SHORTER ARTICLES, COMMENTS AND NOTES

THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

> By adopting this Statute, participants in the Conference have overcome many legal and political problems, which kept this question on the United Nations agenda almost throughout the Organization's history. No doubt, many of us would have liked a Court vested with even more far-reaching powers, but that should not lead us to minimize the breakthrough you have achieved ... It is an achievement which, only a few years ago, nobody would have thought possible.[1]

A. Introduction

The conclusion and adoption of the Statute of a permanent International Criminal Court[2] ("Statute") in Rome in July 1998[3] represent a turning point in the enforcement of legal norms regulating armed conflict. The Rome Conference was the latest, and most important, chapter in a long saga concerning the broader issue of the conclusion and adoption of a Draft Code of Crimes against the Peace and Security of Mankind, an important part of which was the establishment of an international criminal court to try such crimes.[4] The International Law Commission (ILC), the UN organ responsible for the preparation of the Code,[5] decided to separate the two objectives and to proceed with the drafting of a statute for an international criminal court that was distinct from the Draft Code of

1. UN Secretary-General Kofi Annan at the ceremony celebrating the adoption of the Statute of the International Criminal Court, 18 July 1998, Rome.

2. Hereafter "the Court". The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are hereafter referred to as ICTY and ICTR, respectively.

3. The Statute was adopted by the UN Sponsored Diplomatic Conference in Rome on 17 July 1998 by 120 States voting in favour, seven against and 21 abstaining.

4. See J. Crawford, "The ILC's Draft Statute for an International Criminal Tribunal" (1994) 88 A.J.I.L. 140, 141, and citations contained therein.

5. The most active UN principal organ in this area has been the General Assembly and its subsidiary organ the International Law Commission, which formulated a Draft Statute of an International Criminal Court. The Assembly in its Res.44/39 of 4 Dec. 1989 requested the ILC to address the question of establishing an international criminal court; in Res.45/41 of 28 Nov. 1990 and 46/54 of 9 Dec. 1991 invited the ILC 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 Res.47/33 of 25 Nov. 1992 and 48/31 of 9 Dec. 1993 the Assembly requested the ILC to formulate the draft statute for an international criminal court as a matter of priority. Subsequently the General Assembly, in its Res.50/46 of 11 Dec. 1995, decided to establish a Preparatory Committee on the establishment of an International Criminal Court to discuss the major substantive and administrative issues arising out of the Draft Statute prepared by the ILC in 1994 and 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. The Preparatory Committee met from 25 Mar. to 12 Apr. and from 12 to 30 Aug. 1996, during which time it 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.

Crimes: the ILC envisaged a court that would exercise jurisdiction in respect of crimes of international concern which existed as such in various treaties already in force.[6] This approach is reflected in the provisions of the Statute adopted at Rome concerning the jurisdiction of the Court, as explained below.[7]

The Statute of the Court is divided into 13 Parts regulating the following areas: the establishment of the Court (Articles 1–4); jurisdiction, admissibility and applicable law (Articles 5–21); general principles of criminal law (Articles 22–33); composition and administration of the Court (Articles 34–52); investigation and prosecution (Articles 53–61); the trial (Articles 62–76); penalties (Articles 77–80); appeal and revision (Articles 81–85); international co-operation and judicial assistance (Articles 86–102); enforcement (Articles 103–111); the Assembly of States Parties (Article 112); financing (Articles 113–118); and the final clauses (Articles 119–128). The analysis of the Statute which follows does not, for reasons of length and interest, examine in detail all the provisions of these Parts. The focus is on the following three major themes which necessarily involve discussion of the main elements of the Statute: the consequences of the treaty basis of establishment of the Court; the nature of the relationship between the Court and domestic criminal courts (complementarity); and the issue of the jurisdiction of the Court. This discussion cannot, however, take place in a contextual legal vacuum. In particular, the corpus of jurisprudence of the ICTY/ICTR, the predecessors of the Court, in interpreting their respective Statutes will be invaluable as a source of authority for the Court once established as an aid in interpreting its own Statute, since many of the provisions are identical or analogous in nature, and thus the analysis of the Statute of the Court which follows will seek to place the provisions discussed within the context of the Statutes of the ICTY/ICTR.[8]

B. Consequences of the Treaty Basis of Establishment of the Court

The Statute, an international treaty, establishes the Court in Article 1 and stipulates in Article 34 that it shall be constituted of the following organs: the judges of the Court organised in various groupings,[9] the Office of the Prosecutor, and the Registry.[10] In terms of the entry into force of the Statute and thus the legal

6. Crawford, *op. cit. supra* n.4, at pp.141–142.

7. See *infra* Section D1.

8. There is, moreover, brief consideration of the work of the ILC and the Preparatory Committee in formulating the Statute and the proposals by States at the Rome Conference.

9. These groupings are, according to Art.34(a) and (b), the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division. Art.38(3) specifies that the Presidency comprises the President of the Court together with the First and Second Vice-Presidents, who are all elected, according to Art.38(1) by an absolute majority of the judges. Art.38(3) specifies that the Presidency shall be responsible for the proper administration of the Court (with the exception of the Office of the Prosecutor) and the other functions conferred upon it in accordance with the Statute. These functions include: proposing to State parties that there be an increase in the number of judges from the specified 18 (Art.36(1)), if it considers this necessary (Art.36(2)); the assignment of judges into the Appeals Division, the Trial Division and the Pre-Trial Division (Art.39); excusing a judge, at his or her request, from the exercise of a function under the Statute (Art.41(1)); and excusing the prosecutor or deputy prosecutor at his or her request from acting in a particular case (Art.42(6)).

10. Art.48(1) specifies that the Court shall enjoy in the territory of each State party to the Statute such privileges and immunities as are necessary for the fulfilment of its purposes. In the case of the deputy registrar, the staff of the Office of the Prosecutor, and the staff of

point of establishment of the Court,[11] Article 126 provides that this will take place a short period[12] after the deposit of the 60th instrument of ratification, acceptance, approval or accession with the UN Secretary-General.[13]

The major difference between the ICTY/ICTR and the Court is that the former were set up by the Security Council under Chapter VII of the UN Charter on an *ad hoc* basis as UN subsidiary organs while the latter has a treaty basis[14] independent as such of the United Nations.[15] There are two main consequences of this differing

the Registry, Art.48(3) stipulates that they "shall enjoy the privileges and immunities and facilities necessary for the performance of their functions". Additional privileges and immunities are provided in Art.48(2) for the judges, the prosecutor, the deputy prosecutors and the registrar, who "shall, when engaged on 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 terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity". The Statute also provides in Art.48(4) that "Counsel, experts, witnesses ... shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court." Annex 1(F) of the Rome Final Act stipulates the preparation of a draft agreement on the privileges and immunities of the Court as one of the functions of the Preparatory Commission of the Court. On the other functions of this Preparatory Commission, see *infra* n.12.

11. Once established, Art.3 of the Statute stipulates that the seat of the Court shall be in The Hague.

12. The precise period is specified in Art.126(1) as "the first day of the month after the 60th day following the date of the deposit of the 60th instrument". Annex 1(F) of the Final Act of the UN Conference which concluded the Statute provides for the establishment of a Preparatory Commission—made up of the States which have signed the Final Act and other invited States—which will have the objective of ensuring the coming into operation of the Court without delay and making the necessary arrangements for the commencement of its functions. In accordance with this objective, para.5 of Annex 1(F) specifies that the Preparatory Commission shall draft texts of, *inter alia*, the Rules of Procedure and Evidence; elements of the crimes; a relationship agreement between the Court and the UN; an agreement on the privileges and immunities of the Court; a budget for the first financial year; and the rules of procedure of the Assembly of States Parties. Para. 8 of Annex 1(F) states that the Commission is to remain in existence until the conclusion of the first meeting of the Assembly of States Parties, the body made up of States parties which, according to Art.112 of the Statute, exercises management oversight functions.

13. Art.120 states that no reservation may be made by States when ratifying the Statute. This is important to prevent the proliferation of different regimes governing the exercise by the Court of its jurisdiction *vis-à-vis* different States and their nationals. The question whether a particular interpretative declaration submitted by a State when ratifying the Statute is in fact a reservation is a decision which is within the sole discretion of the Court (on the distinction between an interpretative declaration and a reservation, see the case of *Belilos* v. *Switzerland* 88 I.L.R. 635). However, until the Statute enters into force and the Court is thus established, it will be for the Secretary-General, as depositary (Art.125), to decide whether a particular instrument submitted with an instrument of ratification is a reservation and as such cannot be accepted. In the case of dispute with the depositing State, the Secretary-General should circulate the suspect instrument to the other contracting States and even the negotiating States: see Art.77(1)(d) of the 1969 Vienna Convention on the Law of Treaties concerning the functions of the depositary.

14. As such, the temporal and geographical limitations which pertain to the ICTR and ICTY respectively do not apply in the context of the Court: see also C. Warbrick, "International Criminal Law" (1995) 44 I.C.L.Q. 466, 473.

15. On the nature of the possible relationship between the Court and the UN, see *infra* nn.30–32 and corresponding text.

basis of establishment of the Court from that of the ICTY/ICTR: decisions of the Court will not, in general terms,[16] prevail over a State's other treaty obligations; and the separate legal basis of the Court from that of the UN Organisation raises the issue of whether the Organisation should be contributing to the financing of the Court.

It has been discussed elsewhere that the consequence of the UN Tribunals being established as a Chapter VII measure is that they have the competence, acting in accordance with their Statutes, to issue decisions that impose binding obligations on States in the area of, for example, the provision of co-operation and judicial assistance (including arrest and transfer of suspects) to the Tribunals.[17] The importance of this is that such decisions by the Tribunals activate the provisions of Article 103 of the UN Charter[18] with the consequence that these decisions prevail over States' other treaty obligations.[19] The position under the Statute of the Court is markedly different, a consequence of the Court itself being established by means of a treaty.

This position can be illustrated by reference to, for example, the issue of co-operation by States with the Court in the area of the arrest of suspects.[20] Article 89 of the Court's Statute stipulates that "States Parties shall, in accordance with the provisions of this Part [Part 9] and the procedure under their national law, comply with requests for arrest and surrender." It is thus clear that orders by the Court concerning the arrest or transfer of a suspect to the Court will not prevail over a State's national law procedures[21] for determining extradition of a

16. For an exception, see *infra* n.23.

17. See D. Sarooshi, "The Powers of the United Nations International Criminal Tribunals" (1998) 2 Max Planck Yearbook U.N. Law 141, 149–150, and ICTY/ICTR Appeal Chamber cases cited therein.

18. Art.103 of the Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

19. Sarooshi, *op. cit. supra* n.17, at p.150.

20. There is also a general obligation on States under Art.86 of the Statute to co-operate fully with the Court, which includes of course the prosecutor, in its investigation and prosecution of crimes within the jurisdiction of the Court. In the event of non-compliance by a State with such a request which prevents the Court from exercising its powers and functions under the Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, in the exceptional case where the Security Council referred the matter to the Court, to the Security Council (Art.87(7) of the Statute). The effectiveness of such a reference to the Assembly of States Parties has been correctly questioned on the basis that "the Assembly of States Parties given its size and its low frequency of meetings would not function as an effective organ to sanction incidents of non-cooperation" (A. Zimmerman, "The Creation of a Permanent International Criminal Court" (1998) 2 Max Planck Yearbook U.N. Law 169, 223). This is to be contrasted with the ICTY/ICTR where there is provision for recourse to the Security Council in all cases of non-compliance with a warrant of arrest or transfer order by a State. (This is in accordance with rr.59 and 61(E) of the Rules of Procedure and Evidence of the ICTY.) This recourse to the enforcement authority of the Security Council in all cases of non-compliance is lacking in the case of the Court.

21. Moreover, in the context of national laws there is provision in Art.94 of the Statute, which is in Part 9, for the requested State to postpone the execution of the request for a period of time agreed upon with the Court if the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which

suspect,[22] or, in accordance with the other provisions of Part 9, its other treaty obligations.[23]

In the context of a State's other treaty obligations, Article 98(1), which is in Part 9, provides that the

> Court may not proceed with a request for surrender or assistance 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.

However, in practice the State which has the competence to waive such immunity may well have its own cogent domestic reasons for not so doing and thus in practice such a waiver may not be forthcoming. This obviously may constitute a serious impediment to the arrest and transfer to the Court of a suspect who was a head of State and thus could claim State immunity or a person who claimed diplomatic immunity with respect to proceedings designed to secure his presence before the Court. This provision is curious especially in the light of Article 27 of the Statute, which provides that the official capacity of a person whether as head of State or government or any other official designation, including presumably the position of ambassador, does not constitute a bar to, *inter alia*, the Court exercising its jurisdiction over such a person.[24] Despite Article 27, the problem still seems to remain that under Article 98 it will be up to the Court to convince the State concerned to waive the immunity of the suspect in order for his transfer to

the request relates. This provision seems innocuous enough in theory, but in practice it may well serve as a legal pretext for an intransigent State to delay execution of a request for arrest. Clarity in terms of the powers of the Court in this area would have been more desirable especially in the light of the experience of the ICTY and the continued non-cooperation of several States for a considerable period with the Tribunal by hampering requests for investigation and not executing warrants for arrest: see e.g. the letter from the ICTY President Gabrielle Kirk McDonald to the Security Council of 9 Sept. 1998.

22. This is in clear contrast to r.58 of the Rules of Procedure and Evidence of the ICTY, which provides: "The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."

23. This is subject to an exception in the case where a State which is a party to the Statute makes the same request as the Court for the extradition of a person from the requested State for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender: *in casu*, Art.90(2) provides that the requested State "shall" in general terms give priority to the request from the Court.

24. In the report of the Preparatory Committee it is stated in respect of the irrelevance of official position in a case before the Court: "Taking into account the precedents of the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals, there was support for the Statute to disallow any plea of official position as Head of State or Government or as a responsible government official; such official position should not relieve an accused of criminal responsibility. Some delegations thought that this issue could be included in relation to 'defences'. The opinion was also expressed that further consideration would be useful on the question of diplomatic or other immunity from arrest and other procedural measures taken by or on behalf of the Court": Report of the Preparatory Committee on the establishment of an International Criminal Court, Vol. 1 (Proceedings of the Preparatory Committee during Mar.–Apr. and Aug. 1996), G.A., 51st Sess., Supp. No.22, A/51/22, 1996, para.193. The precedents referred to in this passage are Art.7 of the Charter of the International Military Tribunal for the trial of war criminals at Nuremberg, Art.7(2) of the ICTY Statute and Art.6(2) of the ICTR Statute.

take place, given that there is no obligation under the Statute to waive immunity.[25] Accordingly, one interpretation of the position under the Statute would seem to be as follows: the official capacity of a person does not constitute a bar to the Court exercising its jurisdiction over the person (Article 27), but some official capacities may allow a State to exempt itself from an obligation to co-operate with the Court (Article 98). The only exception to this situation is where the Court can negotiate a waiver of immunity with the State concerned.

However, another interpretation of the system under the Statute is possible and indeed to be preferred. This is in accordance with the approach taken by the House of Lords in its recent landmark decision in the first decision in the *Pinochet* case. In this case the question was whether General Pinochet was entitled to immunity as a former head of State from arrest and extradition proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was Head of State of Chile. A three to two majority of the House of Lords decided that the acts with which General Pinochet was charged in Spain and for which his extradition was sought were such that he could not claim immunity. The majority of the House of Lords held that under both international and UK law the ordering by a head of State of the torture and murder of civilians were not acts which could fall within the scope of "official acts" and as such they were not within the functions of a head of State and thus, as a former head of State, he could not claim immunity for these acts.[26] Applying this approach to Article 98 a cogent argument can be made that the nature of the acts for which a person is indicted by the Court is such that they do not allow a person to claim State or diplomatic immunity since they are not "official acts"—a contention reinforced by the terms of Article 27—and as such a State complying with a request for arrest or extradition of a person would not, in the terms of Article 98, be acting "inconsistently with its

25. Such an obligation, even if it were to exist, could apply only to a State party to the Statute, since the treaty cannot bind States which are not a party: see Art.34 of the 1969 Vienna Convention on the Law of Treaties.

26. *R.* v. *Bow Street Stipendiary Magistrate and others ex p. Pinochet Ugarte (Amnesty International and others intervening)* [1998] 4 All E.R. 897, see the opinions of Lords Nicholls, Steyn and Hoffmann. See in particular Lord Steyn, *idem*, pp.945–946. The judgment was, however, vacated by the House of Lords on 17 Dec. 1998; see H. Fox, "The First *Pinochet* Case: Immunity of a Former Head of State" (1999) 48 I.C.L.Q. 207. After the second hearing of the Appellate Committee of the House of Lords in this case, there was a majority decision of six Law Lords to one (Lord Goff dissenting) that Pinochet is not entitled to immunity for the alleged charges of torture and conspiracy to commit torture. Lord Browne-Wilkinson stated in the House of Lords the proposition common to the majority "that torture is an international crime over which international law and the parties to the Torture Convention have given universal jurisdiction to all courts wherever the torture occurs. A former head of state cannot show that to commit an international crime is to perform a function which international law protects by giving immunity" (Judicial Business: Report of the Appellate Committee in the Cause: *R. v. Bartle and the Commissioner of Police for the Metropolis and others ex p. Pinochet*, House of Lords, Wednesday 24 March 1999, Lord Browne-Wilkinson). However, it must be noted that the complementarity provisions of the Court's Statute would mean that if such a case in the future were to be referred to the Court it would in all probability be found inadmissible, since it was the subject of domestic investigation and prosecution; *in casu* Spain, the State which had requested extradition of Pinochet from the UK. On the complementarity provisions see *infra* Section C.

obligations under international law with respect to the State or diplomatic immunity of a person". This would, however, be subject to the limitation specified in the *Pinochet* judgment that it applies only to *former* heads of State and, *mutatis mutandis*, *former* ambassadors and that in the case of such State officials currently in office the waiver of immunity under Article 98 would still, however, be a legal requirement.

However, the potential legal difficulties with the prosecution of a head of State do not end there. If a person, often likely to be the head of State, were granted an amnesty under the law of a State there is a serious issue as to whether the Court could exercise its jurisdiction in respect of that person. Article 17(1)(b) provides that the Court "shall determine" that a case is inadmissible where "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".[27] The question thus arises as to the effect of the grant of an amnesty to a person by a State under its domestic law for the purposes of Article 17(1)(b): does such a grant constitute a decision by the State "not to prosecute the person concerned"? It may seem that it would. However, it could be argued that an amnesty in such a case represents an "unwillingness" by the State genuinely to prosecute, and as such constitutes an express exception to Article 17(1)(b). To second-guess the State, however, and decide that its grant of amnesty is not for genuine grounds is very difficult. Nonetheless the Statute is of some assistance here. Article 17(2) elucidates the meaning of "unwillingness to prosecute" when it states, in relevant part for our purposes, that this is the case where "(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 referred to in Article 5".[28] Accordingly, the Court may ascertain the motivation for the grant of amnesty but only to the extent of satisfying itself that the amnesty was not given to shield the person from prosecution before the Court.

The second important issue which arises as a consequence of the separate treaty establishment of the Court from the United Nations is the relationship of the Court to the UN Organisation. The Court is clearly not part of the UN Organisation—which consists of the six principal organs specified in Article 7(1) of the UN Charter and their subsidiary organs. However, Article 2 of the Court's Statute does provide: "The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf." The nature of this relationship will have important implications for the financing of the Court.

27. This provision is part of the complementarity provisions in the Statute: see *infra* Section C.

28. The other exceptions to the operation of Art.17(1) which are specified in Art.17(2) are as follows: "(b)[where] [t]here 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) [where] [t]he proceedings were not or are not being conducted independently or impartially, 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".

The financing of the Court is envisaged by the Statute in three ways: assessed contributions by States parties (Article 115(a)); funds provided by the United Nations, subject to General Assembly approval, in particular in relation to expenses of the Court incurred due to referrals by the Security Council (Article 115(b)); and voluntary contributions from governments, international organisations, individuals and corporations in accordance with criteria adopted by the Assembly of States Parties (Article 116). The issue which arises here concerns Article 115(b). In particular, it is clear from Article 17 of the UN Charter as interpreted by the *Expenses* case that the General Assembly has the sole competence to decide upon and apportion the budget of the UN Organisation.[29] However, it is also clear according to Article 17 that this competence relates only to the UN Organisation. As such the competence of the General Assembly to decide on a compulsory basis that States must contribute to the budget of the Court—an entity not part of the Organisation—would seem to lack a solid legal foundation. There is, however, provision made under Article 17(3) of the UN Charter for the General Assembly to approve budgetary arrangements made with Specialised Agencies, and thus if the Court attains the status of a UN Specialised Agency[30] the General Assembly may well have the competence to require UN member States to contribute to its budget. The only other legal basis for the General Assembly being able to exercise such a competence is if the Court is brought into a special relationship with the United Nations such that it is considered in legal terms as a "treaty organ of the United Nations". The UN Legal Counsel has defined these as "organs whose establishment is provided for in a treaty, for the purpose of carrying out its provisions, but are so closely linked with the United Nations that they are considered organs of the Organization".[31] This can easily be achieved by means of a General Assembly resolution adopting the Court as a UN "treaty organ".[32]

C. *The Principle of Complementarity*

An important feature of the Statute is the complementary role assigned to the Court *vis-à-vis* national criminal investigations or prosecutions of an accused. Article 17(1) of the Statute stipulates in express terms that the Court shall determine that a case is inadmissible if, *inter alia*: a 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; or if 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

29. I.C.J. Rep. 1962, 162.

30. This would require compliance with the modalities specified in Art.63 of the UN Charter.

31. *UN Juridical Yearbook* (1976), p.200. For further examples and analysis of this type of UN organ, see D. Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs" (1996) 67 B.Y.I.L. 413, 433–434.

32. *Ibid.* The Court could not, however, be a UN subsidiary organ since its establishment, mandate and duration are all determined by its Statute whereas a UN subsidiary organ is subject, in respect of these issues, to the authority and control of its principal organ: Sarooshi, *idem*, pp. 432–458: cf. in the case of the Court, for example, the fact that its judges are to be elected in accordance with Art.36 of its Statute.

the unwillingness or inability of the State genuinely to prosecute.[33] The objective of this system is to encourage the prosecution of persons accused of the crimes in Article 5 within as many States' domestic legal systems as possible, thus making the enforcement of international humanitarian law more effective. Moreover, as Professor Crawford stated at the Rome Conference, "It [the Court] was not intended to displace existing national systems in cases where those systems were capable of working properly. Hence the principle of complementarity." Accordingly, "complementarity" in the context of the Court means that there is a presumption in favour of prosecution in domestic courts. This is in clear contrast to the position of the ICTY/ICTR.[34] Even though the primacy is reversed in favour of the State in the context of the Court the issue is justiciable: Article 17(2) does give the Court the competence to judge in effect the quality of a domestic investigation or prosecution and thus to decide whether it should allow a prosecution in the Court to continue.[35] In the case where a domestic trial has already taken place the legal position is similar.[36]

D. The Jurisdiction of the Court

The exercise of jurisdiction by the Court was one of the most hotly debated issues before and during the Rome Conference. The Statute provides that when a State ratifies the treaty it accepts automatically the Court's jurisdiction over all crimes within its scope: there is no option for States when ratifying the Statute to pick and choose the crimes for which they will accept the Court's jurisdiction. The one exception is temporal in nature. Article 124 allows a State to defer acceptance of the jurisdiction of the Court for a period of seven years after ratifying the Statute with respect to war crimes which are alleged to have been committed by its nationals or on its territory.[37]

33. The meaning of unwillingness or inability in this context has been discussed above: see *supra* nn.27–28 and corresponding text. The difficulty with these provisions in practice is that it may be very difficult for the prosecutor to obtain evidence as to the adequacy of the national proceedings especially since it is precisely the State which is challenging the prosecutor's investigations which holds this evidence.

34. E.g. Art.9 of the ICTY Statute stipulates that although the Tribunal and national courts have concurrent jurisdiction to prosecute persons for the crimes in the ICTY Statute, where there is a question of primacy the ICTY has primacy over national courts, and, moreover, that at any stage of the procedure, the Tribunal may formally request national courts to defer to its primary competence.

35. See *supra* n.28 and corresponding text.

36. Art.17(3) states that where a person has already been tried in a domestic court for conduct which is the subject of the complaint before the Court then the presumption is that the case is inadmissible and, moreover, a trial by the Court is not permitted under Art.20(3). Art.20(3) does, however, provide an express exception to its own operation when it states that the Court may try the case if the proceedings in the domestic court were for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the Court; or the trial was not conducted independently or impartially and was conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

37. Moreover, in terms of temporality, the Court's jurisdiction is limited by virtue of Art.11 to those crimes committed after the entry into force of the Statute.

There are two further aspects of jurisdiction worth considering: the crimes over which the Court has jurisdiction; and the process required for the exercise of jurisdiction by the Court in a particular case.

1. The crimes over which the Court has jurisdiction

The provisions of the Statute which determine the crimes that are within the scope of the Court's jurisdiction do not at present seek to alter the substantive law which the Court will be required to apply[38] in a case.[39] Article 5 of the Statute—like the corresponding provisions of the Statutes of the ICTY/ICTR—specifies that the Court has jurisdiction over the crime of genocide, crimes against humanity and war crimes.[40] However, the Court's Statute goes further than the ICTY/ICTR Statutes when it provides the Court with jurisdiction over the crime of aggression. The issue of the crime of aggression will be examined after consideration of the three common grounds of jurisdiction.

38. In terms of the more general law which is applicable in a case, Art.21(1) of the Statute specifies the following: the Statute, Elements of Crimes, and the Rules of Procedure and Evidence (the Elements of Crimes and the Rules of Procedure and Evidence are to be adopted subsequently by the Assembly of States Parties, although initially being prepared in draft form by the Preparatory Commission: see *supra* n.12); applicable treaties and the established principles of the international law of armed conflict; and general principles of law derived from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. The main general principles of criminal law are set out in express terms in Part 3 of the Statute: it includes provisions relating to, *inter alia*, *nullem crimen sine lege*, a person will not be criminally responsible unless the conduct in question constituted at the time of commission a crime within the jurisdiction of the Court (Art.22); *nulla poena sine lege*, a person convicted by the Court may be punished only in accordance with the Statute (Art.23); non-retroactive application of the provisions of the Statute (Art.24); the principles of individual criminal responsibility (Art.25, and see also *infra* nn.42–43 and corresponding text); the exclusion of jurisdiction over persons under 18 years of age (Art.26); irrelevance of official capacity (Art.27, and see also *supra* n.24 and corresponding text); command responsibility (Art.28); and superior orders (Art.33). The jurisprudence of the ICTY will be of importance to the work of the Court in these areas, especially concerning command responsibility and superior orders: see the case of *Prosecutor* v. *Delalić, Mucić, Delić, and Landžo, ICTY Judgment*, IT–96–21–T, 16 Nov. 1998, paras.330–401; and the forthcoming decision of the ICTY in the *Blaskic* case (currently being heard before the Tribunal) involving a military commander and, the prosecutor alleges, his responsibility for crimes committed by his subordinates.

39. This is analogous to the position of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda established by the UN Security Council: on the ICTY/ICTR Statutes see C. Greenwood, "The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia" (1998) 2 Max Planck Yearbook U.N. Law 97, 111; and Warbrick *op. cit. supra* n.14, at p.468.

40. Accordingly, the Statute does not provide for prosecution of crimes such as drug trafficking: this is in contrast to the Draft Statute of the ILC, on which see Crawford, *op. cit. supra* n.4, at pp.145–146. The provision for the later inclusion of such a crime in the Statute is, however, envisaged by Annex 1(E) of the Rome Conference Final Act which, as a resolution on treaty crimes "*Recommends* that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."

(a) The crime of genocide. The crime of genocide in the Statute of the Court is taken verbatim from Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), and is the same definition which appears in Article 2 of the ICTR Statute and Article 4 of the ICTY Statute. As such, the detailed meaning given to these acts in the important ICTR case of *Prosecutor* v. *Akayesu* will be of importance in the interpretation by the Court of these acts in its own Statute.[41]

The one difference between the wording of the Court's Statute and those of the ICTR/ICTY is that the latter specify in further detail punishable acts as follows: "(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide".[42] In the Court's Statute these acts have been removed from the definition of the crime of genocide and have been incorporated, together with additional elements, in Article 25 of the Statute dealing with individual criminal responsibility which apply more generally to all crimes within the jurisdiction of the Court. This represents a positive innovation and an advancement over the Statutes of the ICTR/ICTY, since there are now additional acts which may constitute a basis for individual criminal responsibility for the commission of the crime of genocide—for example, soliciting or inducing the crime.[43]

(b) Crimes against humanity. The provisions of Article 7(1) of the Statute which list those acts that constitute a crime against humanity differ in several main ways from their corresponding provisions in Article 3 and Article 5 of the ICTR and ICTY Statutes, respectively.

First, there is the clear specification in the *chapeau* of Article 7(1) that a "crime against humanity" means any of the acts specified in the list "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". This same requirement is reflected in Article 3 of the Statute of the ICTR.[44] However, this condition that there only be an "attack directed against any civilian population" is a markedly different requirement

41. *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998, paras.494–524. See also the ICTY case of *Prosecutor* v. *Karadzic and Mladic*, Rule 61 hearing 108 I.L.R. 85.

42. See Art.2 of the ICTR Statute and Art.4 of the ICTY Statute. This is taken verbatim from Art.III of the Genocide Convention. The ICTR case of *Akayesu*, *idem*, paras.525–548 defines further the elements of the crime of complicity in genocide, and the elements of the crime of direct and public incitement to commit genocide (paras.549–562), for the purposes of the ICTR Statute.

43. Art.25(3)(b) of the Statute.

44. However, the ICTR Statute, unlike that of the Court, contains an additional, intent, requirement in its Art.3 that such an attack be on a discriminatory basis, "on national, political, ethnic, racial or religious grounds". For consideration of this requirement by a Trial Chamber of the ICTR, see *Akayesu*, *supra* n.41, at paras.583–584. Moreover, the ICTY has found that a requirement of discriminatory intent is a necessary element of a crime against humanity for the purposes of Art.5 of the ICTY Statute although it is not mentioned in express terms: *Prosecutor* v. *Tadić*, Case No.IT-94-1-T, Opinion and Judgment, 7 May 1997, paras.650–652. The view put forward at the Rome Conference that this intent requirement should apply for all forms of crimes against humanity did not prevail and was accordingly deleted from the final text: as such, this requirement exists under the Statute only in respect of the crime of persecution (Art.7(1)(h)).

from that contained in Article 5 of the ICTY Statute, which requires that the crimes be "committed in armed conflict, whether international or internal in character, and directed against any civilian population".[45] This approach in the Court's Statute represents a positive innovation as compared to the ICTY Statute and may well constitute a statement of the position under customary international law.[46] What constitutes an "attack directed against any civilian population" for the purposes of the Court's Statute is defined in Article 7(2)(a) as meaning 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". The case law of the ICTR/ICTY has clarified significantly the precise content of some of the issues in this area: What is the meaning of "civilian"?[47] What does "directed against any civilian population" mean?[48] What is the meaning of "population",[49] and how does this relate to the "widespread and systematic" requirement?[50] These clarifications by the *ad hoc* Tribunals will prove of invaluable assistance to the Court in its future work.

The second main difference between Article 7 of the Court's Statute and the corresponding provisions of those of the *ad hoc* Tribunals is that in the former more acts are enumerated as constituting a basis for a crime against humanity[51] and those acts which are the same are more fully defined.[52] This is of particular importance to, for example, crimes of sexual violence, which were only covered previously, inadequately,[53] in the Statutes of the *ad hoc* Tribunals under the heading of "rape": Article 7(1)(g) now includes "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".[54]

45. On the legal elements of the existence of an armed conflict, see *Tadić* case, No.IT-94-1-AR72 (2 Oct. 1995), Jurisdiction 105 I.L.R. 453, 486–499 (paras.66–70 of judgment) and Tadić case, Opinion and Judgment, 7 May 1997, paras.561–576, 624–634.

46. As the Appeal Chamber of the Tribunal in *Tadić* stated: "by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law" (I.L.R., *idem*, p.525 (para.141 of judgment)). Moreover, the Appeal Chamber held, *ibid*: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."

47. *Tadić*, *supra* n.44, at paras.636–643. *Akayesu*, *supra* n.41, at para.582.

48. *Tadić*, *idem*, para.635; *Akayesu*, *ibid*.

49. *Tadić*, *idem*, para.644; *Akayesu*, *idem*.

50. *Tadić*, *idem*, paras.645–649; *Akayesu*, *idem*, paras.579–581.

51. The additional acts enumerated in the Court's Statute which are not expressly mentioned in the ICTR/ICTY Statutes are enforced disappearance of persons (Art.7(1)(i)) and the crime of apartheid (Art.7(1)(j)). Cf. the definition given to the crime of apartheid in Art.7(2)(h) which appears narrower than the definition given in Art.II of the International Convention on the Suppression and Punishment of the Crime of Apartheid.

52. Art.7(1)(d), (e), (g), (h) and (k) all provide more specific content than is given in their corresponding provisions in the case of the ICTR (Art.3) and ICTY (Art.5). See also the definitions given to various acts in Art.7(2) of the Court's Statute.

53. See also UN High Commissioner for Human Rights Position Paper on the establishment of a Permanent International Criminal Court, Geneva, 15 June 1998, paras.39–42; and J. Gardam, "Women and the Law of Armed Conflict: Why the Silence?" (1997) 46 I.C.L.Q. 55, 73.

54. There is, however, a very restrictive requirement, which was a compromise reached at the Conference, in respect of "forced pregnancy": Art.7(2)(f) requires that this act be

(c) War crimes. Article 8(1) provides that the Court will have jurisdiction over war crimes when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Article 8(2) defines in considerable detail what acts the Statute considers to be war crimes. Due to considerations of space a detailed examination of these acts is not undertaken. Our discussion instead is limited to some of their main features.

The provisions of Article 8(2)(a) of the Statute concerning war crimes that result from a grave breach of the 1949 Geneva Conventions is taken almost verbatim from Article 2 of the ICTY Statute. Similar to Article 2, the Court's Statute nowhere provides that these grave breaches can in law be committed in an internal conflict. The reason for this is that the substantive law which the Statute empowers the Court to apply in this context, the Geneva Conventions of 1949, does not—in the case of grave breaches of those Conventions in respect of "protected persons"—have application other than in a situation of international armed conflict. As the Appeal Chamber held in the *Tadić* case: "in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts".[55]

Similarly, in regard to serious violations of the laws and customs of war, the list of acts specified in Article 8(2)(b) of the Court's Statute are applicable only if committed in an international armed conflict. This is in contrast, however, to the corresponding provision of the ICTY Statute, Article 3.[56] Nonetheless, the Court's Statute does in Article 8(2)(e) provide a long list of acts the commission of which will constitute a serious violation of the laws and customs applicable in armed conflicts which are not of an international character. The scope of these acts is much more extensive than those specified in the corresponding list of acts in Article 3 of the ICTY Statute,[57] and as such the Court's Statute represents an important innovation in this area.[58]

carried out "with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law".

55. *Tadić*, I.L.R., *supra* n.45, at p.499 (para.84 of judgment).

56. The Appeals Chamber in *Tadić* stated in respect of Art.3 of the ICTY Statute that "it does not matter whether the 'serious violation' [which the Chamber found was a precondition for a violation of Art.3] has occurred within the context of an international or an internal armed conflict", *idem*, p.504 (para.94 of judgment). The scope of the acts which are included in Art.8(2)(b) are much more extensive than that of Art.3, but this is tempered by the narrow application of this provision only to situations of international armed conflict. Cf., however, *infra* n.57 and corresponding text.

57. Of particular note here, e.g., is Art.8(2)(e)(iii), which provides that an intentional attack against UN personnel or other personnel or material involved in a UN peace-keeping mission or a mission to distribute relief supplies constitutes a war crime.

58. Art.8(2)(f) does, however, restrict the application of Art.8(2)(e) when it states that the latter provision "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 the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." This represents the application of Art.1(2) of the Second Additional Protocol of 1977 relating to the protection of victims of non-international armed conflicts. There is, nonetheless, a positive development here since Art.8(2)(e) now refers both to protracted armed conflict between governmental authorities and organised groups and—as opposed to Art.1(1) of the 1977 Second Additional Protocol to the Geneva Conventions—to conflict between organised armed groups.

The inclusion of serious violations of common Article 3 of the four Geneva Conventions of 1949 in the Statute was accepted by a large majority of States. This represents a codification of customary law: the Appeals Chamber of the ICTY in the *Tadić* case had already confirmed in express terms that existing customary international law imposes criminal liability on an individual for serious violations of common Article 3 in an internal armed conflict.[59]

(d) The crime of aggression. The inclusion of the crime of aggression in Article 5(1)(d) of the Statute of the Court was a last-minute addition to the final Statute and yet it is of vital symbolic importance since it signals a future intention to allow the Court to address what is often the cause of a conflict, aggressive action, as opposed to merely the regulation of the conduct of the conflict.[60] However, the Court's competence to exercise its jurisdiction over the crime of aggression only comes into existence—according to Article 5(2), which deals specifically with the Court's exercise of jurisdiction over the crime of aggression[61]—once a provision is adopted in accordance with Articles 121 and 123 adding to the Statute a definition of the crime and setting out the conditions under which the Court is to exercise

59. *Tadić*, I.L.R., *supra* n.45, at p.523 (para.134 of judgment).

60. Moreover, the UN High Commissioner for Human Rights in a position paper on the establishment of an international criminal court stated: "It would seem patently inconsistent for an international criminal court statute to penalize those acts constituting a threat to international peace and security or which may cause harm or injury to human beings, at a relatively low level of magnitude, while ignoring the issue of individual criminal responsibility for belligerency itself writ large" (UN High Commissioner for Human Rights Position Paper on the establishment of a Permanent International Criminal Court, Geneva, 15 June 1998, para.10). The reasons in favour of the inclusion of the "crime of aggression" were also expressed cogently by the German government when it stated: "Not to include this crime would, in our view, be a regression behind the Nuremberg Charter of 1945, the ILC's Nuremberg Principles of 1950, the ILC's Draft Statute (Art.20) of 1994 and the ILC's Draft Code of Crimes against the Peace and Security of Mankind of 1996. It would also amount to a refusal to draw an appropriate conclusion from recent history. The German side believes that we need the inclusion of this crime for reasons of deterrence and prevention, and in order to reaffirm in the most unequivocal manner that the waging of an aggressive war is a crime under international law" (Proposal by Germany concerning Art.20 of the Draft Statute to the Preparatory Committee on the establishment of an International Criminal Court, Working Group on Definitions and Elements of Crime, A/AC.249/1997/WG.1/DP.20, 11 Dec. 1997, p.1. For discussion of elements of this definition see Zimmerman, *op. cit. supra* n.20, at pp.200–201).

61. Art.5(2) of the Statute requires further that any additional provision defining and setting out the conditions for exercise of jurisdiction by the Court over aggression shall be consistent with the relevant provisions of the UN Charter. The reference to the Charter was, possibly, intended to ensure that the definition of aggression cannot apply to the legitimate use of armed force in carrying out Chapter VII military enforcement action (see also the German Proposal, *idem*, p.2; and the statement by the Russian Federation in explaining its vote on the Statute of the Court); and that a prior determination by the Security Council under Art.39 of the Charter that a State has committed an act of aggression would be necessary for the exercise by the Court of its jurisdiction over an individual for the crime of aggression (in favour of such an interpretation were the US and UK governments in their statements in the plenary session of the Rome Conference on adoption of the Statute, and see also Crawford, *op. cit. supra* n.4, at p.147; but cf. the earlier German Proposal, *idem*, p.2). However, beyond this the exact meaning of the provision will depend on the future provisions that will set out, *inter alia*, the conditions under which the Court will exercise jurisdiction with respect to this crime.

jurisdiction with respect to this crime.[62] The reasons for this were lack of agreement by States at the Rome Conference on a definition of aggression and on the conditions under which the Court's jurisdiction would be exercised. This controversy is reflected in the Statute. Article 121(5) allows State parties effectively to opt out of the exercise of jurisdiction by the Court over the crime of aggression when it states that if a party has not accepted a proposal for amendment to Article 5, the provision dealing with the crimes within the jurisdiction of the Court, then the "Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory".[63] This constitutes a significant safeguard for those States which are wary of the future exercise of jurisdiction by the Court over the crime of aggression.

2. *The exercise of jurisdiction by the Court: preconditions and trigger mechanism*

States give their consent to the Court exercising its jurisdiction in a case involving the crimes referred to in Article 5 by virtue of their having become a party to the Statute.[64] There are, however, important preconditions to the exercise of jurisdiction which must be fulfilled. These relate to two of the three ways in which the Court's exercise of jurisdiction in a particular case may be triggered. The jurisdiction of the Court with respect to the crimes referred to in Article 5 can be triggered, according to Article 13 of the Statute, where there is: a reference to the prosecutor by a State party in accordance with Article 14; a reference to the prosecutor by the Security Council acting under Chapter VII of the UN Charter; or where the prosecutor has initiated an investigation at his or her own discretion in accordance with Article 15 of the Statute.[65] The preconditions to the exercise of jurisdiction are that in the first and the third types of reference the Court may exercise its jurisdiction only if at least one of the following States is a party to the Statute: the State on the territory of which the conduct is alleged to have

62. Annex 1(F)(7) of the Rome Final Act states that the Preparatory Commission "shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute." On the Preparatory Commission see *supra* n.12.

63. Moreover, Art.121 of the Statute provides more generally that an amendment can be proposed only after the expiry of seven years from the date of entry into force of the Statute.

64. Art.12(1) of the Statute.

65. The power of the prosecutor to initiate investigations *proprio motu* under Art.15(1) is a significant change from the ILC Draft Statute which gave no independent power to the prosecutor to initiate investigations or prosecutions: on the ILC Draft, see Crawford, *op. cit. supra* n.4, at p.148. Cf., however, the limitation on this power: *infra* n.69 and corresponding text.

occurred[66] or the State of which the person accused of the crime is a national.[67] There is, however, provision in Article 12(3) for the Court to exercise its jurisdiction where a State which falls into either of the above categories is not a party to the Statute but has otherwise accepted the jurisdiction of the Court on an *ad hoc* basis with respect to the crime in question. It is this competence of States to make such an *ad hoc* grant of jurisdiction which was part of the reason the US government voted against the Statute.[68]

Returning to the trigger mechanism, there is a difference between a reference by a State or the Security Council to the prosecutor and an investigation by the prosecutor on his or her own initiative. The terms of Article 13 make clear that a reference by a State or the Security Council may be in respect of "a situation in

66. Art.12(2)(a). This provision also states that if the crime was committed on board a vessel or aircraft, it is the State of registration of that vessel or aircraft which must be a State party.

67. Art.12(2)(b). There is a possible exception to Art.12(2)(b) which exists where a State ratifying the Statute makes a declaration, in accordance with Art.124, that it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory. Art.124 does limit the effect of this declaration to a period of seven years after the entry into force of the Statute for the State concerned.

As such, this system represents a rejection of the German proposal at the Rome Conference that the Court should be able to exercise jurisdiction over any of the crimes in Art.5 on the basis of universal jurisdiction; and it represents a modification of the UK proposal that jurisdiction should be exercised only when both the State of nationality and the territorial State had given consent.

68. As David Scheffer, US Ambassador-at-Large for War Crimes Issues states: "Most problematic is the extraordinary way the court's jurisdiction was framed at the last moment. A country whose forces commit war crimes could join the treaty but escape prosecution of its nationals by 'opting out' of the court's jurisdiction over war crimes for seven years. By contrast, a country that does not join the treaty but deploys its soldiers abroad to restore international peace and security could be vulnerable to assertions that the court has jurisdiction over acts of those soldiers. Under the treaty, the court may exercise jurisdiction over a crime if either the country of nationality of the accused or the country where the alleged crime took place is a party to the treaty or consents. Thus, with only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the court could not on its own prosecute Saddam for massacring his own people" ("America's Stake in Peace, Security and Justice", *American Society of International Law Newsletter*, Sept.–Oct. 1998, p.1 at p.9). Concerning this position, the UK Minister of Foreign Affairs Robin Cook stated in the House of Commons: "I am sorry that, at the end of the Rome conference, the United States felt unable to support the compromise proposals. I understand its concerns about the security of its servicemen who are posted abroad, but we believe that those concerns are misplaced. Britain, too, has a large number of servicemen in posts abroad, and we and other major NATO allies are satisfied that the safeguards that are built in to the International Criminal Court will protect our servicemen against malicious or politically motivated prosecution. In particular, it is a clearly established principle that the court will be able to prosecute only when there is no remedy in national law. We are confident that we can demonstrate that there is a remedy in British justice—and, for that matter, in United States justice—for accusations that are made against our servicemen in good faith. The screening of cases by the pre-trial chamber of the International Criminal Court will provide a safeguard against accusations that are brought in bad faith" (*HC Hansard*, Vol.316, col.804, 20 July 1998).

which one or more crimes within the jurisdiction of the Court appear to have been committed" while the case that can be brought by the prosecutor is much more narrowly defined in terms of a specific crime and cannot thus be as a result of a general investigation of a "situation". This reflects the general concern expressed by States that the Statute should not give over-broad powers to the prosecutor. This concern is reflected further in Article 15, which contains the powers of the prosecutor. Although Article 15(1) gives the prosecutor the competence to initiate investigations "*proprio motu*" in respect of crimes within the jurisdiction of the Court, it is clear, however, that this is not without constraint: the prosecutor must make representations before a Pre-Trial Chamber of the Court and obtain an authorisation for an investigation to proceed.[69] In deciding whether to authorise such an investigation the Pre-Trial Chamber must examine the supporting material presented by the prosecutor and make a preliminary determination that the case appears to fall within the jurisdiction of the Court.[70] Such a determination is, however, without prejudice to a subsequent determination by the Court with regard to the jurisdiction and admissibility of a case.[71]

The Court has a judicial discretion under Article 17 of the Statute to declare that a case is inadmissible in four instances: where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;[72] 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 concerned genuinely to prosecute;[73] the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20(3);[74] or the case is not of sufficient gravity to justify further action by the Court.[75] The circumstances where there is "unwillingness" or "inability" to proceed with a case within a domestic legal system for the purposes of Article 17(1) have already been examined above.[76]

In terms of who can challenge the admissibility or jurisdiction of a case before the Court, Article 19(2) specifies that it may be made by any of the following: an

69. Art.15(3). This will only be after the prosecutor has decided, having evaluated the information made available to him or her, to initiate an investigation unless he or she determines that there is no reasonable basis to proceed under the Statute having regard to the provisions of Art.53 of the Statute. After making this determination the prosecutor must, in accordance with Art.18(1), inform all States parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. This latter provision is intended to allow these States to start investigations or prosecutions which may have the effect, subsequently, of requiring the prosecutor to cease investigations in accordance with Art.18(2).

70. Art.15(4).

71. *Ibid.* If the Pre-Trial Chamber refuses to authorise an investigation, the prosecutor may make a subsequent request for authorisation to the same Pre-Trial Chamber, which must be based on new facts or evidence regarding the same situation (Art.15(5)).

72. Art.17(1)(a).

73. Art.17(1)(b).

74. Art.17(1)(c).

75. Art.17(1)(d).

76. See *supra* nn.27–28 and corresponding text.

accused or a person for whom a warrant of arrest or summons to appear has been issued under Article 58 of the Statute;[77] a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or that it has investigated or prosecuted the case;[78] or a State from which acceptance of jurisdiction is required under Article 12 of the Statute.[79] Article 19(4) limits such a challenge when it states that it can be made only once by any of the competent persons or States. Once a challenge has been made to the Court, Article 19(7) requires that the prosecutor suspend investigations until the Court makes a decision on the objections.[80] The Court is given the sole competence to decide the effect of such objections: this is a specific application of Article 119(1) of the Statute, which confers on the Court an exclusive competence to resolve disputes concerning any of its judicial functions. If either of the parties to the case objects to the Court's decision it may lodge an appeal against the decision of the Pre-Trial Chamber to the Appeals Chamber of the Court.[81]

E. Concluding Remarks

The adoption of the Statute of the International Criminal Court represents the success of the Rome Conference. Moreover, the Statute will allow the Court, once established,[82] to operate in an effective fashion. In particular, the scope of the powers of the prosecutor and the powers of the Court *vis-à-vis* State parties augur well for the efficacious operation of the Court. It is, however, important that the significant safeguards that exist in the Statute restricting the exercise by the Court and the prosecutor of their powers are firmly adhered to in practice. This will do much to assuage the concern of States, such as the United States, and may, it is hoped, provide a sufficient security for these States to ratify the Statute of the Court.

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77. Art.19(2)(a).

78. Art.19(2)(b).

79. Art.19(2)(c). See *supra* nn.66–67 and corresponding text.

80. However, such challenges need not necessarily stymie an investigation by the prosecutor: Art.19(8) provides that pending a ruling by the Court the prosecutor may seek an authorisation from the Court to pursue an investigation for any of the following purposes: preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available (Art.19(8)(a) read together with Art.18(6)); to take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge (Art.19(8)(b)); and, in co-operation with the relevant States, to prevent the absconding of persons in respect of whom the prosecutor has already requested a warrant of arrest under Art.58 (Art.19(8)(c)).

81. Art.82(1)(a) of the Statute allows an appeal by either party concerning a decision with respect to jurisdiction or admissibility. There are, moreover, additional grounds for appeal in Art.82.

82. There are, however, still important agreements, such as the Rules of Procedure and Evidence (Art.51), which need to be concluded even once the Statute enters into force for the Court to be able to operate: see *supra* n.12.

* Lecturer in Public International Law, University College London. The author would like to express his appreciation to Professors Alan Boyle and Colin Warbrick, and Elizabeth Wilmshurst for their very helpful comments on an earlier version of this article. Any opinions expressed are, unless the contrary is stated, solely those of the author.