹⁸¹ The Rules of Procedure and Evidence should address the question of advising the accused that trial may be held in his or her absence.

¹⁸² The view was expressed that additional conditions, such as reasonable attempts to find the person, should also be included.

DOCUMENT A/CONF.183/C.1/WGPM/L.68/REV.2

Working paper on article 70

[Original: English]
[11 July 1998]

Article 70

Offences against the integrity of the Court

1. The Court shall have jurisdiction over the following offences against its integrity, when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be as set forth in the Rules of Procedure and Evidence.¹⁸³ The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to acts against the integrity of the Court committed on its territory, or by one of its nationals.

(b) Upon request by the Court, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

¹⁸³ The Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction misconduct of persons present before it, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures, other than imprisonment, such as temporary or permanent removal, a fine, or other similar measure as set forth in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be set forth in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.71

Working paper on article 72

[Original: English]

[10 July 1998]

Quorum and judgement

Paragraph 1

Proposed second sentence:

The Presidency may, on a case-by-case basis, designate an alternate judge or judges to also be present at each stage of the trial and replace a member of the Trial Chamber if any of its judges is unable to continue attendance.

DOCUMENT A/CONF.183/C.1/WGPM/L.76/REV.1

Working paper on article 71

[Original: English]

[15 July 1998]

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 57, paragraphs 2 and 3 (powers of the Pre-trial Chamber), article 61, paragraph 2 (indictment proceedings), article 64, paragraph 3 (powers of the Trial Chamber), article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), or the application of article 71 bis.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence or the Pre-Trial Chamber or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under part 9 of this Statute or the circumstances described in paragraph 2 of this article, and the State has invoked the grounds for refusal found under article 90, paragraph 2 (d):

- (i) The Court may, before making any conclusion referred to in paragraph 7 (a) (ii), request further consultations for the purpose of hearing the State's representations. The Court shall, if so requested by the State, hold the consultations in camera and ex parte;
- (ii) If the Court concludes that, by invoking the ground for refusal under article 90, paragraph (2) (d), in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 86, paragraph 7, specifying the reasons for its conclusion; and
- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

(ii) Recommendations/Report

**DOCUMENT A/CONF.183/C.1/WGPM/L.2
Report of the Working Group on Procedural Matters**

*[Original: English]
[24 June 1998]*

NOTE

This document is reproduced under part 5.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 6 and articles 61, 64, 67 and 74 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

*Article 61
Notification of the indictment*

*Article 64
Functions and powers of the Trial Chamber*

*Article 67
Rights of the accused*

*Article 74
Sentencing*

NOTE

Understandings of the Committee of the Whole with respect to part 6:

The Working Group decided that the word "indictment" should be replaced by the word "charges" throughout part 6.

The drafting of article 61, paragraph 9, will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial chamber.

With respect to article 64, paragraph 9 (a), the Committee of the Whole draws the attention of the Drafting Committee to the fact there may be some duplication of article 69, paragraph 4.

The bracketed text in article 67, paragraph 1 (d), and article 74, paragraph 4, will be examined in the light of the decision to be taken concerning trials in absentia.

Note regarding part 6 and article 72 contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10⁹⁹ and 11 July 1998

*Article 72
Requirements for the decision*

NOTE

Understandings of the Committee of the Whole with respect to part 6:

Paragraph 2 of article 72 should come after paragraph 5 and before paragraph 6.

The Committee of the Whole informs the Drafting Committee that the phrase "final decision of acquittal or conviction and sentence" should be used to refer to the final decision of the Trial Chamber throughout the Statute.

Note regarding articles 70 bis and 73 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

*Article 70 bis
Sanctions for misconduct before the Court*

Article 73
Reparations to victims

NOTE

Understanding of the Committee of the Whole with respect to part 6:

The Arabic version of article 70 bis, paragraph 1, and article 73 should be aligned with the English version.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/11

Holy See: proposal regarding article 69

[Original: English]
[17 July 1998]

Evidence

Paragraph 5

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence. *Add: These may include privileges relative to doctor-patient, lawyer-client and priest-penitent relationships and other privileges.*

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/WGPM/L.12

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 71**

[Original: English]
[25 June 1998]

NOTE. This is an amended version of the proposal submitted by the United Kingdom in March 1998 (article 71, option 2). The amendments have been made after consultations with other delegations and are intended to clarify and develop the existing text. This text would replace option 2.

Article 71

Protection of national security information

1. (a) This article applies in any case where the disclosure of the information or documents of a State would, in

the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

(b) Where a person has been asked to provide information or give evidence the disclosure of which would prejudice the national security interests of a State, the provisions of this article shall also apply.

(c) If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that such disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

(d) Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f).

2. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence, the Pre-Trial or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

3. Once all reasonable steps have been taken to resolve the matter through cooperative means and the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its view, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

4. Thereafter, the Court shall not make a determination that disclosure should be made except in accordance with the provisions set out below.

5. The Court may hold a hearing for the purpose of hearing the State's representations on non-disclosure. If so, notice to the State will be given in accordance with the Rules. The Court shall, if so requested by the State, hold in camera and ex parte hearings, and may make other special arrangements, including, as appropriate:

(a) Designating a single judge to examine documents or hear submissions;

(b) Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

(c) Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

(d) Ordering that no transcripts be made of the proceedings, and that documents not required by the Court be returned directly to the State without being deposited or filed in the Registry of the Court.

6. The Court shall not make a determination that disclosure should be made unless:

(a) It is clear from the State's actions that it is not acting in good faith towards the Court; in determining the State's bona fides, the Court shall have regard to the following factors:

- (i) Whether efforts have been made to secure the State's assistance through cooperative means and without recourse to measures of compulsion;
- (ii) Whether the State has expressly refused to cooperate;
- (iii) Whether there is clear evidence that the State does not intend to cooperate either because there has been excessive delay in complying with a request for assistance or because there are other circumstances clearly indicating an absence of good faith on its part;

(b) The information or evidence is relevant to an issue before the Court and is necessary for the efficient and fair conduct of the proceedings; and

(c) Having regard to the State's claim that its national security interests would be prejudiced by disclosure, the Court is satisfied that the claim, considered in conjunction with any submission that may have been made by the State, is, on its face, manifestly unfounded.

In making its determination under subparagraph (c) of this paragraph, the Court may take account of evidence that the purpose of the State in making the claim is to shield one of the defendants from criminal responsibility for the crime being investigated or prosecuted.

DOCUMENT A/CONF.183/C.1/WGPM/L.13

Japan: proposal regarding article 70

[Original: English]
[25 June 1998]

Offences or acts against the integrity of the Court

Add a new paragraph 1 bis, as follows:

"1 bis. An official of the Court who receives, demands or agrees to receive a bribe in connection with his or her duties shall also be punished."

DOCUMENT A/CONF.183/C.1/WGPM/L.14

Holy See: proposal regarding article 69

[Original: English]
[25 June 1998]

Evidence

Paragraph 5

Add the following sentence at the end of the paragraph:

"The Court shall respect and observe the classic privileges on confidentiality relative to doctor-patient, lawyer-client and priest-penitent relationships."

DOCUMENT A/CONF.183/C.1/WGPM/L.15

Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic: proposal regarding article 63

[Original: Arabic]
[25 June 1998]

Trial in presence of the accused

1. The trial shall not be held except in the presence of the accused and his lawyer.

2. Notwithstanding the preceding paragraph, the accused may be tried *in absentia*, by decision of the Trial Chamber, if he has been notified of the date set for the trial and:

(a) Refuses to attend or is prevented from attending;

(b) Escapes from lawful custody and does not attend the trial on the date set for it.

3. Notwithstanding paragraphs 1 and 2, the accused may be tried *in absentia*, by decision of the Trial Chamber, if circumstances of *force majeure* [to be determined by the Court] in which he has no hand and which are not expected to end within a reasonable time prevent his attendance.

In such a case, his lawyer shall attend the trial proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.16

Malawi: proposal regarding article 63

[Original: English]
[25 June 1998]

Trial in presence of the accused

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.
2. Where the Trial Chamber decides to proceed in the absence of the accused, it shall, after taking all reasonable steps to inform the accused of the charge, request the Pre-Trial Chamber to convene for purposes of recording evidence; in which case, as appropriate, the provisions of article 61 shall apply.
3. If the accused is subsequently tried under the present Statute, the record of evidence shall, subject to article 69 and the Rules of Procedure and Evidence, be admissible.

DOCUMENT A/CONF.183/C.1/WGPM/L.17

Colombia: proposal regarding article 63

[Original: Spanish]
[25 June 1998]

Trial in presence of the accused

1. As a general rule, the accused shall be tried in his presence.
2. The foregoing shall not prevent the accused from being tried *in absentia* if, all the necessary steps having been taken to secure his appearance, he does not appear for any reason.
3. In every case counsel shall stand bail, informally or otherwise, for the accused.

DOCUMENT A/CONF.183/C.1/WGPM/L.21

United States of America: reference paper

[Original: English]
[26 June 1998]

Rules of Evidence of the International Criminal Court

The attached reference paper (which was previously submitted to the Preparatory Committee as document A/AC.249/1998/DP.15) is submitted to the Working Group as an illustration of how rules of evidence, contained within the Court's rules promulgated under article 52 of the Statute, might appear.

Article 69 of the draft Statute addresses the law of evidence to be applied by the Court. Following extended debate on article 69 during the past week, it now appears that many of the criteria for determining the relevance and admissibility of evidence will not be set forth in the Statute, but instead will be

deferred to the Rules. The present paper is intended to suggest potential structure and content of the Rules of Evidence.

A number of the draft provisions are derived, with appropriate modifications, from the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia ("ICTY rules") and the Draft Set of Rules of Procedure and Evidence for the International Criminal Court prepared by the delegations of Australia and the Netherlands (A/AC.249/L.2) ("A/NL rules"), and these sources are noted. In addition, we have included explanatory notes where we thought it appropriate to highlight significant issues that will need to be considered in preparing the Rules.

Annex

Rules of evidence

(see draft Statute, article 69)

Rule 1. General provisions

(derived from ICTY rule 89; A/NL rule 105)

1. The Rules of Evidence set forth in this section, together with article 69 of the Statute, shall govern the proceedings before a Chamber.
2. These Rules shall be interpreted to ensure fairness to the parties and to the end that the truth may be ascertained and cases justly decided.
3. Where not otherwise provided for in this section, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it.
4. A Chamber may admit any relevant evidence that it deems to be reliable and have probative value. Irrelevant evidence shall not be admitted.
5. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of unduly cumulative evidence.
6. A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
7. A Chamber may request verification of the authenticity of evidence.

Rule 2. Testimony of witnesses

(derived from ICTY rule 90; A/NL rule 106)

1. Before testifying, every witness shall make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

NB: This rule governs a solemn declaration made by a witness, other than the accused. A number of delegations expressed support for a provision ensuring that an accused may make an unsworn statement at trial. This rule does not

seek to address this issue, which would have to be treated in the Statute or separately in the Rules.

2. A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration may testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which he has knowledge and that he understands the duty to tell the truth. [A judgement cannot be based on such testimony alone.]

3. If scientific, technical or other specialized knowledge will assist the Chamber in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

4. Other than an expert or an investigator responsible for a party's investigation, a witness who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

5. A witness may decline to make any statement that might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than [contempt or] perjury, and the Chamber may order such protective measures as may be necessary to effect this result.

Rule 3. Live testimony by means of video or audio link

1. Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber permits otherwise under this rule or rule 4.

2. In the interests of justice and to facilitate the orderly and efficient progression of the proceedings, a Chamber may permit an out-of-court witness to testify, notwithstanding his physical absence, by live audio link, video link or other technology.

3. The examination of the out-of-court witness shall be conducted in accordance with the provisions of the rules governing examination of witnesses at trial. If the State in which the out-of-court witness is located restricts the procedures under which the testimony is given, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Statute and the Rules.

Rule 4. Recorded testimony
(derived from ICTY rule 71)

1. In exceptional circumstances and in the interests of justice, a Chamber may order that testimony be taken and recorded, by audiotape, videotape, transcript or other similar means in advance of trial. The recorded testimony may be

admitted at trial if, for good cause shown, the witness cannot be present at the time of trial.

2. The party seeking to take and preserve testimony shall apply to the Chamber in writing and shall state the name and whereabouts of the person whose recorded testimony is sought, the date and place at which the recorded testimony is to be taken, the matters on which the person is to be examined and the exceptional circumstances involved.

3. If the Chamber grants the application, the party at whose request the recorded testimony is to be taken shall give reasonable notice to the other party, who shall have the opportunity to cross-examine the person to be examined. The parties shall attend the examination, or participate by means of audio link, video link or other similar technology.

4. The Chamber may appoint a judge to preside over the examination, which shall be conducted pursuant to the rules governing testimony of a witness at trial. If the State in which the witness is located restricts the procedures under which the examination proceeds, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Rules.

5. When recorded testimony is taken at the request of the Prosecutor or an indigent accused, [the Chamber may order that the Court will] [the Court shall] bear the expense involved.

Rule 5. Written and oral statements

1. Where a witness is unavailable or where the interests of justice otherwise so require, the Chamber may in its discretion admit prior written or oral witness statements, and give them such weight as it deems appropriate. A judgement cannot be based on such statement alone.

2. When a written or recorded statement or part thereof is introduced by a party, the Chamber may consider any other part or any other written or recorded statement of the witness which in fairness also ought to be considered.

Rule 6. Documentary and other evidence

1. The Chamber may admit documents, including records reflecting official acts or regularly conducted activity, so long as the records have substantial guarantees of trustworthiness.

2. The Chamber may admit summaries, charts or other demonstrative evidence if such evidence will assist in clarifying the issues under consideration.

Rule 7. Confessions
(derived from ICTY rule 92; A/NL rule 108)

1. A confession or admission by the accused given during questioning by the Prosecutor and recorded pursuant to

rule _¹⁸⁴ shall be presumed to have been given voluntarily unless the contrary is proved.

2. A confession or admission by the accused that has not been recorded pursuant to rule _ shall not be excluded if the circumstances establish that it was voluntarily given.

Rule 8. Evidence of consistent pattern of conduct
(derived from ICTY rule 93; A/NL rule 108)

Evidence of a consistent pattern of conduct by the accused may be admitted in the interests of justice.

NB: Other provisions in the Statute or the Rules will provide for disclosure of such evidence prior to trial.

Rule 9. Evidence in cases of sexual assault
(derived from ICTY rule 96; A/NL rule 113)

In cases of sexual assault:

(a) Corroboration of the victim's testimony shall not be required;

(b) Past sexual conduct of the victim shall not be admitted in evidence, except where exclusion would violate the fundamental rights of the accused. Before admitting evidence of a victim's past sexual conduct, the Chamber shall satisfy itself through an offer of proof made in camera that the evidence meets the requirements of this paragraph;

(c) Sexual conduct of the accused may be admitted [if relevant to show motive, opportunity, intent, identity, plan or absence of mistake].

NB: ICTY rule 96 (ii) permits consent as a defence in certain limited circumstances. Limitations on consent as a defence may more properly be treated in relation to defining crimes of sexual violence or general principles of criminal law.

Rule 10. Lawyer-client privilege
(derived from ICTY rule 97; A/NL rule 115)

All communications between lawyer and client shall be regarded as privileged and consequently not subject to disclosure, unless:

(a) The client consents to such disclosure; or

(b) The client disclosed the content of the communication to a third party.

Rule 11. Agreements as to admission
(derived from A/NL rule 111)

1. The defence and the prosecution may agree that a fact, the contents of a document or the expected testimony of a witness should be considered as evidence by the Chamber.

2. In the interest of justice, the Chamber may decline to accept an agreement under paragraph 1.

3. After an agreement has been accepted, a party may withdraw from it only if permitted to do so by the Chamber.

4. An agreement between the defence and the prosecution that a witness, if called to testify, would give certain testimony or that a document, if offered in evidence, has certain contents does not constitute an admission of the truth of the testimony or the contents of the document.

DOCUMENT A/CONF.183/C.1/WGPM/L.22

Syrian Arab Republic: proposal regarding article 69

[Original: Arabic]
[26 June 1998]

Evidence

Paragraph 5

Add the following sentence at the end of the paragraph:

"The Court shall respect and observe the obligations relating to the maintenance of confidentiality, showing due regard for national laws and customary practices such as the physician-patient, lawyer-client and confessor-penitent relationship, and shall respect and observe the confidentiality of private life."

DOCUMENT A/CONF.183/C.1/WGPM/L.23

Canada: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 3

Add a new sentence at the beginning of the paragraph and revise the current sentence, so that the paragraph will read as follows:

"3. The parties may call evidence relevant to the case, in accordance with article 64, paragraph 3. However, the Court has the authority to call all evidence that it considers necessary for the determination of the truth."

¹⁸⁴ The Rules of Procedure could require the Prosecutor to record statements of the accused, in the same manner as ICTY rule 43. If such a rule is promulgated, a presumption in favour of voluntariness could be provided for as above.

DOCUMENT A/CONF.183/C.1/WGPM/L.24

Iraq: proposal regarding article 69

[Original: Arabic]
[26 June 1998]

Evidence

Paragraph 7

7. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt. With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused.

NOTE. This proposal will require the deletion of the second sentence from article 66, which reads: "The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt."

DOCUMENT A/CONF.183/C.1/WGPM/L.25

Colombia: proposal regarding article 69, paragraph 7

[Original: Spanish]
[25 June 1998]

Evidence

Paragraph 7

7. The accused shall have the right to plead defences to trial under the provisions of this Statute, and to present evidence in their support.

DOCUMENT A/CONF.183/C.1/WGPM/L.26

Canada: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 7

7. Where a defence is not already raised by the evidence presented to the Court, the accused may raise such defence and has the right to prove such defence.

DOCUMENT A/CONF.183/C.1/WGPM/L.27

Philippines: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 7 should be reformulated as follows:

"7. The accused shall have the burden of proof in availing himself or herself of the defences in his or her favour under the general principles of criminal law in the

present Statute, subject to the requirements of article 66."

DOCUMENT A/CONF.183/C.1/WGPM/L.28

France and United Kingdom of Great Britain and Northern Ireland: proposal regarding article 73

[Original: English]
[26 June 1998]

Reparations to victims

NOTE. This is a simplified text which narrows the focus of the current "Reparations" text and which would replace the present article 73

1. The Court may establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its judgement the Court will determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. In its judgement, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. Reparations may include restitution, compensation and rehabilitation.

3. Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in article 79.

4. In exercising its power under the present article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1.¹⁸⁵

5. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims, other interested persons or interested States.

6. In relation to a judgement under this article, the national authorities of a State Party shall either:

(a) Enforce the judgement in accordance with national procedural law if victims, their successors or assigns seek enforcement of the judgement by its competent national authorities; or

¹⁸⁵ As regards the reference to article 90, paragraph 1, and part 10 in general, the sponsors consider that it is necessary to ensure that the property and assets referred to in that article include both crime" and non-crime" related property and assets.

(b) Enforce the judgement in accordance with parts 9 and 10 of the Statute if the Court, upon request from victims, their successors or assigns, seeks enforcement of its judgement.

7. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

8. Victims or any person acting on their behalf, the convicted person or other interested persons may appeal against a judgement under the article in accordance with part 8 of the Statute and the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.29

Switzerland: proposal regarding article 65

[Original: English]
[27 June 1998]

Proceedings on an admission of guilt

Paragraph 5 should read as follows:

“5. Any discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused or the penalty to be imposed shall in no way be binding on the Court.”

DOCUMENT A/CONF.183/C.1/WGPM/L.30

Japan: proposal regarding article 73

[Original: English]
[28 June 1998]

Reparations to victims

1. The Court may establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and compensation for the purpose of rehabilitation. The Court may, upon request, determine, in its judgement, the scope and extent of any damage, loss and injury to, or in respect of, victims.

2. In accordance with the principles established by the Court, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

3. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. Victims or their successors or assigns may seek enforcement of a judgement under the present article by competent national authorities. The national authorities of a State Party shall give effect to the judgement in accordance with its national law.

5. Nothing in the present article shall be interpreted as prejudicing the rights of victims under national or international law.

6. Victims or any person acting on their behalf and the convicted person may appeal against judgement under this article.

7. Rules necessary to give effect to the provisions of the present article shall be made in accordance with article 52.

DOCUMENT A/CONF.183/C.1/WGPM/L.31

Poland: proposal to clarify the relationship between article 57, paragraph 3 and article 69, paragraph 6

[Original: English]
[29 June 1998]

Evidence

NOTE

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DOCUMENT A/CONF.183/C.1/WGPM/L.32

Croatia: proposal regarding article 71

[Original: English]
[29 June 1998]

Sensitive national security information

Option 2

Add a new paragraph 1, as follows:

“1. States cannot claim national defence or security interests for withholding documents or evidentiary materials unless the legitimacy of their concerns has been established by a Pre-Trial Chamber or Trial Chamber.”

Paragraphs 1 to 6 thus are renumbered as paragraphs 2 to 7.

This new paragraph 1 can also be added in other options of article 71.

The present proposal corresponds to the Appeals Chamber decision of the International Tribunal for the Former Yugoslavia concerning *subpoena duces tecum* in the *Blaskic* case and relevant norms of the Statute and the Rules of Procedure and Evidence of the ICTY.

The Security Council has established this standard for the efficient functioning of the International Tribunals for the Former Yugoslavia and for Rwanda. There is no reason to apply different practices to the International Criminal Court.

DOCUMENT A/CONF.183/C.1/WGPM/L33

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 67**

[Original: English]
[29 June 1998]

Rights of the accused

1. Amend the chapeau of paragraph 1 as follows:

"Subject to the provisions of this Statute, in the determination of any charge brought under it the accused is entitled to a fair and public hearing, conducted impartially, and to the following minimum guarantees in full equality;"
2. Amend paragraph 1 (g) as follows:

"Neither to be compelled to testify nor to confess guilt and to be permitted to remain silent without any inference as to guilt or innocence being drawn from such silence;"
3. Replace the word "Procuracy" by the word "Prosecution" throughout this provision.

DOCUMENT A/CONF.183/C.1/WGPM/L34

Israel: proposal regarding article 69

[Original: English]
[29 June 1998]

Evidence

Paragraph 2

2. Before deciding on the subject of the admission of recorded evidence (video or audio), the Court has to be satisfied that the following preliminary conditions are met to ensure that the testimony is authentic and has been properly recorded. The recorder must testify about the following issues:

- (a) The record is the original record;
- (b) The person recorded is identified by the recorder as the witness-recorded;
- (c) The record is authentic and has not been interfered with;
- (d) The testimony recorded had been given out of free will without any duress, torture or other unlawful means, and there is no risk that the testimony is not reliable.

DOCUMENT A/CONF.183/C.1/WGPM/L35

Australia: proposal regarding article 67

[Original: English]
[29 June 1998]

Rights of the accused

Paragraph 2

2. The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide.

DOCUMENT A/CONF.183/C.1/WGPM/L36

**Egypt, Oman and Syrian Arab Republic: proposal
regarding article 67**

[Original: Arabic]
[29 June 1998]

Rights of the accused

Paragraph 1

- (a) to be informed immediately and in detail, in his or her own language or in a language of his or her choice, of the nature ...;
- (b) ...
- (c) to be tried without unreasonable delay and speedily;
- (d) ...
- (e) to be entitled to present whatever evidence he or she sees fit, and in particular to examine personally or through an intermediary the prosecution witnesses and to compel the appearance and examination of witnesses for the defence upon the same conditions as for prosecution witnesses;
- (f) ...
- (g) ...
- (h) to make an unsworn statement or any other deposition in his or her defence.

Paragraph 2

It is necessary to identify the person or the body who is to furnish the exculpatory evidence.

Paragraph 3

The paragraph should be retained once the square brackets have been deleted.

Paragraph 4

The paragraph should be placed elsewhere.

DOCUMENT A/CONF.183/C.1/WGPM/L.39

**France and United States of America:
proposal regarding article 71**

[Original: English]
[1 July 1998]

NOTE. This is an amended version of the proposals submitted by France and the United States in March 1998 (A/CONF.183/2/Add.1 and Corr.1, article 71, options 1 and 3). This proposal incorporates much of the amended proposal of the United Kingdom of Great Britain and Northern Ireland on article 71, which has been circulated as document A/CONF.183/C.1/WGPM/L.12. Where this proposal sets forth additions to or amendments of provisions in the United Kingdom's proposal, the text is italicized. An integral part of this proposal is the proposal amending article 90, paragraph 2 (c), which is set out at the beginning of article 71, option 3, in A/CONF.183/2/Add.1 and Corr.1 (see footnote 186 below).

Article 71

Protection of national security information

1. (a) This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

(b) *This article shall also apply when a person who has been requested to give information or evidence has refused to do so on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that the disclosure would prejudice its national security interests.*

(c) If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that such disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

(d) Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), *nor shall this article be interpreted as requiring a State to disclose information obtained under a pre-*

existing agreement of confidentiality from another State or an intergovernmental organization.

2. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence, or the Pre-Trial or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, *or a determination as to whether the evidence, though relevant, is cumulative;*

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

3. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests. *If a State has complied with the provisions of paragraph 2 and this paragraph, it may deny a request for assistance, in whole or in part, in accordance with article 90, paragraph 2 (c).*¹⁸⁶

4. *If, in the opinion of the Court, the State's decision may have been made in bad faith, it may consider the matter further, as set forth in the provisions below.*

5. The Court may hold a hearing for the purpose of hearing the State's representations on non-disclosure. If so, notice to the State will be given in accordance with the Rules of Procedure and Evidence. The Court shall, if so requested by the State, hold

¹⁸⁶ This citation refers to article 90, paragraph 2 (c), as amended in the text at the beginning of option 3, article 71, in document A/CONF.183/2/Add.1 and Corr.1. That text reads:

"2. A State Party may deny a request for assistance, in whole or in part, only if: ...

"(c) having complied with the provisions of article [71], it determines that there are no conditions under which it can comply with the request, including requests for information or evidence arising under article 71 (option 1), without seriously prejudicing its national security interests."

in camera and ex parte hearings and may make other special arrangements, including, as appropriate:

(a) Designating a single judge to examine documents or hear submissions;

(b) Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

(c) Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

(d) Ordering that no transcripts be made of the proceedings, and that documents not required by the Court be returned directly to the State without being deposited or filed in the Registry of the Court.

6. *The Court shall not conclude that the State's decision not to disclose is made in bad faith unless:*

(a) It is clear from the State's actions that it *has engaged in a pattern of* not acting in good faith towards the Court. In determining the State's bona fides, the Court shall have regard to *the State's conduct in present and previous dealings with the Court, including:*

(i) Whether efforts to secure the State's assistance through cooperative means and without recourse to measures of compulsion *have been successful;*

(ii) Whether the State has expressly refused to cooperate; and

(iii) Whether there is clear evidence that the State *did* not intend to cooperate either because there was excessive delay in complying with a request for assistance or because there *were* other circumstances clearly indicating an absence of good faith on its part;

(b) The information or evidence is relevant *and necessary for the resolution of an important issue in the case;* and

(c) *The Court is satisfied that the State's claim that its national security interests would be prejudiced by disclosure is manifestly without foundation, based on a determination that:*

(i) *Upon consideration of the nature of the information sought (including the manner or likely manner in which the State obtained the information), and any submission the State may have made in support of its claim, there is no apparent as is for the claim; or*

(ii) *It is clear that the purpose of the State in making the claim is to shield one of its nationals or*

agents from criminal responsibility for the crime being investigated.

7. *If, pursuant to the procedure set out above, the Court concludes that the State is not acting in conformity with the provisions of the present Statute, the Court may refer the matter as provided in article 86, paragraph 6.*¹⁸⁷

DOCUMENT A/CONF.183/C.1/WGPM/L.48/REV.1

Canada: proposal regarding article 69

[Original: English]
[7 July 1998]

Evidence

Paragraph 4

4. The Court may rule on the relevance and admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial of an accused or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.49

Singapore: proposal regarding article 71

[Original: English]
[3 July 1998]

Protection of national security information

NOTE. Italicized portions denote differences from the paper submitted by France and the United States of America (A/CONF.183/C.1/WGPM/L.39).

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraphs 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so on the ground that disclosure would prejudice the national

¹⁸⁷ This citation refers to the paragraph appearing in A/CONF.183/2/Add.1 and Corr.1, concerning referral by the Court of matters involving non-cooperation by States Parties.

security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), nor shall this article be interpreted as requiring a State to disclose information obtained from another State or an intergovernmental organization under an agreement to protect classified information exchanged between the parties.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, is cumulative;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. *Thereafter, where disclosure of the information or document is other than pursuant to a request for cooperation under part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, order disclosure.*

8. *Where the disclosure of the information or document is sought pursuant to a request for cooperation under part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused:*

(a) *Refer the matter in accordance with article 86, paragraph 6; and*

(b) *Make such inferences that relate to the guilt or innocence of the accused as may be appropriate in the circumstances.*

DOCUMENT A/CONF.183/C.1/WGPM/L.52

Israel: proposal regarding article 64

[Original: English]
[6 July 1998]

Functions and powers of the Trial Chamber

Proposed new paragraph

11. (a) The Prosecutor or the arrested/accused person may appeal to the Trial Chamber against a decision given by the Pre-Trial Chamber.

(b) The appeal shall be heard before a quorum of three judges other than those who hear the trial.

(c) The appeal shall be brought to the Trial Chamber by leave of the Trial Chamber.

DOCUMENT A/CONF.183/C.1/WGPM/L.58/REV.1

Canada: proposal regarding article 68

[Original: English]
[6 July 1998]

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims¹⁸⁸ and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or

¹⁸⁸ Delegations took the view that the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses. Some delegations did not agree with this.

inconsistent with the rights of the accused and a fair and impartial trial.

2. Notwithstanding the principle of public hearings in article 67, the Chambers of the Court may, to protect victims and witnesses, conduct closed proceedings or allow the presentation of evidence by electronic or other special means. Such measures shall be implemented where requested by a child witness or victim, or a victim of sexual violence, unless otherwise ordered by the Court.

3. The Court shall permit the views and concerns of the victims to be presented and considered at stages of the proceedings determined to be appropriate by the Court where their personal interests are affected, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 44, paragraph 4.

5. In respect of any evidence or information to be disclosed pursuant to this Statute, if disclosure of such evidence or information may lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and submit a summary of such evidence or information. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁸⁹

¹⁹⁰[6. In the exercise of its powers under this article, the Court shall take into consideration the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

7. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

¹⁸⁹ The Drafting Committee should be advised that this paragraph could either be included within article 68 or as a new paragraph 10 of article 61, although there was a preference expressed by many delegations to retain it in article 68.

¹⁹⁰ Option 1: Paragraph 6, as amended, to be included in the text.

Option 2 The text of paragraph 6, as amended, to be included as a footnote.

DOCUMENT A/CONF.183/C.1/WGPM/L.65

Netherlands: proposal regarding article 70

[Original: English]
[9 July 1998]

Offences or acts against the integrity of the Court

4. (a) The Court's jurisdiction shall be governed by the rule of territoriality.

(b) In case the territorial State has preferent jurisdiction in accordance with paragraph 1 of this article, the Court shall refer the case to that State and provide assistance to that State in accordance with article 90, paragraph 7. On request of the Court, the territorial state shall prosecute a crime under article 70 as expeditiously as possible.

5. The Rules of Procedure and Evidence shall address the procedural provisions regarding the Court's exercise of jurisdiction under this article in accordance with articles 63 to 67, article 69, article 72 and article 74 of this Statute.

DOCUMENT A/CONF.183/C.1/WGPM/L.69

United States of America: proposal regarding article 73, paragraph 1

[Original: English]
[10 July 1998]

*Reparations to victims*¹⁹¹

DOCUMENT A/CONF.183/C.1/WGPM/L.70/REV.1

Belgium, Italy and United Kingdom of Great Britain and Northern Ireland: proposal regarding article 71 bis

[Original: English]
[10 July 1998]

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it

¹⁹¹ This provision intends that where there are only a few victims the Trial chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.

In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative.

shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 71. If the originator is not a State Party and refuses consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

DOCUMENT A/CONF.183/C.1/WGP/L.4

Mexico: proposal regarding article 21 bis or article 74 bis

[Original: English]
[1 July 1998]

NOTE

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8. Part 7. Penalties

(a) Documents of the Working Group on Penalties

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGP/L.2

Chairman's working paper on article 79

[Original: English]
[30 June 1998]

NOTE. The following text is proposed for consideration, without prejudice to the question of inclusion of fines or confiscated assets.

Fines and assets collected by the Court

Fines and assets collected by the Court may be transferred, by order of the Court, to a trust fund established by the Secretary-General of the United Nations for the benefit of victims of the crime and their families.

DOCUMENT A/CONF.183/C.1/WGP/L.3/REV.1

Chairman's working paper on article 75

[Original: English]
[6 July 1998]

Applicable penalties

Paragraph 1

The Court may impose on a person convicted of a crime under article [5] of this Statute a term of life imprisonment, where justified by the particular circumstances of the crime, or

imprisonment for a specified number of years, which may not exceed a maximum of 30 years.^{192,193}

¹⁹² To meet the concerns of a number of delegations regarding the severity of a life sentence or a long sentence of imprisonment, it would be necessary to provide for a *mandatory* mechanism in part 10, article 100, by which the prisoner's sentence would be re-examined *by the Court* after a certain period of time, in order to determine whether he or she should be released. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question. Among such criteria several delegations emphasized that evidence of the prisoner's early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgements in other cases, and in particular providing information as to the location of assets which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.

With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at: (i) not less than 20 years in case of life imprisonment, and (ii) not less than two thirds of the term in case of imprisonment for a specified number of years. With regard to the period for life imprisonment, it is noted that some delegations supported this period being set at not less than 25 years.

Consideration should also be given to the issue of subsequent mandatory reviews following the initial one. In subsequent reviews other grounds besides those listed above may become more relevant, while the relevance of the stated grounds may diminish. For the purposes of establishing a system of periodic review, there would appear to be a need to distinguish between life imprisonment and imprisonment for a specified number of years. In the case of the former, it is suggested that subsequent reviews take place at three-year intervals. In relation to other terms of imprisonment, in view of the technical complexity of similar provisions, it is suggested that subsequent mandatory reviews take place according to a schedule specified in the Rules of Procedure and Evidence.

¹⁹³ The Coordinator would like to stress the following:

Extensive consultations, as well as statements in the plenary of the Conference and in the Working Group on Penalties, have shown that a number of delegations strongly favour an inclusion of the death penalty as one of the penalties to be applied by the Court. On the other hand, the consultations as well as statements in the plenary and in the Working Group have also shown that a number of other delegations are strongly opposed to such an inclusion. In this context, a number of delegations have stressed that cooperation between States and the Court would effectively be hindered should the Statute provide either directly or indirectly for an inclusion of the death penalty.

On the basis of these consultations it is the opinion of the Coordinator that there are no grounds for establishing a consensus on this issue. At the same time, a very substantial number of interventions of delegations in the course of the work in the Working Group have indicated a strong desire to achieve a balanced compromise on the main penalties to be included in the Statute. All delegations have indicated a willingness to find solutions which may be conducive to the shared goal of an early establishment of an International Criminal Court with a broad basis of support from the international community.

It should be noted that not including the death penalty in the Statute would have no bearing on national legislations and practices in this field. States have the primary responsibility for prosecuting and punishing individuals for crimes falling under the subject-matter jurisdiction of the Court. In accordance with the principle of complementarity between the Court and national jurisdictions, the Court would clearly have no say on national policies in this field.

DOCUMENT A/CONF.183/C.1/WGP/L.7

Chairman's working paper on article 79

[Original: English]
[2 July 1998]

Fines collected by the Court

1. A trust fund shall be established by decision of the Assembly of States Parties, for the benefit of victims of crimes within the jurisdiction of the Court and of their families.
2. Money and the proceeds of other property collected by the Court through fines or forfeiture may be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

DOCUMENT A/CONF.183/C.1/WGP/L.9/REV.1

Chairman's working paper on article 77

[Original: English]
[6 July 1998]

Determination of the sentence

Paragraph 3

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and may not exceed the maximum prescribed in article 75, paragraph ..., which may only be applied where justified by the circumstances of the crimes.

DOCUMENT A/CONF.183/C.1/WGP/L.10

Chairman's working paper on article 75

[Original: English]
[2 July 1998]

Applicable penalties

Paragraph 2

2. In addition to imprisonment, the Court may order
 - (a) A fine, which, having regard to the circumstances and means of the convicted person, is not excessive;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

In the event of refusal to comply with an order imposed by the Court to pay a fine or a forfeiture, the convicted person may be re-sentenced by the Court in accordance with the Rules of Procedure and Evidence.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGP/L.14

[incorporating documents A/CONF.183/C.1/WGP/L.14/Corr.1 and Corr.2 of 6 July 1998 and Add.1 of 7 July 1998 and Add.1/Corr.1 of 8 July 1998, Add.2 of 9 July 1998 and Add.3/Rev.1 of 17 July 1998]

Report of the Working Group on Penalties

[Original: English]
[4 July 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Penalties, under the chairmanship of Mr. Rolf Einar Fife (Norway), the following articles of part 7:

PART 7. PENALTIES

Article 75. Applicable penalties

[Article 76]. Penalties applicable to legal persons

Article 77. Determination of the sentence

[Article 78]. Applicable national legal standards

[Article 79]. Fines [and assets] collected by the Court

2. The Working Group held four meetings to consider the articles contained in part 7, from 30 June to 3 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 7 for its consideration: article 75, paragraph 2; article 77, paragraphs 1 and 2; and article 79. The Working Group also notes the deletion of article 75, last two subparagraphs of paragraph 1 (a) subparagraph [(b)], subparagraph [(c)] and subparagraph [(d)]; and article 78.

3. The Working Group held one additional meeting to consider the remaining articles contained in part 7, on 7 July 1998. The Working Group herewith transmits to the Committee of the Whole the following article for inclusion in part 3: article 21 bis. The Working Group further notes the deletion of [article 76].

4. The Working Group held one additional meeting, on 9 July 1998, to consider the remaining articles contained in part 7. The Working Group herewith transmits to the Committee of the Whole the following articles of part 7 for its consideration: article 75, paragraph 1; and article 77, paragraph 3.

5. The Working Group held two additional meetings, on 11 and 16 July 1998, to consider the remaining article contained in part 7. The Working Group herewith transmits to the Committee of the Whole the following article of part 7, as well as the accompanying statement, for its consideration:

article 79 bis. The Working Group also notes the deletion of article 75, paragraph 1 (e).¹⁹⁴ The Working Group thereby concluded its consideration of part 7.

II. Text of draft articles

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

*Article 21 bis*¹⁹⁵

Nulla poena sine lege

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

PART 7. PENALTIES¹⁹⁶

Article 75

Applicable penalties

1.¹⁹⁷ The Court may impose on a person convicted of a crime under article [5] of this Statute one of the following penalties, subject to article 100:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹⁹⁸

[(b)]: (Deleted)

[(c)]: (Deleted)

[(d)]: (Deleted)

(e): (Deleted)

2.¹⁹⁹ In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for by the Rules of Procedure and Evidence;

¹⁹⁴ Some delegations do not agree with the decision to exclude the death penalty but they have decided to permit the Conference to proceed on the basis of the Chairman's proposal while reserving the right to put their views on record at appropriate stages of the Conference.

¹⁹⁵ The Working Group draws the attention of the Drafting Committee to the possibility of including this provision as a separate article or as a provision of article 21.

¹⁹⁶ The Working Group informs the Drafting Committee that the term "forfeiture" is to be translated as follows throughout the Statute: French: confiscation; Spanish: decomiso; and Arabic: مصادرة

¹⁹⁷ The Working Group notes that the adoption of this paragraph is without prejudice to the structure of this article and without prejudice to the issue of the inclusion or the non-inclusion of the death penalty.

¹⁹⁸ Some delegations expressed concerns about an explicit reference to life imprisonment.

¹⁹⁹ The Working Group draws the attention of the Drafting Committee to the need to consider this article in conjunction with article 99, Enforcement of fines and forfeiture measures.

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

NOTE

To meet the concerns of a number of delegations regarding the severity of long sentences of imprisonment, it would be necessary to provide for a *mandatory* mechanism in part 10, article 100, by which the prisoner's sentence would be re-examined *by the Court* after a certain period of time. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question. Among such criteria several delegations emphasized that the behaviour of the prisoner, including in particular early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgements in other cases, and in particular providing information as to the location of assets which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.

With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at not less than two thirds of the term of imprisonment. In case of life imprisonment, the period to be served before a review may take place would be not less than 25 years.

Article 100 should also provide for subsequent mandatory reviews following the initial one. In view of the technical complexity of such rules, it is suggested that subsequent mandatory reviews take place according to modalities specified in the Rules of Procedure and Evidence.

[Article 76

Penalties applicable to legal persons]

(Deleted)

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into

account such factors as the gravity of the crime and the individual circumstances of the convicted person.²⁰⁰

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 75, paragraph 1 (b).²⁰¹

[Article 78
Applicable national legal standards]

(Deleted)

Article 79²⁰²
Fines and assets collected

1. A Trust Fund shall be established by decision of the Assembly of States Parties, for the benefit of victims of crimes within the jurisdiction of the Court and of their families.

2. Money and other property collected through fines or forfeiture may be transferred by order of the Court, to the Trust Fund.

3. The Trust fund shall be managed according to criteria to be determined by the Assembly of States Parties.

²⁰⁰ It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

²⁰¹ The Working Group draws the attention of the Drafting Committee to the future need to finalize the paragraph numbers of article 75.

²⁰² The Working Group draws the attention of the Drafting Committee to the need to ensure consistency in the use of terms in this article and article 73, Reparations to victims.

*Article 79 bis*²⁰³

Nothing in this part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this part.

NOTE

The Working Group recommends that the President of the Conference make the following statement and that this statement be included in the official records of the Conference:

With regard to the non-inclusion of the death penalty in the Statute, I should like to make the following statement:

"Statement

"The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes."

**(b) Notes contained in the transmittal letters
from the Chairman of the Committee of
the Whole to the Chairman of the Drafting
Committee**

**Note regarding part 7 and articles 75 and 79 contained in
the transmittal letter from the Chairman of the
Committee of the Whole to the Chairman of the
Drafting Committee dated 7 July 1998⁹⁸**

*Article 75
Applicable penalties*

*Article 79
Fines and assets collected*

NOTE

Understandings of the Committee of the Whole with respect to part 7:

²⁰³ The Drafting Committee may wish to consider the placement of this article in part 7.

The Committee of the Whole informs the Drafting Committee that the term “forfeiture” is to be translated as follows throughout part 7: French: *confiscation*; Spanish: *decomiso*; and Arabic: مصادرة

The Committee of the Whole draws the attention of the Drafting Committee to the need to consider article 75 in conjunction with article 99, Enforcement of fines and forfeiture measures.

The Committee of the Whole draws the attention of the Drafting Committee to the need to ensure consistency in the use of terms in article 79 and article 73, Reparations to victims.

Note regarding article 75 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10 July 1998⁹⁹

Article 75
Applicable penalties

NOTE

Understandings of the Committee of the Whole with respect to part 7:

The Committee of the Whole draws the attention of the Drafting Committee to the future need to finalize the paragraph numbers of article 75.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/WGP/L.1

Italy: proposed amendments regarding articles 75, 76 and 77

[Original: French]
[30 June 1998]

Article 75
Applicable penalties

Subparagraph (a)

Delete the words “[a maximum term of imprisonment of [30] years:]”

Delete the subsequent square brackets, leaving the succeeding wording as it is, throughout.

Subparagraph (b)

Insert the following wording, leaving the present text as it is and deleting the square brackets:

“(a fine) ... set at an amount representing the maximum pecuniary penalty prescribed by the criminal law of the State in which the Court has its seat”.

Subparagraph (c)

Delete the entire subparagraph.

Article 76
Penalties applicable to legal persons

Subparagraph (v)

Retain the entire wording and delete the square brackets.

Article 77
Determination of the sentence

Paragraph 1

After the words “of the convicted person”, insert the wording in note 13 describing the circumstances.

Paragraph 2

In the second sentence, replace the word “may” by the word “shall”.

DOCUMENT A/CONF.183/C.1/WGP/L.5

Austria: proposal regarding article 77

[Original: English]
[1 July 1998]

Determination of the sentence

Paragraph 3

3. When a person has been convicted of more than one crime, the Court shall pronounce a single sentence of imprisonment, not exceeding the maximum sentence provided for in article 75, while indicating the portion of the sentence relating to each of the crimes.

DOCUMENT A/CONF.183/C.1/WGP/L.6

Ukraine: proposal regarding article 77

[Original: Russian]
[1 July 1998]

Determination of the sentence

Paragraph 3

The text should read as follows:

“When a person has been convicted of more than one crime, the Court shall pronounce a separate sentence for each crime and shall determine a definitive sentence for the several crimes by merging the lesser sentence in the greater sentence or by adding the whole or part of the sentences together, provided that the total duration of punishment shall not exceed the penalties prescribed for the gravest crime.”

DOCUMENT A/CONF.183/C.1/WGP/L.11

[incorporating documents A/CONF.183/C.1/WGP/L.11/Corr. 1 and 2 of 3 and 8 July 1998]

Algeria, Bahrain, Comoros, Egypt, Iran (Islamic Republic of), Iraq, Kuwait, Libyan Arab Jamahiriya, Nigeria, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal regarding article 75

[Original: Arabic]
[3 July 1998]

Applicable penalties

The Court may impose on a person convicted under this Statute one or more of the penalties provided for by the national law of the State in which the crime was committed.

In cases where national law does not regulate a specific crime, the Court may apply one or more of the following penalties:

- (a)
- (b)
- (c)
- (d)

DOCUMENT A/CONF.183/C.1/WGP/L.12

Belgium, Benin, Brazil, Burundi, Dominican Republic, Egypt, France, Oman, Portugal, Republic of Korea, Romania, Samoa, Slovenia, South Africa, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United Republic of Tanzania: proposal regarding article 76

[Original: English]
[2 July 1998]

Penalties applicable to juridical persons

A juridical person shall incur one or more of the following penalties:

- (a) Fines;
- (b) Forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.²⁰⁴

DOCUMENT A/CONF.183/C.1/WGP/L.13

Barbados, Dominica, Jamaica, Singapore and Trinidad and Tobago: proposal regarding article 75

[Original: English]
[3 July 1998]

Applicable penalties

The Court may impose upon a person convicted under this Statute one or more of the following penalties:

- (a) The death penalty;
- (b) A term of life imprisonment;
- (c) A term of imprisonment not exceeding thirty (30) years.

The Court may attach to any sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of the Statute].

DOCUMENT A/CONF.183/C.1/WGP/L.15

Mexico: proposal regarding article 75

[Original: English]
[7 July 1998]

Applicable penalties

Paragraph 1

1. The Court may impose on a person convicted of a crime under article [5] of this Statute one of the following penalties:

- (a) Imprisonment for a specified number of years which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment only when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

9. Part 8. Appeal and review

- (a) **Documents of the Working Group on Procedural Matters**
- (i) **Working documents**

DOCUMENT A/CONF.183/C.1/WGPM/L.72

Working paper on article 81

[Original: English]
[10 July 1998]

Appeal against other decisions

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

²⁰⁴ To be made consistent with article 75.

(a) A decision with respect to jurisdiction or admissibility;

(b) An order granting or denying release of the defendant on bail;

(c) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁰⁵

2. Unless the Appeals Chamber so orders upon request in accordance with the Rules of Procedure and Evidence and unless otherwise provided for in this Statute, an interlocutory appeal shall not of itself have suspensive effect.

After a decision is taken on article 73, *add* to article 81 a paragraph 3 as follows:

“3. Victims or any person acting on their behalf, the convicted person or a person adversely affected by an order under article 73, may appeal against that order. To that end, specific provisions shall be made in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.74

Working paper on article 84

[Original: English]
[11 July 1998]

Compensation to an arrested or convicted person

1. Anyone who has been victim of unlawful arrest or detention shall have an enforceable¹⁶⁹ right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,⁶⁴ unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. Under exceptional circumstances, the Court in its discretion may award compensation, according to the criteria set forth in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of

acquittal or a termination of the proceedings, where the Court finds conclusive facts showing that there had been a grave and manifest miscarriage of justice.²⁰⁶

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPM/L.2
Report of the Working Group on Procedural Matters

[Original: English]
[24 June 1998]

NOTE

This document is reproduced under part 5.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 8 and article 81 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 81
Appeal against decisions

NOTE

Understandings of the Committee of the Whole in respect of part 8:

The term “decision” or “sentence”, as appropriate, should be used consistently throughout part 8 rather than the term “judgement”.

In connection with the opening clause of paragraph 1 of article 81, the Committee of the Whole draws the attention of the Drafting Committee to the fact that the word “Parties” should not be capitalized in French.

With respect to article 81, paragraph 1 (b), the word “defendant” should not appear in the English text.

²⁰⁵ Subject to the final drafting of article 71, it was suggested to include within this provision a right to appeal orders of the Court related to the disclosure of national security information. It was also suggested to grant the same right to affected persons for activities of the Prosecutor performed under article 57 bis, paragraph 3 (d).

²⁰⁶ There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriages of justice. Other delegations considered this text to be too restrictive.

Note regarding part 8 and articles 82 and 83 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

*Article 82
Proceedings on appeal*

*Article 83
Revision of conviction or sentence*

NOTE

Understandings of the Committee of the Whole with respect to part 8:

The term “decision” or “sentence”, as appropriate, should be used consistently throughout part 8 rather than the term “judgement”. The term “sentence” should be translated as *pena* in Spanish and the corresponding term in Arabic.

In article 82, paragraph 5, a cross-reference to article 63 may be necessary depending on the decision taken on that article.

The blank in article 83, paragraph 1, will be considered at a later stage.

Note regarding article 84 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

*Article 84
Compensation to an arrested or convicted person*

NOTE

Understanding of the Committee of the Whole with respect to part 8:

The wording of article 84 should follow the wording of the relevant provisions of the International Covenant on Civil and Political Rights in all of the language versions.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/WGPM/L.44

Netherlands: proposal regarding article 81

*[Original: English]
[2 July 1998]*

Appeal against interlocutory decisions

Paragraph 1

After subparagraph [d], add a new subparagraph d bis reading as follows:

“(d bis) A decision under article 71 with a view to disclosure of information or documents;”

DOCUMENT A/CONF.183/C.1/WGPM/L.45

Japan: proposal regarding article 83

*[Original: English]
[3 July 1998]*

Revision of conviction or sentence

Paragraph 5

5. Execution of the judgement of the Court may, upon its motion if the interest of justice so requires or at the request of the State of enforcement, be delayed or suspended during the period allowed for revision and for the duration of the revision proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.46

Kenya: proposal regarding article 81

*[Original: English]
[3 July 1998]*

Appeal against interlocutory decisions

New paragraph 3

3. Other decisions may be appealed with leave of the Chambers concerned, and in the event of refusal, such refusal may be appealed.

DOCUMENT A/CONF.183/C.1/WGPM/L.47

Canada: proposal regarding article 81

*[Original: English]
[3 July 1998]*

Appeal against interlocutory decisions

Paragraph 1 (e)

(e) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the trial.

DOCUMENT A/CONF.183/C.1/WGPM/L.50

United States of America: proposal regarding article 81

*[Original: English]
[3 July 1998]*

Appeal against interlocutory decisions

Footnote for paragraph 2

In the event that the final version of article 17 addresses the suspension of a trial proceeding when there is an appeal

from a decision on admissibility or jurisdiction, the matter of the non-suspensive effect of an appeal under article 81, paragraph 2, should be revisited to ensure consistency.

DOCUMENT A/CONF.183/C.1/WGPM/L.53

Syrian Arab Republic: proposal regarding article 82

[Original: Arabic]
[6 July 1998]

Proceedings on appeal

Paragraphs 4 and 5

4. The decision shall be taken unanimously by all the judges and shall be delivered in open court. Any of the judges may dissent from the opinion of the majority provided that they explain the reasons for their dissent, to which the majority must reply.

5. The Appeals Chamber may deliver its judgement in the absence of the accused if the latter's absence is in conformity with the provisions of article 63 of this Statute.

DOCUMENT A/CONF.183/C.1/WGPM/L.54

Israel: proposal regarding article 82

[Original: English]
[6 July 1998]

Proceedings on appeal

Paragraph 2 (c)

(c) New evidence will not be allowed to be brought to the Appeals Chamber unless the party so appealing shows that the new evidence was not available prior to this time, and that there was no negligence on the part of the party that seeks the acceptance of the new evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.55

Kenya: proposal regarding article 84

[Original: English]
[6 July 1998]

Compensation to a suspect/accused/convicted person

Paragraph 3

3. The Court may also award compensation to a person who was held in detention if such detention is found to have been based on no reasonable grounds, or when the proceedings against him or her have concluded with a decision to release him or her because the evidence upon which the proceedings were based was unreasonable and tainted with malice.

DOCUMENT A/CONF.183/C.1/WGPM/L.56

Canada: proposal regarding article 84

[Original: English]
[6 July 1998]

Compensation to a suspect/accused/convicted person

[Paragraph 3]

[3. The Court may also award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision to release him because of insufficient evidence to support charges against him or because of a final decision of acquittal, provided that the Court determines that the prosecution was undertaken for malicious or *mal fides* purposes.]

DOCUMENT A/CONF.183/C.1/WGPM/L.57

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 83**

[Original: English]
[6 July 1998]

Revision of conviction or sentence

Option 1 (two-step process)

Paragraph 1 (c)

Delete the current text for the subparagraph and substitute the following text:

(c) One or more of the judges who participated in conviction or confirmation has committed an act of serious misconduct or serious breach of duty of sufficient gravity to justify their removal from office under article 47;

DOCUMENT A/CONF.183/C.1/WGPM/L.59

Argentina: proposal regarding article 83

[Original: English]
[6 July 1998]

Revision of conviction or sentence

Option 1 (two-step process)

Paragraph 2

2. If a majority of the judges of the Appeals Chamber is disqualified pursuant to article 42, the functions of the Appeals Chamber under this article shall be performed by the Presidency.

DOCUMENT A/CONF.183/C.1/WGPM/L.60

Philippines: proposal regarding article 82

[Original: English]
[7 July 1998]

Proceedings on appeal

Paragraph 4, second paragraph, second sentence

Any judge may deliver a separate or dissenting opinion.

DOCUMENT A/CONF.183/C.1/WGPM/L.62

Syrian Arab Republic: proposal regarding article 83

[Original: Arabic]
[8 July 1998]

Revision of conviction or sentence

Paragraph 5

5. A death sentence imposed by the Court may be suspended during the period of time allowed for revision of the sentence. This shall also apply to a prison sentence, if it is not already being served, on the basis of a decision by the Court, if the Court finds that the evidence warrants a modification of the sentence on the application of the convicted person.

DOCUMENT A/CONF.183/C.1/WGPM/L.73

Canada: proposal regarding article 82

[Original: English]
[11 July 1998]

Proceedings on appeal

The decision of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The decision shall state the reasons on which it is based. When there is no unanimity, the decision of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

10. Part 9. International cooperation and judicial assistance

(a) Documents of the Working Group on International Cooperation and Judicial Assistance

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGIC/L.5

Chairman 's discussion paper regarding articles 87 and 88

[Original: English]
[26 June 1998]

Article 87

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 5

A State Party [having received a request under this part may, in accordance with the Rules of Procedure and Evidence,]

file a written application with the Court to [set aside] [withdraw] [or amend] the request on specified grounds [including those mentioned in articles 15 and 18] [, including that execution of the request in its current form would require the requested State to breach an existing treaty obligation undertaken to another State] [or in the case of a request for surrender, that the person named in the warrant is not the person in the custodial State or that the person cannot be located] or that there is insufficient information to execute the request.] (the rest of the paragraph as in current article 87, paragraph 5).

or

Article 88

Contents of request for [surrender] [transfer] [extradition]

Paragraph 2

Where a State receives a request under this part and identifies problems with the request which may impede or prevent its execution, including but not limited to:

(a) Insufficient information to execute the request; or

(b) In the case of a request for surrender, despite best efforts, that the person sought cannot be located or that investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) That execution of the request in its current form would require the requested State to breach an existing treaty obligation undertaken to another State,

the requested State shall, without delay, consult with the Court to resolve the matter.

DOCUMENT A/CONF.183/C.1/WGIC/L.6

Chairman 's discussion paper regarding article 87

[Original: English]
[26 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 6

(a) A State Party shall give priority to a request from the Court under paragraph 1, over requests from other States Parties, whether the request from the State Party relates to the same offence or a different offence from that for which the Court seeks the surrender of the person.

(b) If the requested State also receives a request from a non-State Party with which it has an extradition relationship, for the extradition of the same person, for the same offence for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or extradite the person to the State. In making its decision the requested State shall consider all the relevant factors, including but not limited to:

- (i) The respective dates of the requests;
- (ii) The interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the alleged offender and the victims;
- (iii) The possibility of subsequent surrender between the Court and the State requesting extradition.²⁰⁷

(c) If the requested State also receives a request from a non-State Party with which it has an extradition relationship, for the extradition of the same person, for a different offence from that for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or extradite the person to the State. In making its decision the requested State shall consider all the relevant factors, including those set out in (b) above, but in particular the relative nature and gravity of the offences.

DOCUMENT A/CONF.183/C.1/WGIC/L.16

Chairman's discussion paper regarding article 90

[Original: English]
[10 July 1998]

National law/Grounds for refusal

Option 1

No reference to national or procedural law in the chapeau of article 90, paragraph 1;

and

Deletion of ground for refusal (b) in article 90, paragraph 2, option 2.

Option 2 (A)

Reference to national law in the chapeau of article 90, paragraph 1;

and

Deletion of ground for refusal (b) in article 90, paragraph 2, option 2.

Option 2 (B)

No reference to national law in the chapeau article 90, paragraph 1;

and

Include ground for refusal (b) in article 90, paragraph 2, option 2.

Option 3

Include in the chapeau of article 90, paragraph 1, the words "in accordance with the procedures under their national law";

and

Insert new article 86 bis;

and

Delete ground for refusal (b) in article 90, paragraph 2, option 2.

Option 4

Insert free-standing article 86 bis.

DOCUMENT A/CONF.183/C.1/WGIC/L.19

Chairman's discussion paper regarding article ...

[Original: English]
[14 July 1998]

Conflicting obligations

In lieu of paragraph 2, option 2, subparagraph (f)

1. In the event that a State Party receives competing requests from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

2. Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State.

3. In other cases, if necessary, competing requests shall be resolved in accordance with the principles established in article 87 bis.

DOCUMENT A/CONF.183/C.1/WGIC/L.13/REV.2

Rolling text of article 91

[Original: English]
[13 July 1998]

Paragraph 4

4. When circumstances so require, in the case of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a

²⁰⁷ Subparagraph (b) may not be necessary and could be combined with paragraph 1 if the decision is taken on article 17 to allow all States to object. If this is the decision, then the remedy for the State is to object and the only instance where there would be competing requests for the same offence would be where the Court has made a finding under article 15, in which case the Court should have priority.

person on a voluntary basis, including doing so without the presence of the authorities of the requested State if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State requested is a State on the territory of which the crime which is alleged to have been committed, and there has been a determination of admissibility pursuant to articles [16 or 17], the Prosecutor may directly execute such request following such consultations with the requested State as he or she deems appropriate;

(b) In other cases, the Prosecutor may directly execute such request following consultations with the requested State and subject to any reasonable conditions or concerns raised by that State. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

(ii) Recommendations/Report

DOCUMENT /CONF.183/C.1/WGIC/L.11

[incorporating document A/CONF.183/C.1/WGIC/L.11/Corr.1 and 2 of 2 July 1998 and Add.1 of 6 July 1998 and Add.1/Corr.1 of 7 July 1998, Add.2 and Add.2/Corr.1 of 13 July 1998, Add.3 of 13 July 1998 and Add.3/Corr.1 and 2 of 14 July 1998, Add.4 of 14 July 1998 and Add.4/Corr.1 of 15 July 1998, and the rolling texts contained in L.8/Rev.1 of 30 June 1998 and Rev.1/Corr.1 and 2 of 1 and 2 July 1998, L.10 of 1 July 1998 and L.10/Corr.1 of 2 July 1998, and L.15 of 6 July 1998 and L.15/Corr.1 of 7 July 1998]

Report of the Working Group on International Cooperation and Judicial Assistance

*[Original: English]
[1 July 1998]*

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on International Cooperation and Judicial Assistance, under the chairmanship of Mr. Phakiso Mochochoko (Lesotho), the following articles of part 9:

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 85. General obligation to cooperate

Article 86. [Requests for cooperation: general provisions]

Article 87. [Surrender] [Transfer] [Extradition] of persons to the Court

Article 88. Contents of request for [surrender] [transfer] [extradition]

Article 89. Provisional arrest

Article 90. Other forms of cooperation [and judicial and legal [mutual] assistance]

Article 91. Execution of requests under article 90

[Article 92]. Rule of speciality

2. The Working Group held 5 meetings to consider these articles, from 25 June to 2 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 85, article 86 paragraphs 1 to 4, 6 and 7, article 88, article 89, article 90 bis, article 91, paragraphs 1 to 3 and 5, and article 91 bis.

3. The Working Group held an additional meeting on 7 July 1998 to consider the remaining articles. The Working Group transmits to the Committee of the Whole the following articles for its consideration: article 87, paragraphs 1 and 11; article 90, paragraphs 1, 1 bis, 1 ter, 6 and 7; article 90 ter; and article 90 quater. The following provisions have been deleted: article 87, paragraphs 2, 5, 7 and 10 and article 90, paragraph 8.

4. The Working Group held an additional meeting on 13 July 1998 to consider the remaining articles. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 86, paragraph 5, article 87 bis, article 90 (a), article 90 (b), article 90 quater, additional paragraph 2, article 92 and article X. The Working Group also notes the deletion of article 87, paragraph 6.

5. The Working Group held an additional meeting on 14 July 1998 to consider the remaining articles. The Working Group transmits to the Committee of the Whole the following articles for its consideration: article 86 bis and article 90, paragraph 2 bis.

6. The Working Group also concluded its discussion on outstanding issues with respect to certain provisions previously transmitted to the Committee of the Whole and accordingly transmits the following amendments for the consideration of the Committee of the Whole:

- In article 87, paragraph 1, the square brackets around the words “and the procedure under their national law” should be removed;
- In article 90, paragraph 1, the words “[and their national [procedural] law]” should be replaced with “and under procedures of national law”;
- In article 91, paragraph 1, the brackets around the words “the relevant procedure under” should be removed.

7. The Working Group held three additional meetings, on 14 and 15 July 1998, to consider remaining articles. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 87, paragraphs 3 (a), 3 bis, 4 and 8; article 90, paragraphs 2 (a) and

(d), 3, 4 and 9; and article 91, paragraph 4. The Working Group also notes the deletion of article 87, paragraphs 3 (b), (c), (d) and (e), and 9; and article 90, paragraphs 2 (b), (c), (e) and (f), and 5.

8. The Working Group thereby has concluded its work.

II. Text of draft articles

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 85

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, fully cooperate with the Court in its investigation and prosecution of crimes under this Statute.

Article 86

Requests for cooperation: general provisions

1. *Authorities competent to make and receive requests/Channels for communication of requests*

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Subsequent changes in the designation shall be done in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. *Language of requests*

Requests for cooperation and supporting documents shall either be in or accompanied by a translation into an official language of the requested State or in one of the working languages reflected in article 51, in accordance with the choice made by that State upon ratification, accession or approval.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. *Confidentiality of requests from the Court*

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. *Victims and witnesses*²⁰⁸

In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. *Cooperation by non-States Parties*

The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may inform the Assembly of States Parties [or, where the Security Council referred the matter to the Court, the Security Council].²⁰⁹

6. *Cooperation of intergovernmental organizations*

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

7. *States Parties' failure to cooperate*²¹⁰

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [or, where the Security Council referred the matter to the Court, to the Security Council].

Article 86 bis

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this part.

²⁰⁸ Article 88, paragraph 4, and article 90, paragraph 8 (b), could then be deleted.

²⁰⁹ The same language should be used in article 102, paragraph 2 (f), when dealing with this issue.

²¹⁰ The wording of article 102 (Assembly of States Parties), paragraph 2 (f), must be adjusted to be consistent with the new wording of this paragraph.

Article 87

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and [surrender] [transfer] [extradition].

2. (Deleted)

3. A State Party may deny a request for surrender only if:

(a) With respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court;²¹¹

(b) (Deleted)²¹²

(c) (Deleted)

(d) (Deleted)

(e) (Deleted)

3 bis. Where the person sought for surrender brings a challenge before a national court on the basis of *ne bis in idem* as provided in article ..., the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for the surrender of the person until the Court makes a determination on admissibility.

[4. If a request for surrender is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]²¹³

5. (Deleted)

6. (Pending)

7. (Deleted)

8. If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which surrender to the Court is sought, the

requested State, after making its decision to grant the request, shall consult with the Court.

9. (Deleted)

10. (Deleted)

11. *Transit of* [surrendered] [transferred] [extradited] person

(a) A State Party shall, except where transit through that State would impede or delay the surrender, authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

Article 87 bis

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under this article shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court:

(a) If the Court has, pursuant to articles 16 and 17,²¹⁴ determined that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

²¹¹ This provision will be reconsidered in the light of the outcome of the discussions on jurisdiction.

²¹² Some States reserved their position with respect to the deletion of this provision as this would raise problems of compatibility with constitutional provisions and domestic legislation.

²¹³ The need for this paragraph depends on the outcome of discussions on paragraph 3 of this article.

²¹⁴ The relevance of these articles will have to be reconsidered in the light of the outcome of discussions on part 2.

(b) If the Court makes such a determination pursuant to the requested State's notification under paragraph 1.²¹⁵

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.²¹⁶

4. If the requesting State is a non-State Party, the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.²¹⁵

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting non-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 offence was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall give priority to the request from the Court if it is not under an existing international obligation to extradite the person to the requested State;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the

requested State, 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 those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.²¹⁷

Article 88

Contents of request for [surrender] [transfer] [extradition]

1. A request for arrest and [surrender; transfer; extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).²¹⁸ The request shall contain or be supported by:

(a) In the case of a request for the arrest and [surrender; transfer; extradition] of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3:

(i) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) A copy of the warrant of arrest;

(iii) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, but those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements with other States and should, if possible, be less burdensome, taking account the distinct nature of the Court;²¹⁹

(b) In the case of a request for the arrest and [surrender; transfer; extradition] of a person already convicted:

(i) A copy of any warrant of arrest for that person;

(ii) A copy of the judgement of conviction;

²¹⁵ There was general agreement that the fact that the Court has determined that the case is inadmissible does not, on its own, place the requested State under any international obligation to surrender the person to the requesting State.

²¹⁶ A view was expressed that there should be a time limit within which the Court should make a determination.

²¹⁷ Views were expressed that in those circumstances the Court should have an ability to reconsider its decision on admissibility based on the new circumstances.

²¹⁸ The confirmation is without prejudice to article 89.

²¹⁹ Some delegations have emphasized that they accepted paragraph 1 (a) (iii) with the proviso that article 87, paragraph 3, option 2 [d] will be deleted. The issue, however, is still under discussion in the Working Group.

- (iii) Information to demonstrate that the person sought is the one referred to in the judgement of conviction;
- (iv) [If the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

2. Upon the request of the Court, States Parties shall consult with the Court whether generally or with respect to a specific matter, regarding any requirements under their national law that may apply under paragraph 1 (a) (iii) of this article. In the consultations, the States Parties shall advise the Court of the specific requirements of their law.

Article 89
Provisional arrest

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 88.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought, the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

3. A person who is provisionally arrested may be discharged from custody²²⁰ if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 88 within the time limits specified in the Rules of Procedure. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.

4. The fact that the person sought has been discharged from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 90
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this part and under procedures of national law, comply with requests by the Court to provide assistance in relation to investigations or prosecutions as follows:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) The questioning of any suspect or accused;

(d) The service of documents, including judicial documents;

(e) Facilitating the appearance of persons as witnesses or experts before the Court, which shall be voluntary;²²¹

(f) The temporary transfer of persons as provided in paragraph 1 ter of article 90;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;²²² and

(l) Any other types of assistance with a view to facilitating the investigation and prosecution of crimes under the Statute which are not prohibited by the law of the requested State.

1 bis. The Court shall have the authority to provide an assurance to a witness or expert appearing before the Court that

²²⁰ The question of specific time limit should be addressed in the Rules of Procedure and Evidence.

²²¹ This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.

²²² The issue of whether the Court is to be vested with such powers is linked with article 75 in part 7 on penalties.

he or she will not be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts or omissions that preceded the departure of that person from the requested State.

1 ter. (a) The Court may request the temporary transfer of a person in custody for purposes of testimony, identification or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person transferred shall remain in custody, and when the purposes of the transfer have been fulfilled the Court shall return the person without delay to the requested State.

2. A State Party may deny a request for assistance, in whole or in part, only if:

(a) With respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)]], it has not accepted the jurisdiction of the Court.²²³

(b) **(Deleted)**

(c) **(Deleted)**

(d) The request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];²²⁴

(e) **(Deleted)**

(f) **(Deleted)**

2 bis. With respect to a request presented under paragraph 1, if execution of a particular measure of assistance as detailed in the request is prohibited in the requested State on the basis of an existing fundamental legal principle²²⁵ of general application,

²²³ To be reconsidered in the light of the outcome of discussions on jurisdiction.

²²⁴ To be reconsidered in the light of the outcome of discussions on article 71. It is noted that there is another formula of this provision in document A/CONF.183/C.1/WGPM/L.39, footnote 186, which reads:

“A State Party may deny a request for assistance, in whole or in part, only if:

“...

“(c) Having complied with the provisions of article [71], it determines that there are no conditions under which it can comply with the request, including requests for information or evidence arising under article 64, without seriously prejudicing its national security interests.”

²²⁵ It is understood that this includes laws preventing the freezing or seizure of certain types of property, in which case other alternatives such as seizure of the proceeds of sale or disposal should be relied on.

the requested State shall promptly consult with the Court to try and resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the prohibition cannot be overcome, the Court shall modify the request as necessary.

3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

[4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.]²²⁶

5. **(Deleted)**

6. *Confidentiality*²²⁷

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. *Assistance by the Court*

(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute or which constitute a serious crime under the national law of the requesting State.

(b) ²²⁸

(i) The assistance provided under subparagraph (a) shall include, among others:

(1) The transmission of statements, documents or other types of evidence

²²⁶ The need for this paragraph depends on the outcome of discussions on paragraph 2 of this article.

²²⁷ Views have been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.

²²⁸ Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.

obtained in the course of an investigation or a trial conducted by the Court; and

- (2) The questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

- (1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;²²⁹
- (2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State Party.

8. (Deleted)

9. (a) (i) In the event that a State Party receives competing requests other than for surrender or extradition from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request;

- (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 87 bis.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

*Article 90 (a)*²³⁰

Postponement of execution of a request in respect of ongoing investigation

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different

from that to which the request relates, the requested State may postpone the execution of a request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately granted subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 90, paragraph 1 (j).

*Article 90 (b)*²³¹

Postponement of execution of a request in respect of admissibility challenge

Without prejudice to [articles 54 quater and 54, paragraph 2], where there is an admissibility challenge under consideration by the Court pursuant to [articles 16 and 17], the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 16 or 17.²³²

Article 90 bis [90, paragraph 8]

Contents of request for other forms of assistance

1. A request for other forms of assistance referred to in article 90 shall be in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

²²⁹ The relationship with article 92 needs to be considered.

²³⁰ This article should be placed after article 90 (Other forms of cooperation) and before article 90 bis (Contents of request for other forms of assistance under article 90).

²³¹ The Working Group draws the attention of the Drafting Committee to the need to consider the question of the placement of this article.

²³² The wording of this article will need to be reviewed in the light of the outcome of the discussions on articles 16 and 17.

(e) Such information as may be required under the law of the requested State in order to execute the request;

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, States Parties shall consult with the Court, whether generally or with respect to a specific matter, regarding any requirements under their national law that may apply under paragraph 2 (e) of this article. In the consultations, the States Parties shall advise the Court of the specific requirements of their law.

4. The provisions of this article shall, where applicable, also apply in respect of a request made to the Court.

*Article 90 ter
Consultations*

Where a State Party receives a request under this Part and identifies problems with the request, which may impede or prevent its execution, including but not limited to:

(a) Insufficient information to execute the request; or

(b) In the case of a request for surrender, despite best efforts, that the person sought cannot be located or that investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) That execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken to another State, the requested State shall, without delay, consult with the Court to resolve the matter.

*Article 90 quater
Waiver of immunity*

1. The Court may not proceed with a request for surrender/cooperation which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 91

Execution of requests under articles 90 and 90 bis

1. Requests for assistance shall be executed in accordance with the relevant procedure under the laws of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime which is alleged to have been committed, and there has been a determination of admissibility pursuant to articles [16 or 17], the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.²³³

5. Provisions allowing a person heard or examined by the Court under article 71 to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

²³³ A few delegations expressed strong reservations about this provision due to the view that it provided to the Prosecutor powers which could impact on their national sovereignty concerns. These delegations strongly felt that failure of consultations between the Court and the State does not warrant referral of the issue to the Assembly of States Parties or the Security Council.

Article 91 bis
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State, except for the following, which should be borne by the Court:

- (a) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;
- (b) Costs of translation, interpretation and transcription;
- (c) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court;
- (d) The costs of any expert opinion or report requested by the Court; and
- (e) The costs associated with the transport of a person being surrendered to the Court by a custodial States; and
- (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. The Court shall bear the ordinary costs of execution.

Article 92
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. **(Deleted)**

3. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 88. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article X²³¹
Use of terms

For the purposes of this Statute:

(a) "Surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute;

(b) "Extradition" means the delivering up of a person by one State to another as provided by convention, treaty or national legislation.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding articles 86, 88, 89 and 91 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 2 July 1998²³⁴

Article 86

Requests for cooperation: general provisions

Article 88

Contents of request for [surrender] [transfer] [extradition]

Article 89

Provisional arrest

Article 91

Execution of requests under articles 90 and 90 bis

NOTE

The Committee of the Whole transmits the above articles on the following understanding:

The text within brackets in article 86, paragraph 7, should be reconsidered in the light of the decision on the question of the referral of a matter to the Court by the Security Council;

The terms that appear within brackets in articles 88 and 89 should be reconsidered in the light of the use of those terms in article 87;

The terms that appear within brackets in article 91, paragraph 1, should be reconsidered in the light of the decision as to the question of the application of national law in this part.

²³⁴ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.68. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Note regarding articles 87 and 90 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 87

[Surrender] [Transfer] [Extradition] of persons to the Court

Article 90

Other forms of cooperation

NOTE

Understandings of the Committee of the Whole in respect of part 9:

The terms [surrender] [transfer] [extradition] that appear within brackets should be reconsidered in the light of the decision on the use of these terms in part 9.

The reference to national law that appears within brackets in article 87, paragraph 1, and article 90, paragraph 1, should be reconsidered in the light of the decision on the question of the application of national law in part 9.

Note regarding part 9 and articles 86, 87 bis, 90, 90 (a), 90 (b), 91 and X contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

Article 86

Requests for cooperation: general provisions

Article 87 bis

Competing requests

Article 90 (a)

Postponement of execution of a request in respect of ongoing investigation

Article 90 (b)

Postponement of execution of a request in respect of admissibility challenge

Article 91

Execution of requests under articles 90 and 90 bis

Article X

Use of terms

NOTE

Understandings of the Committee of the Whole with respect to part 9:

The terms that appear within brackets in article 86, paragraph 5, should be reviewed in the light of the outcome of the discussions on part 2;

The reference to articles 16 and 17 in article 87 bis, paragraph 2 (a), and article 91, paragraph 4 (a), should be reconsidered in the light of the outcome of the discussions on part 2;

The references to various articles in article 90 (b) should be reviewed in the light of the final text of those articles;

Article 90 (a) should be placed after article 90 (Other forms of cooperation) and before article 90 bis (Contents of request for other forms of assistance under article 90);

The Drafting Committee should consider the question of the placement of article 90 (b) and of article X;

The use of the terms “surrender” and “extradition” in part 9 should be reviewed in the light of the decision on the use of these terms as reflected in article X;

The Drafting Committee should consider using the terms “requested State Party” wherever “requested State” appears in part 9.

Concerning article 87, paragraph 1, article 90, paragraph 1, and article 91, paragraph 1, previously transmitted to the Drafting Committee, the Committee of the Whole informs the Drafting Committee as follows:

In article 87, paragraph 1, the brackets around the words “and the procedure under their national law” should be removed;

In article 90, paragraph 1, the words “[and their national [procedural] law]” should be replaced with “and under procedures of national law”;

In article 91, paragraph 1, the brackets around the words “the relevant procedure under” should be removed.

Note regarding articles 87, 90, and 91 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 15 July 1998³²

Article 87

Surrender of persons to the Court

Article 90

Other forms of cooperation

Article 91

Execution of requests under articles 90 and 90 bis

NOTE

Understandings of the Committee of the Whole with respect to part 9:

Article 87, paragraph 3 (a), should be reconsidered in the light of the outcome of the discussions on jurisdiction;

The need for article 87, paragraph 4, should be reconsidered in the light of the outcome of the discussions on paragraph 3 of this article;

Article 90, paragraph 2 (a), should be reconsidered in the light of the outcome of the discussions on jurisdiction;

Article 90, paragraph 2 (*d*), should be reconsidered in the light of the outcome of the discussions on article 71;

The need for article 90, paragraph 4, should be reconsidered in the light of the outcome of the discussions on paragraph 2 of this article;

The reference to articles 16 and 17 in article 91, paragraph 4 (*a*), should be reviewed in the light of the text of these articles.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.80

India: proposal regarding the compendium of draft articles referred to the Drafting Committee by the Committee of the Whole (A/CONF.183/C.1/L.58)

[Original: English]
[15 July 1998]

Article 86

Paragraph 7

Delete the phrase or, where the Security Council referred the matter to the Court, to the Security Council.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/L.93

Poland: proposal regarding article X

[Original: English]
[17 July 1998]

Use of terms

For the purposes of this Statute:

(*a*) “surrender” means the delivering up of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3, or who has been convicted by the Court, by a State to the Court, pursuant to this Statute;

(*b*) “extradition” means the delivering up of a person for the purpose of trial or service of a sentence, by one State to another as provided by treaty, convention or national legislation.

DOCUMENT A/CONF.183/C.1/WGIC/L.1

Canada: proposal regarding an alternative text for article 88

[Original: English]
[25 June 1998]

Contents of request for [surrender] [transfer] [extradition]

1. A request for arrest and [surrender; transfer; extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed [if necessary] through the channel provided for in article 86. The request shall contain or be supported by:

(*a*) In the case of a request for the arrest and [surrender; transfer; extradition] of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3:

- (i) Information describing the person sought, sufficient to identify the person and information as to that person’s probable location;
- (ii) A copy of the warrant of arrest;
- [(iii)] Such documents, statements or other types of information regarding the commission of the offence and the accused’s role therein which may be required by the laws of the requested State;] [however, in no event may the requested State’s requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];

(*b*) In the case of a request for the arrest and [surrender; transfer; extradition] of a person already convicted:

- (i) A copy of any warrant of arrest for that person;
- (ii) A copy of the judgement of conviction;
- (iii) Information to demonstrate that the person sought is the one referred to in the judgement of conviction;
- (iv) [If the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

[2. Where the State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, [for such period as may be necessary to enable the Court to provide the additional information requested.]] If the additional information is not provided within the reasonable

time limit fixed by the requested State, the person may be released.]

DOCUMENT A/CONF.183/C.1/WGIC/L.2

China: proposal regarding article 87

[Original: English]
[25 June 1998]

Paragraph 6

6. *Parallel requests from the Court and States*

(a) If the requested State also receives a request from a State for the extradition of the same person for the same offence for which the Court is seeking the person's [surrender] [transfer] [extradition], it shall accord priority to the request from the State over the request from the Court, unless the matter is referred by the Security Council to the Court, or the Court has determined pursuant to article 15 that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition is sought.

(b) If the requested State also receives a request from a State for the extradition of the same person for a different offence other than the offence for which the Court is seeking the person's [surrender] [transfer] [extradition], it shall accord priority to the request for the offence of a grave nature. If the offences are of the same gravity, the requested State shall make its decision on the priority of requests after considering all relevant factors.

Paragraph 7

Add a new subparagraph, as follows:

"(d) The person sought is not the person whom the proceeding is against."

Paragraph 9

Replace the paragraph with a new paragraph, as follows:

"9. The requested State shall, in accordance with its legal procedures, take steps to arrest the accused and [surrender] [transfer] [extradite] him to the Court in accordance with the provisions of this Statute, or extradite him to another State having requested extradition, or refer the case to its competent authorities for the purpose of prosecution."

DOCUMENT A/CONF.183/C.1/WGIC/L.3

Italy: proposal regarding article 87

[Original: French]
[25 June 1998]

Paragraph 6

6. A State Party shall, as far as possible, give priority to a request for surrender from the Court under paragraph 1 over

requests for extradition from other States, in application of all the legal instruments at its disposition.

DOCUMENT A/CONF.183/C.1/WGIC/L.4

Republic of Congo: proposal regarding article 87

[Original: French]
[25 June 1998]

The Republic of Congo favours the term "surrender" in preference to that of "extradition". For reasons of cooperation with the Court, we are inclined towards the former.

The term "extradition" is highly problematical since extradition is a matter of relations between States.

It must be emphasized that relations between the Court and States Parties are a legitimate concern.

The Republic of Congo is in favour of the term "surrender".

DOCUMENT A/CONF.183/C.1/WGIC/L.7

Singapore: proposal regarding article 87

[Original: English]
[26 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 5 bis

Where compliance with the request for surrender/cooperation would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, the Court shall, in addition, obtain under this Part the cooperation of that third State for the waiver of the immunity.

DOCUMENT A/CONF.183/C.1/WGIC/L.9

Croatia: proposal regarding article 87

[Original: English]
[29 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

New paragraph 3

"3. States shall not refuse a request for [surrender] [transfer] [extradition] of persons to the Court. The obligation to [surrender] [transfer] [extradite] persons to the Court under this Statute shall prevail over any legal impediment to do so which may exist under the national law or extradition treaties of the State concerned."

The present proposal corresponds to the Statute (article 29) and the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (rule 56, rule 58) and the Statute (article 28) and Rules of Procedure and

Evidence (rule 56, rule 58) of the International Tribunal for Rwanda.

The Security Council has established this standard for the efficient functioning of the International Tribunals for the Former Yugoslavia and for Rwanda. There is no reason to apply different practices to the International Criminal Court.

DOCUMENT A/CONF.183/C.1/WGIC/L.12

Canada: proposal regarding article 91

[Original: English]
[2 July 1998]

Paragraph 4

4. In the case of a request which can be executed without any compulsory measures, such as the interview of or taking of evidence from a person on a voluntary basis or the examination of a place or site which is accessible to the public, upon his or her request, the Prosecutor and other authorities within his or her office may conduct any such examination, interview or the taking of evidence, and may do so outside the presence of national authorities if that is essential for the request to be successfully executed.

DOCUMENT A/CONF.183/C.1/WGIC/L.14

Central African Republic: proposal regarding article 86

[Original: French]
[6 July 1998]

Paragraph 4 [6]

States Parties' failure to cooperate

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

Paragraph 6 [4]

Cooperation by non-States Parties

(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of comity.

(b) Where a State not party to this Statute which has entered into an agreement or an ad hoc arrangement with the Court fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the United Nations General Assembly so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

(c) (new) Where a State not party to this Statute which has not entered into an agreement or an ad hoc arrangement with the Court fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the United Nations General Assembly or, where the Security Council referred the matter to the Court, to the Security Council so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

NB: Paragraph 5 of the original version (Cooperation of intergovernmental organizations) now becomes paragraph 6.

DOCUMENT A/CONF.183/C.1/WGIC/L.17

[incorporating document A/CONF.183/C.1/WGIC/L.17/Corr.1 of 12 July 1998]

United States of America: proposal regarding article 87, paragraph 8 (b), relating to temporary surrender

[Original: English]
[12 July 1998]

Paragraph (b)

(b) Having fully taken into account the views of the Court, postpone the surrender of the person until such time as the proceedings against the person have been completed and any other legal impediment to his surrender or temporary surrender no longer exists.

DOCUMENT A/CONF.183/C.1/WGIC/L.18

Denmark, Norway, Sweden and Switzerland: proposal regarding article 87

[Original: English]
[13 July 1998]

Paragraph 1 bis

Where a requested State has indicated to the Court its willingness to accept sentenced persons under article 94, that State may, with the agreement of the Court, make the surrender of its own national conditional on the person being returned to the requested State for service of any sentence imposed.

DOCUMENT A/CONF.183/C.1/WGIC/L.20

Canada: proposal regarding article 87

[Original: English]
[14 July 1998]

Surrender of persons to the Court

Paragraph 8 (b)

(b) Having fully taken into account the views of the Court and the necessity for the trial to proceed, and taking into

consideration the gravity of the offence, postpone the surrender of the person until the proceedings against the person, other than the service of any sentence, have been completed. If further postponement is required for other procedures before a court where the person's presence is required, the requested State shall consult with the Court and may postpone surrender further, for a period of time agreed upon with the Court, which period should take into account any legal impediments to surrender in the requested State.

11. Part 10. Enforcement

(a) Documents of the Working Group on Enforcement

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGE/L.15/REV.1

Chairman's informal draft for discussion

[Original: English]
[10 July 1998]

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before the expiry of sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence.

3. In every case, the Court shall, on its own motion or on application of the sentenced person, review whether, under the circumstances, to reduce the sentence imposed when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment. The Court shall not conduct such a review before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors is present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used to the benefit of victims; or

(c) Other factors which establish a clear and significant change of circumstances sufficient to justify the reduction in sentence, which factors shall be specified in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as shall be elaborated in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGE/L.19

Chairman's proposal regarding article 101

[Original: English]
[11 July 1998]

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender in accordance with Part 9. Where the Court seeks the person's surrender, it may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.²³⁵

DOCUMENT A/CONF.183/C.1/WGE/L.4/REV.1

Working paper on articles 94 and (x)

[Original: English]
[2 July 1998]

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

Option 1 (unchanged)

Option 2

(a) (unchanged);

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the [Court] [Presidency] and in accordance with this part.

(c) The administering State of enforcement shall notify the [Court] [Presidency] of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The [Court] [Presidency] shall be given at least 45 days' notice of any such circumstances.

²³⁵ The modalities for implementation of this article would need to be established in the Rules of Procedure and Evidence.

(d) Where the [Court] [Presidency] cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article (x), subparagraph (a).

Article (x)

Role of States in enforcement [and supervision] of sentences of imprisonment

(a) In every case the [Court] [Presidency] may at any time decide to transfer the sentenced person to the prison of another State.

(b) The sentenced person may at any time apply to the [Court] [Presidency] to be transferred from the State of enforcement.

DOCUMENT A/CONF.183/C.1/WGE/L.6

[Incorporating document A/CONF.183/C.1/WGE/L.6/Corr.1 of 2 July 1998]

Working paper on article 96

*[Original: English]
[1 July 1998]*

Supervision and administration of sentence

Paragraph 1

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] and shall be reasonably consistent with widely accepted international conventional standards governing treatment of prisoners.

DOCUMENT A/CONF.183/C.1/WGE/L.7

Working paper on proposal to merge article 96, paragraph 2, options 1 and 2

*[Original: English]
[2 July 1998]*

Supervision and administration of sentence

1. **(As proposed.)**

2. The conditions of detention shall be governed by the law of the State of enforcement and reasonably consistent with widely accepted international conventional standards governing treatment of prisoners, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²³⁶

3. Communications between persons sentenced and the Court shall be unimpeded and confidential, subject to [any overriding security considerations].

DOCUMENT A/CONF.183/C.1/WGE/L.8

Working paper on article 94

*[Original: English]
[2 July 1998]*

Role of States in enforcement [and supervision] of sentences of imprisonment

1. **(Pending)**

2. In exercising its discretion to make a designation under paragraph 1, the [Court] [Presidency] may take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment;

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person regarding any concerns as to personal security or rehabilitation;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or regarding a State's ability to enforce a sentence in accordance with this Part, as may be appropriate in designating the State of enforcement.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

DOCUMENT A/CONF.183/C.1/WGE/L.9

Working paper on article 96

*[Original: English]
[3 July 1998]*

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] and shall be consistent with widely accepted international conventional standards governing treatment of prisoners.

2. The conditions of detention shall be governed by the law of the State of enforcement and reasonably consistent with widely accepted international conventional standards governing treatment of prisoners, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²³⁷

²³⁶ Provision on transfer to be considered under the proposal of the United Kingdom of Great Britain and Northern Ireland for article 94.

²³⁷ Paragraph 2 was accepted by some delegations only on the basis that there will be an article (x) on transfer.

3. Communications between persons sentenced and the Court shall be unimpeded and confidential, subject to any overriding security considerations.

DOCUMENT A/CONF.183/C.1/WGE/L.10

Working paper on articles 94 and (x)

[Original: English]

[3 July 1998]

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

Option 1: (unchanged)

Option 2

(a) (unchanged)

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the [Court] [Presidency] and in accordance with this part.

(c) The administering State of enforcement shall notify the [Court] [Presidency] of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The [Court] [Presidency] shall be given at least 45 days' notice of any such circumstances.

(d) Where the [Court] [Presidency] cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article (x), subparagraph (a).

Article (x)

Role of States in enforcement [and supervision] of sentences of imprisonment

1. (a) In every case the [Court] [Presidency] may at any time decide to transfer the sentenced person to the prison of another State.

(b) The sentenced person may at any time apply to the [Court] [Presidency] to be transferred from the State of enforcement.

2. In exercising its discretion to make a designation under paragraph 1, the [Court] [Presidency] shall take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment;²³⁸

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

DOCUMENT A/CONF.183/C.1/WGE/L.11

Working paper on articles 97 and 98

[Original: English]

[3 July 1998]

Article 97

Transfer of the person upon completion of sentence

1. Where the State of enforcement does not authorize the person to remain in its territory following completion of sentence, the person shall be transferred to another State. The person may indicate the State to which he wishes to be transferred. However, if that State does not agree to accept the person, he or she may be transferred to the State of his or her nationality or another State that agrees to accept the person.

2. The costs involved in transferring the person to another State pursuant to paragraph 1 shall be borne by the Court, if no State bears those costs.

3. [Subject to the provisions of article 98,] The State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

[Article 98]

Limitation of prosecution or punishment for other offences

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment or to extradition to a third State for any conduct committed prior to delivery to the State of enforcement, unless

²³⁸ Some delegations expressed the view that there needs to be an additional article on this issue. Some delegations expressed the view that this should be the only reference.

such prosecution, punishment or extradition has been approved by the [Court] [Presidency] at the request of the State of enforcement.

2. The [Court] [Presidency] shall rule on the matter after having heard the person.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court or returns to the territory of that State after having left it.]

DOCUMENT A/CONF.183/C.1/WGE/L.12

Working paper on article 93

[Original: English]
[3 July 1998]

General obligation regarding enforcement of judgements

Formula 1

States Parties shall enforce directly on their territory the judgements of the Court.

Formula 2

States Parties shall give effect to the judgements of the Court in accordance with the provisions of this Part and their national law.

NB: The second, bracketed paragraph of article 93 is reserved, pending resolution of the issue of enforcement of orders of reparation under article 73 and article 99

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGE/L.14

[incorporating documents A/CONF.183/C.1/WGE/L.14/Add.1 of 11 July 1998 and Add.1/Corr.1 and Add. 2 of 14 July 1998]

Report of the Working Group on Enforcement

[Original: English]
[7 July 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Enforcement, under the chairmanship of Ms. Mary Ellen Warlow (United States of America), the following articles of part 10:

PART 10. ENFORCEMENT

Article 93. General obligations regarding recognition [and enforcement] of judgements

Article 94. Role of States in enforcement [and supervision] of sentences of imprisonment

Article 95. Enforcement of the sentence

Article 96. Supervision and administration of sentence

Article 97. Transfer of the person upon completion of sentence

[Article 98]. Limitation of prosecution/punishment for other offences

[Article 99]. Enforcement of fines and forfeiture measures

Article 100. Pardon, parole and commutation of sentences [early release]

[Article 101]. Escape

2. The Working Group held five meetings to consider the articles contained in part 10, Enforcement, from 30 June to 3 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 10 for its consideration: article 94, paragraph 3; article 94 bis; article 95; article 96; article 97; article 98; article 99, paragraphs 1 and 1 bis.

3. The Working Group held four further meetings, from 9 to 11 July 1998, to consider the remaining articles of part 10. The Working Group herewith transmits to the Committee of the Whole the following articles of Part 10 for its consideration: article 94, article 99, paragraph 3, and article 100. The Working Group notes the deletion of article 93 and article 99, paragraph 2.

4. The Working Group recommends that the words "review of the judgement or sentence" in article 95, paragraph 2, which has already been referred to the Drafting Committee, be replaced by "appeal or revision of judgement or sentence". This change is necessary to make the article consistent with part 8.

5. The Working Group held two further meetings, from 11 to 13 July 1998, to consider the remaining articles of part 10. The Working Group herewith transmits to the Committee of the Whole the following text for article 101.

6. The Working Group has thereby concluded its work on part 10.

II. Text of draft articles

PART 10. ENFORCEMENT

Article 93

General obligation regarding recognition [and enforcement] of judgements

(Deleted)²³⁹

Article 94

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. The State so designated shall promptly inform the Court whether it accepts the request.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) The administering State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such circumstances. During this period, the State of enforcement shall not act contrary to the provision of article 100.

(d) Where the Court cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article 94 bis, paragraph 1.

2. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment in accordance with principles of equitable distribution to be elaborated in the Rules of Procedure and Evidence;²⁴⁰

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2. In such a case, the costs involved in enforcement of a sentence of imprisonment shall be borne by the Court.

Article 94 bis

Change in designation of State of enforcement

1. In every case the Court may at any time decide to transfer the sentenced person to the prison of another State.

2. The sentenced person may at any time apply to the Court to be transferred from the State of enforcement.

Article 95

Enforcement of the sentence

1. Subject to conditions it may have specified in paragraph 1 (b) of article 94, the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

2. The Court alone shall have the right to decide any application for review of the judgement or sentence. The State of enforcement shall not impede the sentenced person from making any such application.

Article 96

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international conventional standards governing treatment of prisoners.

2. The conditions of detention shall be governed by the law of the State of enforcement and consistent with widely accepted international conventional standards governing treatment of prisoners, and shall in any case be not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²⁴¹

3. Communications between a person sentenced and the Court shall be unimpeded and confidential.

²³⁹ Delegations noted with respect to the deletion of article 93 their understanding that the use of the term "give effect to" in article 99 could not be interpreted as allowing States to modify amounts of fines or forfeitures ordered by the Court.

²⁴⁰ Some delegations expressed the view that there needs to be an additional article on this issue. Other delegations expressed the view that this should be the only reference

²⁴¹ Paragraph 2 was accepted by some delegations only on the basis that there will be article 94 bis.

Article 97

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement shall, in accordance with the law of the State of enforcement, be transferred to another State which agrees or is obligated to receive him or her, unless the State of enforcement authorizes the person to remain in its territory.

2. The costs involved in transferring the person to another State pursuant to paragraph 1 shall be borne by the Court, if no State bears those costs.

3. Subject to the provisions of article 98, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 98²⁴²

Limitation of prosecution or punishment for other offences

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment or to extradition to a third State for any conduct committed prior to delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall rule on the matter after having heard the person.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court or returns to the territory of that State after having left it.

Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties in accordance with the procedure of their national law.²⁴³

1 bis. When the State Party is unable to give effect to the order for forfeiture, it shall take measures to recover the value of the

proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

2. (Deleted)

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.²⁴⁴

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before the expiry of sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.²⁴⁵

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used to the benefit of victims; or

(c) Other factors which establish a clear and significant change of circumstances sufficient to justify the reduction in sentence, which factors shall be specified in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as shall be elaborated in the Rules of Procedure and Evidence.

²⁴² Some delegations who had wanted article 98 deleted indicated a willingness to accept article 98 if necessary to achieve consensus. However, they stressed that their position to delete article 92 (also dealing with the rule of speciality) remained unchanged. Some other delegations felt that article 98 must be included, but also felt that article 92 should be deleted.

²⁴³ Some delegations also wanted to emphasize that their willingness to accept a reference to national procedural law in this Part does not prejudice their position with respect to the inclusion of such a reference in Part 9.

²⁴⁴ The Working Group noted that there were a number of potential complex problems which may arise in the implementation of this provision, including questions about the disposition of various types of property, which should be addressed in the Rules of Procedure and Evidence.

²⁴⁵ The Rules of Procedure and Evidence should also provide for the person to be heard through his or her legal representative.

Article 101
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender in accordance with Part 9. Where the Court seeks the person's surrender, it may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.²³⁵

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/12

Declaration by the Netherlands

[Original: English]
[17 July 1998]

The delegation of the Kingdom of the Netherlands states that the principle of equitable burden sharing regarding the imprisonment of an irrevocable sentence by the International Criminal Court is an imperative duty of vital importance of all States Parties to the present Statute.

On the basis of this principle the future preparatory negotiations will elaborate this principle in further detail.

The residual duty of the host State to imprison sentenced persons if the Court has not been able to designate a State of imprisonment will only apply in an exceptional situation, which inherently does not conform to the principle of equitable burden sharing.

DOCUMENT A/CONF.183/C.1/WGE/L.1

Japan: proposal regarding articles 93 and 99

[Original: English]
[29 June 1998]

Article 93

General obligation regarding recognition and enforcement of judgements

First paragraph

Amend the paragraph to read:

"States Parties shall give effect to the judgement of the Court in accordance with the provisions of this Part and their national law."

Article 99

Enforcement of fines and forfeiture measures

Amend the whole article to read:

"1. The Court may request States Parties to enforce its order of fines and forfeiture measures. The requested State Party shall submit to its competent authorities, with a view to giving effect to it, the order of fines and forfeiture issued by the Court.

"2. Property which is obtained by a State Party as a result of its giving effect to an order of fines and forfeiture measures issued by the Court shall be disposed of by that State Party according to its domestic law and administrative procedures."

DOCUMENT A/CONF.183/C.1/WGE/L.2

Italy: proposal regarding article 94

[Original: French]
[30 June 1998]

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

At the end of option 2 (a), add the following sentence:

"In every case the Court may at any time decide to transfer the sentenced person to the prison of another State."

DOCUMENT A/CONF.183/C.1/WGE/L.3

Uruguay: proposal regarding article 94

[Original: Spanish]
[30 June 1998]

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1, option 2 (b)

(b) The sentence shall be served as directed by the Court, without prejudice to the internal law of the State in whose territory the sentence is to be served.

DOCUMENT A/CONF.183/C.1/WGE/L.5

Syrian Arab Republic: proposal regarding article 97

[Original: Arabic]
[1 July 1998]

Transfer of the person upon completion of sentence

Paragraphs 1 and 2

1. The prisoner shall be released following completion of sentence and, where the State of enforcement does not authorize the person to remain in its territory (if he or she so requests), the person shall be transferred to the State of his or her choice, the State of his or her nationality or another State that agrees to accept the person.

2. The costs involved in transferring the prisoner referred to in paragraph 1 shall be borne by the Court if no State bears those costs.

DOCUMENT A/CONF.183/C.1/WGE/L.17

Canada: proposal regarding article 99

*[Original: English]
[9 July 1998]*

Enforcement of fines and forfeiture measures

This article applies in the case where identified assets or property against which an order for fine or forfeiture may be realized are located in the territory of the State party.

12. Part 11. Assembly of States Parties

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.41

[incorporating document A/CONF.183/C.1/L.41/Corr.1 of 3 July 1998]

Coordinator's rolling text for article 102

*[Original: English]
[2 July 1998]*

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;²⁴⁶

(e) Determine whether to alter, as appropriate, the number of judges;

(f) **(Pending)**

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world as far as possible.

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of the Court.

3 bis. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly of States Parties or of the Bureau.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions on matters of substance by consensus in the Assembly and in the Bureau. If consensus cannot be reached, decisions on matters of substance must be approved by a two-thirds majority of those present and voting, provided that an absolute majority of States Parties constitutes the quorum for voting, except as otherwise provided in the Statute.

6. A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

7. The Assembly shall adopt its own rules of procedure.

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

²⁴⁶ This paragraph is without prejudice to the final decision on article 104.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.47

[incorporating documents A/CONF.183/C.1/L.47/Corr.1 of 6 July 1998 and Add.1 of 8 July 1998 and Add 2 of 14 July 1998]

Recommendations of the Coordinator

[Original: English]

[3 July 1998]

1. At its 18th meeting, on 29 June 1998, the Committee of the Whole considered part 11 consisting of article 102 entitled "Assembly of States Parties". The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations on the text for article 102.
2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text of article 102, paragraph 1, paragraph 2 (a) to (e) and (g), paragraph 3, paragraph 3 bis, paragraph 4, and paragraphs 6 to 8.
3. As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text of article 102, paragraph 5.
4. As a result of still further informal consultations, the Coordinator submits to the Committee of the Whole the following text of article 102, paragraph 2 (f).

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau and take appropriate action in regard thereto;
 - (d) Consider and decide the budget for the Court;²⁴⁶
 - (e) Determine whether to alter, as appropriate, the number of judges;

(f) Consider any question relating to non-cooperation pursuant to article 86, paragraphs 5 and 7;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and eighteen members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of the Court.

3 bis. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly of States Parties or of the Bureau.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

6. A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

7. The Assembly shall adopt its own rules of procedure.

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]
[23 June 1998]

Proposals relating to official and working languages

NOTE

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DOCUMENT A/CONF.183/C.1/L.28

Ukraine: proposal regarding article 102

[Original: Russian]
[29 June 1998]

Assembly of States Parties

Paragraph 3 (b)

It is proposed that the text of this subparagraph should be amended to read as follows:

“(b) The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character] *from among candidates nominated from each geographical group as defined by the General Assembly of the United Nations*, taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world.”²⁴⁷

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

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13. Part 12. Financing of the Court

Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.55/REV.1

[incorporating document A/CONF.183/C.1/L.55/Rev.1/Corr.1 of 11 July 1998]

Coordinator’s rolling text for articles 103, 103 bis, 105 and 107

[Original: English]
[9 July 1998]

Article 103

Except as otherwise specifically provided, all financial matters related to the Court, and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by the Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

*Article 103 bis
Payment of expenses*

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

*Article 105
Voluntary contributions*

Without prejudice to article 104, the Court may receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, as additional funds, in accordance with relevant criteria adopted by the Assembly of States Parties.

*Article 107
Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.78

[incorporating document A/CONF.183/C.1/L.78/Corr.1 of 16 July 1998]

Recommendations of the Coordinator

[Original: English]
[15 July 1998]

I. Introduction

1. At its 18th meeting, on 29 June 1998, the Committee of the Whole considered Part 12 entitled “Financing of the Court”.

²⁴⁷ It is proposed that the last words [“... as far as possible”] should be deleted.

The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations for part 12.

2. As a result of the informal consultations, the Coordinator herewith submits to the Committee of the Whole the text contained in section II below.

3. The title of the part should be changed to "Financing".

II. Text recommended

PART 12. FINANCING

Article 103

Except as otherwise specifically provided, all financial matters relating to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by the Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 103 bis²⁴⁸ Payment of expenses

Expenses of the Court and the Assembly of States Parties including its Bureau and subsidiary bodies shall be paid from the funds of the Court.

Article 104 Funds of the Court

The expenses of the Court and the Assembly of States Parties including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses²⁴⁹ incurred due to referrals by the Security Council.²⁵⁰

Article 105 Voluntary contributions

Without prejudice to article 104, the Court may receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities,²⁵¹ as additional funds, in accordance with relevant criteria adopted by the Assembly of States Parties.

²⁴⁸ Former article 103.

²⁴⁹ This may include the possibility of start-up funding by the United Nations if so decided by the General Assembly.

²⁵⁰ The issue of referrals could be reviewed in the light of the decision taken under part 2.

²⁵¹ The view was expressed that the Court may only receive contributions in kind from individuals and corporations.

Article 106 Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessments, based on the scale adopted by the United Nations for its regular budget, and adjusted in accordance with the principles on which that scale is based.

Article 107 Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

14. Part 13. Final clauses

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.54/REV.2
Coordinator's rolling text regarding the preamble
and part 13

[Original: English]
[10 July 1998]

NOTE.

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(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.61
Recommendations of the Coordinator regarding the
preamble and part 13

[Original: English]
[11 July 1998]

NOTE

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(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.14/REV.1
Mexico: revised proposals regarding articles 12 bis, 15
and article 108

[Original: Spanish]
[24 June 1998]

NOTE

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DOCUMENT A/CONF.183/C.1/L.24

**Switzerland: proposal regarding article 37
(Qualification and election of judges), article 110
(Amendments) and article 111 (Review of the Statute)**

[Original: English]
[29 June 1998]

NOTE.

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DOCUMENT A/CONF.183/C.1/L.29

Denmark: proposal regarding article 111

[Original: English]
[29 June 1998]

Review of the Statute

Suggestion to merge option 1 and option 2

1. [...] years after the entry into force of this Statute the Depositary shall convene a meeting of the Assembly of States Parties with a view to agreeing to any adjustments in the Statute necessary in the interests of justice, fairness and efficiency. The review may include but is not limited to the catalogue of crimes contained in article 5.

2. Subsequently, at the request of a State Party, the Depositary shall, upon approval by a majority of States Parties, convene a meeting of the Assembly of States Parties for the same purpose as stated in paragraph 1.

3. The provisions of paragraphs 3 to 6 of article 110 shall apply to any amendment to the Statute resulting from such a meeting of the Assembly of States Parties.

15. Final Act

**(a) Documents submitted by the Coordinator
Recommendations/Report**

DOCUMENT A/CONF.183/C.1/L.49/REV.1

[incorporating document A/CONF.183/C.1/L.49/Rev.1/Add.1 of 11 July 1998]

Recommendations of the Coordinator

[Original: English]
[6 July 1998]

1. At its 20th meeting, on 30 June 1998, the Committee of the Whole considered the draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations on the text for the Final Act.

2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text of the draft Final Act.

3. As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text for paragraphs 4 (a) and (f) of the annex.

4. The Working Group held further consultations with respect to the bracketed portion of paragraph 4 (a) the text of which was referred to the Drafting Committee by the Committee of the Whole. As a result, the Working Group recommends to remove the square brackets and slightly redraft the text as follows.

**DRAFT FINAL ACT OF THE UNITED NATIONS DIPLOMATIC
CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT**

1. The United Nations General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in its resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, the Assembly invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in its resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, the Assembly requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At that session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider

arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. By its resolution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the

International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. In the same resolution, the General Assembly requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. Pursuant to the same resolution, the Secretary-General invited non-governmental organizations accredited by the Preparatory Committee, with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer: ...

17. The Conference elected Mr. Giovanni Conso (Italy) as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

19. The following committees were set up by the Conference:

General Committee:

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole:

Chairman: Mr. Philippe Kirsch (Canada)

Vice-Chairmen: Ms. Silvia Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan

(Romania) and Phakiso Mochochoko (Lesotho)

Rapporteur: Mr. Yasumasa Nagamine (Japan)

Drafting Committee

Chairman: Mr. M. Cherif Bassiouni (Egypt)

Members: Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

Chairman: ...

Members: Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: ...

21. The Conference had before it a draft Statute on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate (A/CONF.183/2/Add.1 and Corr.1).

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR. ...) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR. ...) and the reports of the Committee of the Whole (A/CONF.183/...) and of the Drafting Committee (A/CONF.183/...), the

Conference drew up the Rome Statute of the International Criminal Court.

24. The foregoing Statute, which is subject to ratification, acceptance or approval, was adopted by the Conference on .. July 1998 and opened for signature on .. July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Statute will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the people and the Government of Italy

Resolution on the Establishment of the Preparatory Commission for the International Criminal Court

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this .. th day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

Annex

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

A

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee.

B

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Pays tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman, Mr. Adrian Bos, for their outstanding and hard work, their commitment and their dedication.

C

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its deep appreciation and gratitude to the people and the Government of Italy for making the necessary arrangements for the holding of the Conference in Rome, for their generous hospitality and for their contribution to the successful completion of the work of the Conference.

D

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its appreciation and thanks to Mr. Giovanni Conso, President of the Conference, Mr. Philippe Kirsch, Chairman of the Committee of the Whole, and Mr. M. Cherif Bassiouni, Chairman of the Drafting Committee, who, through their experience, skilful efforts and wisdom in steering the work of the Conference, contributed greatly to the success of the Conference.

E

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as

possible at a date to be decided by the General Assembly of the United Nations;

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;

3 bis. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations;

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Elements of crimes and the Rules of Procedure and Evidence on a priority basis;²⁵²

(b) A relationship agreement between the Court and the United Nations;

(c) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

(d) **(Deleted)**

(e) Financial regulations and rules;

(f) An agreement on the privileges and immunities of the Court;

(g) A budget for the first financial year;

(h) The rules of procedure of the Assembly of States Parties.

5. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.

7. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat

²⁵² The question of timing is still under discussion.

services as it may require, subject to the approval of the General Assembly of the United Nations.²⁵³

8. The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding the Final Act contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

NOTE

Understandings of the Committee of the Whole with respect to the Final Act:

The text within square brackets in paragraph 4 (a) of the annex will be reconsidered in the light of the discussions on this issue.

The wording of paragraph 7 of the annex is subject to the finalization of article 104.

Note regarding the annex to the Final Act contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

NOTE

The Committee of the Whole further informs the Drafting Committee that it decided to remove the square brackets in paragraph 4 (a) of the annex to the Final Act previously transmitted to the Drafting Committee and to slightly redraft the text of that paragraph as follows:

"4. (a) Elements of crimes and the Rules of Procedure and Evidence on a priority basis;"

²⁵³ The wording of this paragraph is subject to the finalization of article 104.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]
[23 June 1998]

Proposals relating to official and working languages

NOTE

This document is reproduced under part 4.

DOCUMENT A/CONF.183/C.1/L.57

Belarus, Kazakhstan and Ukraine: proposal regarding a draft resolution on equitable representation in elections to the Court

[Original: Russian]
[9 July 1998]

DRAFT RESOLUTION ON EQUITABLE REPRESENTATION IN ELECTIONS TO THE COURT,²⁵⁴ SUBMITTED BY THE DELEGATIONS OF BELARUS, KAZAKHSTAN AND UKRAINE

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court, which establishes a requirement of equitable geographical distribution in elections to the Court,

Inviting the maximum number of States to become Parties to the Statute so that the International Criminal Court may enjoy universal support,

Expresses the hope that, in accordance with the said requirement, States Parties will strive to elect²⁵⁵ at least [...] ²⁵⁶ judges from each geographical group as defined by the United Nations General Assembly, especially when State accession to the Statute has become widespread and the composition of each geographical group is broadly similar to the membership of that group at the United Nations.

²⁵⁴ The title of this resolution should be added to paragraph 26 of the draft Final Act.

²⁵⁵ It is important that equitable geographical distribution should be the issue at the stage of the elections proper, not at the candidate selection stage or at other stages preceding the elections.

²⁵⁶ This figure must be determined as a function of the total number of judges on the Court, as laid down in article 37 of the Statute.

DOCUMENT A/CONF.183/C.1/L.71

**Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad
and Tobago and Turkey: proposal regarding crimes of
terrorism and drug crimes**

[Original: English]
[14 July 1998]

NOTE

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DOCUMENT A/CONF.183/C.1/L.75

**Movement of Non-Aligned Countries: proposal regarding
the Bureau proposal in document A/CONF.183/C.1/L.59
and Corr.1**

[Original: English]
[14 July 1998]

NOTE

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