CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

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I. THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

Introduction

The Preparatory Commission (PrepCom) was established by Resolution F of the Final Act of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC). Under this resolution the PrepCom is intended 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 [the Court's] functions".[1]

The Commission's mandate under Resolution F included preparing the draft texts of the Rules of Procedure and Evidence (RPE), the Elements of Crimes (EOC),[2] a relationship between the Court and the United Nations, basic principles of a headquarters agreement to be negotiated between the Court and the host country, financial regulations and rules, privileges and immunities of the Court, a budget for the first financial year and the rules of procedure of the Assembly of States Parties.[3] Additionally the Commission was to prepare proposals for a provision on aggression to be submitted at the Review Conference seven years after the entry into force of the Statute.[4]

The PrepCom held three sessions in 1999, and a further three in 2000. Each meeting was attended by representatives of States who had signed the Final Act of the Conference on the International Criminal Court, other invited States,[5] and "representatives of interested regional intergovernmental organizations and other interested international bodies, including the international tribunals for the former Yugoslavia and Rwanda".[6]

*. This section deals with recent developments in British practice, making some attempt to set the practice against the international and domestic context in which it takes place.

1. U.N. Doc. A/CONF.183/10, Resolution F.

2. The timetable for the RPE and EOC required that their draft texts be completed before 30 June 2000, *ibid*., para. 6.

3. *Ibid*., para. 5.

4. *Ibid*., para. 7.

5. *Supra* n.1, para. 2.

6. G.A. Resolution 53/105, 26 Jan. 1999, para. 6.

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Drafting of the Elements of Crimes

1. Genocide

The Elements of genocide were discussed in the First PrepCom at the end of which the Co-ordinator for the Working Group on the EOC issued a discussion paper on the proposed Elements of this offence[7] which formed the basis for revisions in the Fourth PrepCom.[8] The alterations made at that session survived the final reading of the EOC in the Fifth PrepCom and were reprinted virtually unchanged in the Finalized Draft Elements of Crimes.[9]

Common to the Elements of each offence is a repetition of the specific intent of genocide, that "[t]he perpetrator intended to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", taken directly from the Genocide Convention.[10] Originally a more controversial requirement, proposed by the Co-ordinator, that the perpetrator "knew or should have known that the harm caused would destroy, in whole or in part, such group or was part of a pattern of similar conduct directed against that group", constituted the second common Element.[11] However, this was replaced in the Fourth PrepCom by a provision that "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could in itself effect such destruction".[12] An introduction to the EOC of Genocide now explains that "in the context of" "would include the initial acts in an emerging pattern" and that "manifest" is "an objective qualification".[13] This would appear to remove the necessity to prove the accused's subjective knowledge of the circumstances or likely effect of his or her actions, whilst ensuring that isolated cases of "hate" crimes are not treated as genocide.

In the First PrepCom, the Co-ordinator had proposed comments relating to the crime of genocide.[14] These confirmed that genocide could be committed, *inter alia*, by acts of "torture, rape, sexual violence or inhuman or degrading treatment" and "recognized that rape and sexual violence may constitute genocide in the same way as any other act, provided that the criteria of the crime of genocide are met".[15] Such an open acknowledgement of the relevance of gender violence in the crime of genocide was strongly supported by NGOs, especially the Women's Caucus for

7. PCNICC/1999/WGEC/RT.1, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, pp.20–21.

8. PCNICC/2000/L.1/Rev.1/Add.2, 7 April 2000, pp.6–8.

9. PCNICC/2000/INF/3/Add.2, 6 July 2000, pp.6–8, now reissued unchanged in the English version as PCNICC/2000/1/Add.2.

10. *Ibid*.

11. PCNICC/1999/WGEC/RT.1, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, pp.20–21. See also K. Dörmann, 'The First and Second Sessions of the Preparatory Commission for the International Criminal Court', 2 YIHL (1999) 283–306, p.286.

12. *Supra* n.8, pp.6–8.

13. *Ibid*., p.6.

14. PCNICC/1999/WGEC/RT.3, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, p.23.

15. *Ibid*. This confirms the finding of the Trial Chamber of the International Criminal Tribunal for Rwanda in the case of *The Prosecutor* v. *Akayesu*, where it stated that "rape and sexual violence . . . constitute genocide in the same way as any other act", Judgment, 2 Sept. 1998, Case No. ICTR-96-4-T, para. 731.

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Gender Justice.[16] The suggested comments relating to genocide were replaced at the Fourth PrepCom with footnotes[17] which omitted the general statement that sexual violence could constitute genocide provided that all the conditions of the offence were met. It is to be hoped that this omission was maintained in the Finalized Draft Elements only because it was felt unnecessary expressly to state something that clearly represented current law.

With respect to the specific types of genocide, despite academic disagreement on the issue, the Elements confirm that the killing of only one person could amount to genocide if the requisite intent were present and the common elements were fulfilled.[18] Indeed, the discussion paper applied the approach of the offence being fulfilled by action against just one person to each of the five types of genocide. Regarding the transfer of children to another group, the earlier proposal that they be aged under 18 years[19] has been maintained in the Finalized Draft Text of the EOC.[20]

2. Crimes Against Humanity

The Elements of crimes against humanity were first tackled at the Third PrepCom[21] and then underwent only minor alterations during the Fifth PrepCom before being included in the Finalized Draft Text of the Elements of Crimes.[22] Common to each of these offences are two Elements, that the "conduct was committed as part of a widespread or systematic attack directed against a civilian population"; and that the perpetrator knew or intended this. These Elements are explained in an introduction to the EOC regarding crimes against humanity,[23] which caused some controversy when debated at the PrepCom.[24]

The introduction explained, in line with the definition in the Rome Statute, that the widespread or systematic attack had to be "pursuant to or in furtherance of a State or organizational policy to commit such attack".[25] However, the expression "policy to commit such attack" was defined in the introduction as requiring that the State or organisation "actively promote or encourage such an attack".[26] This would seem to limit the situations in which a crime against humanity could be

16. Women's Caucus for Gender Justice, 'Genocide: Sexual Violence as Acts of Genocide', submitted to the 16–26 Feb. 1999 Preparatory Commission, available at: http://www.iccwomen.org/icc/pc199902/genocide.htm.

17. *Supra* n.8, p.6 footnote 2, p.7 footnote 3 and p.8 footnote 4.

18. *Supra* n.9, p.6. Compare P. Drost, Genocide (1959, A. W. Sythoff, Leyden), p.85 who believes that one murder may suffice for genocide, with L. Kuper, *Genocide: Its Political use in the Twentieth Century* (1982, Yale University Press, New Haven), p.32, who assumes that there must be an "'appreciable' number of victims".

19. PCNICC/1999/WGEC/RT.1, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, p.21.

20. *Supra* n.9, p.8.

21. PCNICC/1999/L.5/Rev.1/Add.2, 22 Dec. 1999, pp.8–15.

22. *Supra* n.9, pp.9–17.

23. *Supra* n.21, p.8, and *supra* n.9, p.9.

24. See discussion of the chapeau to the Elements of crimes against humanity in Human Rights Watch Commentary to the Third Preparatory Meeting on the ICC, available at CICC website: http://www.igc.apc.org/icc/html/n.g.o..html Also see statements on this by Côte d'Ivoire, PCNICC/2000/INF/4, 13 July 2000, p.1.

25. Article 7(2)(a), Rome Statute.

26. *Supra* n.9, p.9.

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found, beyond that which is strictly necessary according to the Statute. However, during the Fifth PrepCom, a footnote was added which moderated the effect of this somewhat, that "[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".[27]

Regarding the Elements of the specific crimes against humanity, the Elements of crimes of sexual violence were based upon the elements of the corresponding war crimes.[28] However, unlike the EOC of torture for war crimes, the Elements of torture as a crime against humanity do not require proof of any particular purpose behind the infliction of "severe physical or mental pain or suffering", provided that the person or persons concerned are "in the custody or under the control of the perpetrator" and the pain or suffering "did not arise only from, and was not inherent in or incidental to, lawful sanctions".[29]

The Elements of the crime of persecution were expanded in an interesting way by the PrepCom in its Fifth session. Following the Third PrepCom session they read that the accused "severely deprived one or more persons or a group of fundamental rights", targeting such persons by reason "of their belonging to an identifiable group or collectivity".[30] This is in line with the definition of persecution in Article 7(3)(g) of the Rome Statute. However, in the Fifth PrepCom, the latter Element was altered to read that the perpetrator targeted such persons "by reason of the identity of a group or collectivity *or targeted the group or collectivity as such*".[31] Thus the Elements interpret the offence as protecting groups *per se* and not merely protecting individuals who belong to a group.

The Elements for the crime against humanity of enforced disappearance of persons developed between the first and final reading of the EOC.[32] The EOC agreed at the Fifth PrepCom are lengthy and rather complex.[33] Essentially they now require that a person be deprived of his or her freedom owing to arrest, detention or abduction, and that there be a refusal to acknowledge "that deprivation of freedom or to give information on the fate or whereabouts of such person".[34] If the perpetrator is not himself refusing to give this information, he must be aware that in the ordinary course of events there would be such a refusal.[35] The deprivation of freedom must be carried out with the "authorization, support or acquiescence of, a State or a political organization", as must the refusal to acknowledge that deprivation or refusal to give information on the "fate or whereabouts" of that person.[36] Finally, the perpetrator must have "intended to

27. *Ibid*., footnote 6. However, this footnote also states that "the existence of such a policy cannot be inferred solely from the absence of governmental or organizational action".

28. *Supra* n.21, p.11, see footnote 13. See forward EOC of war crimes for a discussion of the Elements of these offences.

29. *Supra* n.9, p.12.

30. *Supra* n.21, p.13.

31. *Supra* n.9, p.15, emphasis added.

32. Compare *supra* n.21, p.14 with *supra* n.9, pp.15–16.

33. *Supra* n.9, pp.15–16.

34. *Ibid*.

35. *Ibid*.

36. *Ibid*.

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remove such person or persons from the protection of the law for a prolonged period of time".[37]

3. War Crimes

The EOC for the Grave Breaches under Article 8(2)(a) were proposed at the First and Second PrepComs.[38] Common to each offence was an Element stating that the "conduct took place in the context of, and was associated with an international armed conflict", which now appears in the Finalized Draft Text of the EOC.[39] In the Fourth PrepCom the requirement that the accused must also be aware of the "factual circumstances that established the existence of an armed conflict" was added as a common Element to the grave breach war crimes, but the new introduction to the EOC of war crimes made it clear that the accused need not legally or factually evaluate the armed conflict as international as opposed to non-international.[40] In respect of each grave breach offence, it was also agreed from the outset that those affected must be protected under the 1949 Geneva Conventions, and that the perpetrator must be aware of the factual circumstances establishing that status.[41] Therefore, the EOC common to the grave breach war crimes confirm that under the Rome Statute such offences can only be committed in an international armed conflict.[42]

In respect of the individual Elements of the grave breaches in war crimes, the crimes include the offence of torture which, in contrast to the Elements of torture as a crime against humanity, requires that the accused have a purpose behind the infliction of severe physical or mental pain or suffering, such as "obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination".[43] The Elements do not, however, restrict the

37. *Ibid*.

38. PCNICC/1999/WGEC/RT.2, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, pp.21–23 and PCNICC/1999/WGEC/RT.4, reprinted in PCNICC/1999/L.4/Rev.1, 18 Aug. 1999, pp.66–68.

39. *Supra* n.9, pp.18–23.

40. *Supra* n.8, pp.15–21. Such a statement is essential, as otherwise an unacceptable loophole would be available to defendants from conflicts of an uncertain nature, such as that of the former Yugoslavia. This addition was maintained in the Finalized Draft Text of the EOC, *supra* n.9, pp.18–23.

41. PCNICC/1999/WGEC/RT.2, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, pp.21–23; PCNICC/1999/WGEC/RT.4, reprinted in PCNICC/1999/L.4/Rev.1, 18 Aug. 1999, pp.66–68 and *supra* n.9, pp.18–23. This requirement for knowledge on the part of the accused of the factual circumstances establishing the protected status of a victim is modified by a footnote in the Finalized Draft Text of the EOC which states that "[w]ith respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict", *supra* n.9, p.18, footnote 33.

42. Although this is not stated expressly in Article 8(2)(a), it is the clear meaning of the text as a whole, as is demonstrated by the expression "[o]ther serious violations of the laws and customs applicable in international armed conflict", used in Article 8(2)(b). This is consistent with the approach of the majority in *The Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, Case No. IT-94-1-AR72, paras.80–84.

43. *Supra* n.9, p.19. (This definition was altered somewhat from that proposed at the First PrepCom, see PCNICC/1999/WGEC/RT.2, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, p.22.)

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offence of torture to the involvement of a public official, which is a welcome advance on the definition provided by the Convention Against Torture.[44] Additionally the expression "such as" demonstrates that other similar purposes, such as humiliation of the victim, proposed by the ICTY in Furundzija would also be likely to amount to a prohibited purpose.[45]

The Elements of wilfully causing great suffering require that the perpetrator caused "great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons".[46] The issue of whether rape and sexual violence can constitute this offence is not explicitly mentioned by the Elements. However, von Hebel and Robinson report that most States at the Rome Conference were of the view that the language covered offences of sexual violence in any case.[47]

The Elements of denying a fair trial include the requirement that the perpetrator denied judicial guarantees "as defined, in particular, in the third and fourth Geneva Conventions of 1949".[48] Therefore, an accused must have such protection as guarantees of independence and impartiality, and the right to a defence.[49] However, the expression "in particular" leaves the door open for the ICC to find that other judicial guarantees are essential for a fair and regular trial and in particular Dörmann comments that a denial of the presumption of innocence at the victim's trial may also constitute this offence.[50]

Article 8(2)(b) of the Rome Statute covers 'other serious violations of the laws and customs applicable in international armed conflict', and the offences under this section have common Elements that the conduct take place in an international armed conflict and that the perpetrator be aware of this.[51] At the Second PrepCom, to ease discussion of the war crimes, the subsections of Article 8(2)(b) were divided into eight clusters within four groups, "based on the possible commonality of their elements".[52]

44. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Art.1(1)

45. *The Prosecutor* v. *Furundzija*, Trial Chamber Judgment, 10 Dec. 1998, Case No.IT-95-17/1-T, para. 162.

46. *Supra* n.9, p.20. (This Element has not changed significantly since the First PrepCom, see PCNICC/1999/WGEC/RT.2, reprinted in PCNICC/1999/L.3/Rev.1, 2 March 1999, p.23.)

47. H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', pp.79–126, Chapter 2, in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999, Kluwer Law International, The Hague), pp.108–109.

48. *Supra* n.9, p.21. This Element has not changed in substance since it was proposed in the Second PrepCom, see PCNICC/1999/WGEC/RT.4, reprinted in PCNICC/1999/L.4/Rev.1, 18 Aug. 1999, p.67.

49. Article 84, Third Geneva Convention, 1949.

50. K. Dörmann, 'Preparatory Commission for the International Criminal Court: the Elements of War Crimes', 839 IRRC (2000) 771–795.

51. *Supra* n.9, pp.23–37. These Elements are also common to the grave breach war crimes.

52. See comments on the 2nd PrepCom on the UN website available at: http://www.un.org/law/icc/prepcomm/prepjul.htm (There were in fact nine clusters in all, but one of them was Art. 8(2)(c).)

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The first group contained the humanitarian and human rights provisions. These included violent crimes against the person,[53] crimes of transferring persons or destroying their property[54] and crimes of using children or nationals of the hostile party in operations of war.[55] One of the most interesting offences within this group is that of rape, sexual slavery, enforced prostitution, forced pregnancy and sexual violence.[56] The inclusion of offences of sexual violence in the Rome Statute was strongly supported by NGOs such as the Women's Caucus for Gender Justice who prepared several papers on the EOC for the PrepCom.[57] The definition of rape given by the EOC, that the perpetrator "invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body", committed by "force, or by threat of force or coercion",[58] clearly draws upon and develops the jurisprudence of the ICTR and the ICTY in the *Akayesu* and *Furundzija* cases.[59]

Another crime within this group, which caused much controversy, was that of the transfer by the occupying power of parts of its civilian population into the territory it occupies, or the deportation or transfer of parts of the population of the occupied territory within or outside that territory.[60] In the Second PrepCom this offence was the subject of four different proposals,[61] the negotiations on this subject being particularly delicate because of the position of Israel, which had initially voted against the Rome Statute primarily because of this offence. Following the Fifth PrepCom the EOC now state simply that the perpetrator "[t]ransferred, directly or indirectly, parts of its own population into the territory it occupies" or "[d]eported or transferred all or parts of the population of the occupied territory within or outside this territory".[62] Although this would seem to add little clarification to the offence, Israel has since signed the Rome Statute.[63]

The second group of offences within Article 8(2)(b) consisted of the Hague Law provisions, governing behaviour on the battlefield, such as treacherous wounding or killing and perfidy.[64] The Elements of treacherously killing or wounding were very much based on Article 37(1) of the 1977 Additional Protocol I to the Geneva Conventions from the beginning.[65] They now read that the perpetrator "invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international

53. This includes Art.8(2)(b)(x), (xxi) and (xxii).
54. This includes Art.8(2)(b)(viii), (xiii) and (xvi).
55. This includes Art.8(2)(b)(xiv), (xv) and (xxvi).
56. Art.8(2)(b)(xxii), Rome Statute.
57. Available from their website: http://www.iccwomen.org/icc/.
58. *Supra* n.9, p.34.
59. See *The Prosecutor* v. *Akayesu*, Trial Chamber Judgment, 2 Sep. 1998, Case No.ICTR-96-4-T, para. 688 and *The Prosecutor* v. *Furundzija*, *supra*. n.45, para. 185.
60. Art.8(2)(b)(viii), Rome Statute.
61. PCNICC/1999/WGEC/INF.3 reprinted in PCNICC/1999/L.4.Rev.1, 18 Aug. 1999, pp.78–80.
62. *Supra* n.9, p.28.
63. Israel signed the Rome Statute on 31 Dec. 2000.
64. This includes Art.8(2)(b)(vi), (vii), (xi) and (xii).
65. PCNICC/1999/WGEC/RT.10 reprinted in PCNICC/1999/L.4/Rev.1, 18 Aug. 1999, pp.76–77 at p.77.

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law applicable in armed conflict" with intention to betray that confidence or belief, and indeed killed or injured such persons from an adverse party, having made use of that confidence or belief in order to do so.[66]

The third group of offences covered provisions on the conduct of hostilities, within which were the clusters of targeting civilians and civilian objects,[67] targeting protected objects[68] and starving civilians or using them as shields.[69] Within this group the EOC of the war crime of causing excessive incidental death, injury or damage was difficult to frame. It was first tackled in the Third PrepCom, where the Elements stated that an attack must be launched which the attacker knew would "result in incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[70] This formula, which essentially repeats the definition of this offence in the Rome Statute, was adopted with little change in the Finalized Draft Text, but with the addition of a footnote,[71] which emphasises that the military advantage must be "foreseeable by the perpetrator at the relevant time" and "[s]uch advantage may or may not be temporally or geographically related to the object of the attack".[72]

The final group of offences within Article 8(2)(b) covered provisions on the use of weapons, poisoned weapons, asphyxiating gases and bullets which expand or flatten easily in the human body.[73] However, it was impossible to frame Elements for the offence of "[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently discriminate",[74] given that no such weapons or material have yet been agreed upon.[75]

Article 8(2)(c) of the Rome Statute lays down jurisdiction over war crimes in non-international armed conflicts, taken from Common Article 3 of the 1949 Geneva Conventions. The EOC for these offences include four common Elements, that the conduct must "take place in the context of" and be "associated with an armed conflict not of an international character" and the perpetrator must be "aware of the factual circumstances that established the existence of an armed conflict".[76] In addition, the victims must be "either *hors de combat* or ... civilians, medical personnel, or religious personnel taking no active part in the hostilities", and the perpetrator must be "aware of the factual circumstances that established

66. *Supra* n.9, p.30.
67. This includes Arts.8(2)(b)(i), (ii) and (iii).
68. This includes Arts.8(2)(b)(iv), (v), (ix) and (xxiv).
69. This includes Arts.8(2)(b)(xxiii) and (xxv).
70. *Supra* n.21, p.20.
71. This footnote was initially adopted in the Fourth PrepCom, PCNICC/2000/L.1/Rev.1/Add.2, 7 April 2000, p.22, footnote 42.
72. *Supra* n.9, pp.24–25, footnote 36.
73. This includes Arts.8(2)(b)(xvii), (xviii), (xix) and (xx).
74. Article 8(2)(b)(xx).
75. These will be considered and adopted in accordance with Arts.121 and 123 of the Rome Statute, seven years after the coming into force of the Statute.
76. *Supra* n.9, pp.37–41. These Elements are also common to Art.8(2)(e).

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this status".[77] Whilst an "armed conflict not of an international character" is not defined, it is likely that the ICC will find persuasive the definition of an armed conflict in the *Tadic* case, which held that such a conflict exists "whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[78]

In respect of the Elements for the individual offences within Article 8(2)(c), the final version is not much changed from the original proposals at the Second PrepCom.[79] The individual EOC of murder, mutilation, cruel treatment, torture, outrages upon personal dignity and taking hostages reflect exactly the EOC for the offences under Article 8(2)(a) and (b) of wilful killing, mutilation, inhuman treatment, torture, outrages upon personal dignity and taking hostages, except that the Elements for mutilation do not require that the conduct caused death or seriously endangered the physical or mental health of the victim as is provided for the Elements of mutilation in an international armed conflict.[80]

The Elements of sentencing or execution without due process under Article 8(2)(c) are not reflected elsewhere in the Rome Statute. They require that prior to sentence or execution there was "not previous judgement pronounced by a court, or the court that rendered judgement was not regularly constituted" in that it did not afford the guarantees of "independence and impartiality" or other "judicial guarantees generally recognized as indispensable under international law".[81] However the EOC of this offence not only require that the perpetrator be aware of the absence of judgement or denial of the relevant guarantees, but must also have been aware of "the fact that they are essential or indispensable to a fair trial".[82] This would seem to suggest that only severe lack of due process prior to sentencing or execution would render an individual liable for this offence.

The final EOC of war crimes are in respect of the offences contained in Article 8(2)(e) of the Rome Statute. The Elements under this section exactly reflect the EOC of the equivalent offences in international armed conflicts under 8(2)(b) except for minor alterations of a linguistic nature which merely reflect that these offences take place in internal conflicts. The only offence in this section which does not have an exact equivalent under Article 8(2)(b) is the war crime of displacing civilians. The Elements state that the perpetrator must have ordered the displacement of a civilian population and be in a position to effect such displacement by giving such an order.[83] In addition the order must not have been "justified by the security of the civilians involved or by military necessity".[84] These

77. *Ibid*.

78. *The Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, 2 Oct. 1995, Case No.IT-94-1-AR72, para. 70. The ICC may also refer to the stricter definition of a non-international armed conflict laid down in Art. 1, 1977 Additional Protocol II.

79. Compare PCNICC/1999/WGEC/RT.5/Rev.1 reprinted in PCNICC/1999/L.4/Rev.1, 18 Aug. 1999, pp.68–70, with *supra* n.9, pp.37–41.

80. See the Elements for Art. 8(2)(b)(x) of the Rome Statute, PCNICC/2000/INF/3/Add.2, 6 July 2000, p.29.

81. *Supra* n.9, p.40.

82. *Ibid*.

83. *Ibid*., p.46

84. *Ibid*.

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provisos reflect Article 17 of the 1977 Additional Protocol II to the Geneva Conventions, which states that the civilian population shall not be displaced for reasons related to the conflict "unless the security of the civilians involved or imperative military reasons so demand".

The Crime of Aggression

The definition of the crime of aggression was not agreed upon prior to the conclusion of the Rome Statute. Therefore, whilst Article 5(1)(d) states that the ICC shall have jurisdiction over the crime of aggression, it has not yet been defined. Furthermore, a provision setting out the relationship between the ICC and the Security Council on the crime of aggression is necessary, given that the Security Council is empowered by Article 39 of the UN Charter to determine whether an act of aggression has taken place.

Article 5(2) of the Rome Statute states that the ICC shall have jurisdiction over the crime of aggression when a provision has been adopted under Articles 121 and 123 "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime" and that this provision must be consistent with the relevant provisions of the UN Charter. Articles 121 and 123 allow for a review conference of the ICC, taking place seven years after the coming into force of the Rome Statute, to adopt amendments to the Statute.

The PrepCom attempted to forge agreement on the necessary provisions in this difficult area, first issuing a consolidated text of proposals on the subject at the Third PrepCom.[85] However, after the Sixth PrepCom the latest consolidated text of proposals on the crime of aggression was still comprised of several options and variations on those options.[86] Further consideration of this issue in the next PrepComs will be necessary to achieve a consensus.

The Rules of Procedure and Evidence

Aside from elaborating the Elements of Crimes, the single other most essential task facing the Preparatory Commission was the drafting of Rules of Procedure and Evidence (RPE). The President of the ICTY stressed the crucial importance of the RPE and that "the Rules should be . . . a framework, not a straightjacket".[87] The RPE will be an essential instrument for the application of the Rome Statute.[88] Moreover, the use of RPE by international tribunals is increasingly being viewed as a very substantial procedural component of the emerging system of international criminal justice. The importance of the RPE in the context of their impact beyond the narrow confines of the ICC's courtroom walls has been noted

85. PCNICC/1999/WGCA/RT.1 reprinted in PCNICC/1999/L.5/Rev.1, 22 Dec. 1999, pp.26–30.

86. PCNICC/2000/L.4/Rev.1, 14 Dec. 2000, pp.13–17. See also UN Press Release L/2967, 1 Dec. 2000.

87. Judge McDonald, Address to ICC PrepCom: ICTY Press Release JL/P.I.S./425–E, 30 July 1999. See also remarks by Judge May: ICTY Press Release JL/P.I.S./479–E, 20 March 2000.

88. Along with the Elements of Crimes and the Statute itself, the RPE are specified as applicable law to be utilised by the ICC "[i]n the first place": ICC Statute, Art. 21(1)(a). See the ICTY's Rules of Procedure and Evidence: UN Doc. IT/32/Rev.18 (2000).

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by various observers, including non-governmental organisations which participated actively in the PrepCom deliberations and in the negotiations for the Rome Statute itself:

> The ICC's Rules will make an important contribution to international standard setting, being a potential point of reference for, and influence upon, national standards of justice. This underscores both the significance of the enterprise and the importance of conforming to international human rights law.[89]

The finalised draft text of the RPE was produced as an Addendum to the Report of the Preparatory Commission.[90] It runs to 225 Rules, divided into 12 major substantive chapters covering the following topics: composition and administration of the court,[91] jurisdiction and admissibility,[92] provisions relating to various stages of Court proceedings,[93] investigation and prosecution,[94] trial procedure,[95] penalties,[96] appeal and revision of convictions or sentences,[97] offences against the administration of justice and misconduct before the Court,[98] compensation to arrested or convicted persons,[99] international co-operation and judicial assistance[100] and enforcement of sentences and other orders of the Court.[101] Judge McDonald's plea for judicial participation in the consideration and elaboration of the ICC's Rules, in the form of a recommendation that the Assembly of States Parties elect the Court's first bench of judges *before* the consideration and adoption of the RPE,[102] obviously fell on deaf ears: no election for the ICC bench has yet taken place, but the draft RPE have been finalised. In fairness to the PrepCom delegates, though, it should be said that on the whole, the RPE do strike a good balance between ensuring the ability of the Court to function efficiently and effectively, the interests of witnesses (who may put

89. Human Rights Watch: *Commentary to the Preparatory Commission Rules of Evidence and Procedure [sic] for the International Criminal Court* (Part 1, Feb. 1999), available on the Internet at http://www.iccnow.org/.

90. Eventually issued as UN Doc. PCNICC/2000/1/Add.1.

91. Chapter 2, Rules 4–43. Chapter 1 contains general provisions relating to definitions, authentic texts and amendments.

92. Chapter 3, Rules 44–62.

93. Chapter 4, Rules 63–103. The matters covered in this Chapter include evidentiary concerns, disclosure, victims and witnesses.

94. Chapter 5, Rules 104–130.

95. Chapter 6, Rules 131–144.

96. Chapter 7, Rules 145–148.

97. Chapter 8, Rules 149–161.

98. Chapter 9, Rules 162–172.

99. Chapter 10, Rules 173–175.

100. Chapter 11, Rules 176–197.

101. Chapter 12, Rules 198–225.

102. ICTY Press Release JL/P.I.S./425-E, 30 July 1999. In the alternative, Judge McDonald suggested the establishment of an "advisory committee of judges, with experience in international criminal justice, to review the Rules and provide appropriate advice prior to the adoption of the Rules"—this recommendation, too, was ignored by the PrepCom delegates.

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themselves at risk by testifying before the Court)[103] and the rights of suspects and the accused. A notable feature of the RPE is their length and detail: it had been suggested in some quarters that the Rules should be drafted with restraint in view of the extent and ambit of the Rome Statute, as "exhaustively detailed" Rules would "unduly restrict" the Court's operation.[104]

During the PrepCom negotiations, comprehensive draft texts for the RPE were submitted for discussion by, *inter alia*, the Governments of Australia,[105] France[106] and the American Bar Association;[107] in addition, many shorter proposals were submitted by other States on specific parts of the Rules. Some of the hardest-fought battles in the negotiations concerned various aspects of pre-trial procedure. In particular, a major difference in approach between the Australian and French proposals, and one which occupied much of the PrepCom's time in its fourth session, concerned the commencement of investigations and proceedings in the pre-trial phase. The French, true to the precepts of the *droit civil*, proposed a so-called "fused" approach which would have allowed admissibility matters under Articles 18 and 19 to be dealt with by the Pre-Trial Chamber at the Article 15 stage of proceedings (submission by the Prosecutor of a request for authorisation of an investigation).[108] The Australian approach, on the other hand, was characterised as "linear" in that it sought to keep hearings under Articles 15, 18 and 19 completely separate from each other.[109] The result of the negotiations on this point was that the different types of challenges and preliminary rulings were separated in principle, but it appears that the Court will have a considerable amount of discretion in its interpretation of many aspects of the Statute and Rules: the finalised draft text provides that,

> When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case ... or is acting on its own motion ... it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a

103. Witness protection has been a major issue for the ICTY in particular, as many prosecution witnesses have been placed in fear of or actually subjected to intimidation, targeting either themselves or their families, in the often small communities in the former Yugoslavia from which they or the accused come: see M. Leigh, "The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused" (1996) 90 A.J.I.L. 235; F. Hampson, "The International Criminal Tribunal for Yugoslavia and the Reluctant Witness" (1998) 47 I.C.L.Q. 50.

104. Human Rights Watch Commentary, *supra* n.89, p.1.

105. UN Doc. PCNICC/1999/DP.1.

106. UN Doc. PCNICC/1999/DP.43.

107. Available on the Internet at http://www.igc.org/icc/html/aba.htm.

108. Draft Rule 54.1 of the French proposal read, "In any event, the Prosecutor may, before initiating an investigation or referring a case to the Pre-Trial Chamber under article 15, request the Pre-Trial Chamber for a ruling regarding a question of admissibility or jurisdiction in accordance with the provisions of article 19, paragraph 3 ... ": UN Doc. PCNICC/1999/DP.6.

109. See Coalition for an International Criminal Court, *[4th] Preparatory Commission Report* (1999, available on the Internet at http://www.igc.apc.org/icc/html/cicc200003.htm).

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confirmation or a trial proceeding as long as this does not cause undue delay . . . .[110]

From this it might be concluded that the PrepCom delegates did at least heed Judges McDonald's and May's pleas for flexibility in the Rules,[111] even if their more "intrusive" recommendations were ignored. The overall result has been the attainment of a certain level of efficiency, with generally straightforward and effective pre-trial procedures prescribed.

Certain other major substantive debates which assumed some prominence in the RPE negotiations may be mentioned. For instance, the "admissibility factors" under Article 17 of the Statute were tightened from an original suggestion that a State intending to pursue a national prosecution of an ICC crime under Article 17 simply assert that its courts have "met international standards" for independent and impartial prosecutions and confirm "its actions with regard to any relevant investigation or prosecution", to a requirement that the State *show* that international standards are met and confirm in writing that *the case is actually being* prosecuted.[112] Another notable improvement on original draft texts was the PrepCom's clarification of a non-Party State's *ad hoc* consent to proceedings, given under Article 12(3) of the Statute, to apply to "all crimes of relevance to the situation".[113] This was to avoid the possibility of such a State abusing the Statute by being overly selective in its consent to ICC jurisdiction by, for example, only accepting such jurisdiction with regard to alleged crimes committed by its adversaries or in respect of isolated incidents rather than a situation as a whole. Finally, there was some debate on issues relating to victims and witnesses. Because of the experiences of the *ad hoc* international tribunals in this regard, the ICC Statute gives some prominence to these issues and this preoccupation is correspondingly reflected in the RPE. It was necessary for the Rules to make provision, *inter alia*, for informing victims about trial proceedings and making provision for them to participate in such proceedings,[114] and for providing reparations to victims.[115] Furthermore, the realisation—again, following the experience of the two UN *ad hoc* Tribunals[116]—that a substantial proportion of the crimes committed in armed conflicts involve sexual violence led to the adoption of special evidentiary principles to be applied in such cases, especially in relation to the inferral of consent.[117]

Evidentiary issues in cases of sexual violence and issues relating to the role of the Victims and Witnesses Unit were in fact two of the substantive topics broached by Judge May in his remarks to the fourth session of the PrepCom[118] and it is gratifying to note that his points are largely reflected in the finalised draft text of the RPE. The two other categories of issues raised by Judge May and his ICTY

110. RPE, Rule 58.2.
111. *Supra* n.87.
112. RPE, Rule 51.
113. *Ibid*., Rule 44.2.
114. *Ibid*., Rules 89–93.
115. *Ibid*., Rules 94–99.
116. See K. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status" (1999) 93 A.J.I.L. 97.
117. RPE, Rules 70 and 71.
118. ICTY Press Release JL/P.I.S./479-E, 20 March 2000.

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colleagues for the attention of the PrepCom delegates related to defence counsel and the enforcement of sentences. In respect of the former, Judge May had noted the implementation at the ICTY of training courses to familiarise defence counsel with the Tribunal's procedures and suggested that the PrepCom might require mandatory training for ICC defence counsel; this idea, however, was not subsequently taken up. Nor, in the end, was Judge May's recommendation that the ICC Rules provide for an association of defence counsel to promote professional ethics and discipline (as well as supervise training arrangements), based on the ICTY's adoption of a Code of Professional Conduct.[119] With regard to the enforcement of sentences, Judge May noted that the necessity for implementing legislation in the majority of States participating in the ICC "would be the perfect opportunity" to ensure that States also have the legal possibility of co-operating with the ICC by accepting prisoners convicted by the ICC into their prisons.[120]

Other documents

The PrepCom Secretariat also produced three miscellaneous documents which the Rome Statute requires to be adopted by the Assembly of States Parties before the ICC will be able to begin work. These are the Draft Financial Regulations of the ICC,[121] the Draft Relationship Agreement between the UN and the ICC,[122] and the Draft Agreement on the Privileges and Immunities of the ICC.[123] The Draft Financial Regulations are based on the model provided by the Financial Regulations of the International Tribunal for the Law of the Sea (ITLS).[124] Pending formal adoption of the latter by the Meeting of States Parties to the UN Convention on the Law of the Sea, the ITLS currently applies the standard UN Financial Regulations *mutatis mutandis*—which, the PrepCom Secretariat suggests, are an appropriate template for the ICC Financial Regulations, as they are also applied *mutatis mutandis* by other international judicial organs such as the ICTY and the International Court of Justice.[125]

The Draft Relationship Agreement sets out the parameters of co-operation between the UN and the ICC, given that the latter is being established, according to the Preamble of the Draft Agreement, as "an independent permanent institution in relationship with the United Nations system"—a curiously awkward formula, as it is understood that the ICC will operate *de facto* as a UN organ. Nevertheless, Article 2 of the Draft Relationship Agreement recognises the ICC as having international legal personality and "such legal capacity as may be necessary for the exercise of its functions", in accordance with Article 4 of the Rome Statute. Most of the rest of the draft Agreement provides for various forms

119. UN Doc. IT/125 (1997).

120. Rule 200 of the RPE provides for the establishment and maintenance, by the Registrar, of a list of States that have indicated their willingness to accept persons sentenced by the ICC. Part IV of the International Criminal Court Bill introduced into the House of Lords on 14 Dec. 2000 makes provision for the UK to accept such prisoners.

121. UN Doc. PCNICC/2000/WGFIRR/L.1.

122. UN Doc. PCNICC/2000/WGICC-UN/L.1.

123. UN Doc. PCNICC/2000/WGAPIC/L.1.

124. UN Doc. SPLOS/36 (8 Oct. 1998).

125. See *supra* n.121, "Introductory note", paras.2–4.

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of co-operation, such as between the ICC and the UN Security Council[126] and between the Prosecutor and the UN.[127] Two notable aspects of the relationship between the ICC and the UN, given the subject-matter of the Court's jurisdiction, are the very close contact envisaged between the institutions in cases where the Court is investigating or prosecuting war crimes committed against the personnel, operations or flag of the UN ("the Court will keep the United Nations constantly informed about its proceedings in such cases");[128] and the prospect of UN co-operation with the ICC in cases where the suspect is associated with the UN itself and would thus normally benefit from various privileges and immunities, even to the extent of waiving such immunities "if necessary".[129]

Finally, the Draft Agreement on Privileges and Immunities proceeds from the position stated in Article 48 of the Rome Statute, that the ICC "shall enjoy in the territory of each State Party . . . such privileges and immunities as are necessary for the fulfilment of its purposes". The specific privileges and immunities envisaged for the ICC and its personnel are unexceptionable to anyone familiar with diplomatic law: they follow the principle of functional immunity which is generally agreed to be the basis of the modern international law of immunities[130] and include immunity for the property, funds and assets of the Court[131] and its archives and documents;[132] exemption from taxes, customs duties and import/export restrictions;[133] and freedom of communication and from censorship.[134] In addition, representatives of States Parties,[135] judges, prosecutorial and administrative staff,[136] other officials of the Court,[137] counsel[138] and experts and witnesses[139] shall all benefit from immunities very similar to those of diplomats. These include freedom from personal arrest or interference with personal baggage, immunity from legal process in respect of words spoken or written or acts performed by them in their official capacity, inviolability of official documents, freedom of communication, and exemption from immigration restrictions and from baggage inspections. All of these privileges may be waived by designated authorities in the hierarchy of the ICC.[140]

126. Relationship Agreement, Art.4.

127. *Ibid*., Art.5.

128. *Ibid*., Art.7. The war crimes in question are defined in Art.8(2)(b)(iii) and (vii) of the Rome Statute.

129. *Ibid*., Art.8. Such persons are normally covered by the 1946 Convention on the Privileges and Immunities of the United Nations (1 U.N.T.S. 15); however, Art.27(2) of the Rome Statute provides that, "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

130. See the Preamble to the 1961 Vienna Convention on Diplomatic Relations (500 U.N.T.S. 95).

131. Agreement on Privileges and Immunities, Art.6.

132. *Ibid*., Art.7.

133. *Ibid*., Art.8.

134. *Ibid*., Art.11.

135. *Ibid*., Art.13.

136. *Ibid*., Art.14.

137. *Ibid*., Art.15.

138. *Ibid*., Art.16.

139. *Ibid*., Art.17.

140. *Ibid*., Art.19.

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Concluding remarks

It is clear that over the two years since the Rome Conference, substantial progress has been made in producing important and detailed documents that will be crucial for the effective functioning of the Court. The PrepCom has produced comprehensive final draft versions of the EOC and RPE, which will be essential for the operation of the ICC in practice, as they will assist respectively in the precise formulation of important international crimes and in the development of international criminal procedures. In addition, important framework documents were produced to regulate the Court's finances, as well as its relationship with the UN and the immunities and privileges of its personnel and others who may be required to participate in its work. These are all clearly vital for an international institution like the ICC to function smoothly. Nevertheless, some important tasks still lie before the PrepCom. Although it was thought that its work would be achieved after six sessions, it has been necessary to schedule two further sessions to meet in 2001 (26 February–9 March and 24 September–5 October). These will need to resolve the major outstanding issue of the definition of aggression and its inevitable corollary, the relationship between the ICC and the Security Council in relation to prosecutions for aggression. This will inevitably be an issue of great political sensitivity in view of the latter's primary responsibilities in determining the threat or existence of acts of aggression.

CHRISTINE BYRON & DAVID TURNS*

A "SPECIAL COURT" FOR SIERRA LEONE?

A. Introduction

The conflict in Sierra Leone began in 1991 and still continues. It has led to over 50,000 deaths. The fighting has been characterised by the use of child combatants and widespread mutilation of civilians by amputation. When the conflict began, it would have seemed improbable that any UN response would include a forum for the trial of international crimes. After all, even the high tide of international enforcement of international criminal law, the Nuremberg International Military Tribunal, had begun to be excised from mainstream treatments of international law.[1] The possibility of a permanent international criminal court had recently been revived, and sent to the International Law Commission for consideration, but the record of the ILC with controversial projects would not have led to an expectation of quick progress.[2] Yet, nearly 10 years on, the UN is now involved in setting up a fourth criminal court,[3] the "Special Court" for Sierra Leone. Despite

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1. See C. J. Warbrick, "International Criminal Law" (1995) 44 I.C.L.Q. 446, pp.446–447.

2. See B. Ferencz, "An International Criminal Code and Court: Where They Stand and Where They're Going" (1992) 20 Columbia J. Transnational L. 375.

3. The other three being the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and the Permanent International Criminal Court (ICC), which will be established after the Rome Statute for the International Criminal Court is ratified by 60 States, A/CONF.183/9, Article 126. The ICC is not, strictly speaking, a UN body, but the process of negotiating the Rome Statute was arranged by the UN, and pursuant to Article 2 of that Statute, the ICC will be brought into a relationship with the UN.

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the selectivity inherent in *ad hoc* reactions, and the continuing opposition to the Rome Statute in some quarters, it is now difficult to deny that progress is being made towards a new form of international criminal order where the improbabilty of prosecution for international crimes can no longer be presumed.[4]

The process leading towards the creation of the Special Court began in earnest in mid-2000, with a request from the Government of Sierra Leone to the UN Secretary-General for assistance in setting up a court to try offences committed in its civil war.[5] In August 2000 the Security Council responded to this call with Resolution 1315. Resolution 1315 followed the trend of the Security Council Resolutions 827 and 955, which provide the legal basis for the ICTY and ICTR, by asserting that accountability for international crimes is linked to the restoration and maintenance of peace,[6] or, as the colloquialism has it, there can be no peace without justice. In contradistinction to those two resolutions, however, Resolution 1315 was not intended to provide the legal basis of the Special Court.[7] Instead, the Security Council requested that the Secretary General negotiate an agreement with the Sierra Leonean government to create the Special Court, and report back to the Security Council with his recommendations. The Secretary-General did this, producing the *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone on* 4 October 2000.[8] This report, to which was annexed a draft Agreement between the UN and Sierra Leone and a draft Statute for the Special Court, provided the basis for negotiations in the Security Council. The Security Council responded to the *Report* in a letter to the Secretary-General dated 22 December 2000,[9] which asked the Secretary-General to make certain alterations to the draft Agreement and Statute. The U.K. has been involved in the negotiations for the Special Court from the start, and remains supportive of an early start to the Court's work. Given that the creation of the Special Court is supported by Sierra Leone, the Security Council, and the Security Council's Mission to Sierra Leone,[10] it appears likely that an agreement along the lines of the Secretary-General's Report, as amended by the Security Council, will provide the basis for the Special Court some time in 2001. It is the purpose of this

4. For a balanced view of such a development see J. Charney, "Progress in International Criminal Law?" (1999) 93 A.J.I.L. 452.

5. S/2000/786.

6. The linkage between the commission of the "core" international crimes and international peace and security is also emphasised in preambular paragraph 3 of the Rome Statute, see O. Triffterer, "Preamble" in O. Triffterer (ed.), *Commentary on the Rome Statute for the International Criminal Court* (1999), 1, pp.9–10.

7. It was, nonetheless, described by the U.K. Representative to the Security Council as "a good, firm step to set up a court", see BBC News, "War Crimes Tribunal for Sierra Leone", 14 Aug. 2000, http://news.bbc.co.uk/hi/english/world/africa/newsid_879000/879825.stm.

8. S/2000/915 (hereafter "*Report*").

9. S/2000/1234 (hereafter "*Letter*").

10. The *Report of the Security Council Mission to Sierra Leone* (S/2000/992) (hereafter "*Mission Report*"), p.13, merely recommended that the Security Council think over carefully the issues involved. However, in a statement in Freetown on 12 Oct. 2000 the U.K.'s representative to the Security Council, and head of the mission to Sierra Leone, Sir Jeremy Greenstock, said: "it is not premature for us to send one clear message: we remain determined that fair, speedy and effective justice is delivered by this court", UN Press Release SC/6936, 13 Oct. 2000.

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comment to introduce the Special Court, and point out some of the similarities and differences between the current proposals and the three statutes for international criminal tribunals promulgated in the 1990s.

B. Structure of the Special Court

A court is an international court if its legal basis lies in an international legal instrument and it applies international law.[11] The Special Court straddles the distinction between an international and a national court: it is anchored neither in the UN nor the Sierra Leonean constitutional systems.[12] As the Secretary-General puts it, the Court is a "treaty-based sui generis court of mixed jurisdiction and composition".[13] Although its basis will be the treaty between the UN and Sierra Leone, the Court will apply both international and national law. This marks a change from the ICTY/ICTR model of a fully international court, but one which, after consultation between the parties, was thought most appropriate for the Sierra Leonean situation.

The Court is to be a self-contained body, with its own Prosecutor's Office, Registry and Appeals Chamber.[14] The possibility of the joint ICTY/ICTR Appeals Chamber acting as an appellate chamber for the Special Court was mooted, but rejected.[15] Although the Secretary-General recognised that having a common appeals chamber for all three bodies would ensure a common approach to the law,[16] it was considered impractical.[17] In particular, it was thought that it would impose an onerous task on the already overburdened joint Appeals Chamber, leading to excessive delays in hearing appeals.[18] The judges of the joint Appeals Chamber were also uncomfortable about having to apply Sierra Leonean law.[19] To ensure consistency the Special Court's Appeal Chamber is to be "guided" by the decisions of the joint Appeals Chamber of the ICTY and ICTR.[20]

11. See C. P. R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 New York University Journal of International Law and Politics 709, pp.713–714. Romano adds the criteria of permanence, proceeding by way of rules of procedure and a legally binding outcome. The last two criteria relate to the judicial nature of a body, not the distinction between international and national courts. As evidenced by Article 66 of the Third Geneva Convention, the non-permanent nature of a judicial body need not deprive it of its status as a court.

12. *Report, op. cit*., paras.9 and 39.

13. *Idem*., para. 9.

14. *Idem*., para. 39

15. *Idem*., paras.40–46.

16. This was one of the reasons the ICTY's Appeal Chamber was transformed into a joint chamber for the ICTY and ICTR, D. Shraga & R. Zacklin, "The International Criminal Tribunal for Rwanda" (1996) 7 E.J.I.L. 501, p.511.

17. *Report, op. cit*., paras.40–46.

18. *Idem*., paras.42–43.

19. *Idem*., para. 45.

20. Special Court Statute, Article 20(3) (hereafter "*Statute*"). Where the Security Council has suggested amendments to the draft Statute, the Security Council's suggested wording is referred to as "Revised Article".

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The Secretary-General suggested that the Special Court have two Trial Chambers that should each sit with three judges and an alternate.[21] The Security Council, possibly seeking a smaller start-up budget for the Court, responded by suggesting that there be a sole Trial Chamber, although another could be added after six months, if the Secretary-General, or the Court's Prosecutor or President requested that such a step be taken.[22] In addition, the Security Council rejected the provisions on alternate judges as the ICTY and ICTR had managed without them.[23] These may be sensible cost-cutting measures for the Special Court in its early days, avoiding the situation where there could be a large number of judges, but little work and few defendants while the Prosecutor prepares indictments.[24] The experiences of the ICTY and ICTR, which recently gained additional Trial Chambers to deal with their workloads,[25] gives reason to believe that a further trial chamber may be required.

The composition of the Special Court is to reflect its mixed nature. Each Trial Chamber will be composed of three judges, one appointed by the Government of Sierra Leone and two appointed by the Secretary-General.[26] The Appeals Chamber is to be made up of five judges, two appointed by Sierra Leone, three by the Secretary-General.[27] As the judges will have to deal not only with international crimes but also crimes under Sierra Leonean law,[28] it was thought important that they should either have local knowledge or be from a common law background. Therefore the Secretary-General, when asking for nominations from States for the judges, is to seek nominations in particular from members of the Economic Community of West African States (ECOWAS) and the Commonwealth.[29] Although the Prosecutor is to be appointed by the Secretary-General, the deputy Prosecutor is to be appointed by Sierra Leone, and both appointments are only to be made after consultations with the other party to the Agreement.[30] This should ensure that the appointees are satisfactory to both parties and able to work together effectively.

The financing of the Special Court has proved controversial. The Security Council made clear in Resolution 1315 that the mode of finance was to be by voluntary contributions,[31] but the Secretary-General criticised this, averring that "a special court based on voluntary contributions would be neither viable or

21. Article 2 of the Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (hereafter "*Agreement*"). *Report, op. cit*., para. 49.

22. Revised Article 2(1).

23. *Letter*, p.2. Revised Article 2(1) allows the President of the Court to ask for such judges after six months, should they be required.

24. When the ICTY was in its infancy, there was a period when the judges had very little trial work. They busied themselves, inter alia, with writing the rules of procedure and evidence, Warbrick, above n.1, pp.469–470. There will be less work of that nature for the Special Court judges: Statute Article 14 declares the Rules of Procedure and Evidence of the ICTR shall, *mutatis mutandis*, apply to the Special Court.

25. See Security Council Resolution 1329, S/RES/1329 (2000).

26. Revised Article 2(2)(a).

27. Revised Article 2(2)(c).

28. See *infra*, section D.

29. Article 2(2)(a).

30. Article 3(1)(2).

31. Resolution 1315, para. 8(c).

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sustainable".[32] Instead, the Secretary-General suggested that the Court should be funded from the budget of the United Nations.[33] The Security Council's letter reasserted its demand that the Court be financed through voluntary contributions.[34] Despite the Security Council's insistence, the voluntary mechanism of funding is problematic. In the Prepcom prior to the Rome Conference, such a method of financing was almost entirely unsupported. Heavy reliance on donors may raise serious questions of independence of the tribunal.[35] Voluntary funding is also likely to delay the creation of the Court, as the Secretary-General will have to find the large sums of money involved in the creation and running of the Court.[36] There is no guarantee that he will be able to secure such funds, as the Security Council itself recognised.[37] As the ICTY discovered, the lack of adequate, stable funding has a significant deleterious effect on an international tribunal.[38]

C. Temporal and Personal Jurisdiction

Personal Jurisdiction and Relationship to National Courts

(a) Relationship to National Courts: One of the major differences between the ICTY and the ICTR, on the one hand, and the ICC on the other is their relationship to national jurisdictions. While the two UN Tribunals are described as having primacy over national prosecutions, the ICC's relationship is one of complementarity.[39] In short, unless *non bis in idem* is at issue, the two UN Tribunals are entitled to request the deferrence of national jurisdictions to themselves, almost at their discretion.[40] The ICC may only take jurisdiction over cases where a State is "unwilling or unable" to do so itself.[41] The Special Court, as the Security Council envisages it, will have elements of both systems. For offences other than those committed by "peacekeepers and related personnel",[42] the Special Court will have primacy over Sierra Leonean courts.[43] This is consistent

32. *Report, op. cit*., paras.69–70.

33. *Idem*., para. 71. This was also the wish of the government of Sierra Leone, *Mission Report, op. cit*., para. 48.

34. Revised Article 6.

35. See M. Halff & D. Tolbert, "Article 116" in Triffterer (ed.), *supra* n.6, 1129, pp.1129–1131.

36. The Secretary-General is not to begin setting up the Special Court until he has 12 months financing available, and pledges for the second year, *Letter*, p.2. The Secretary-General estimated that the initial costs, purely for the buildings and salaries for the first year, would be in the region of $25.5m. This does not include, *inter alia*, the prosecution's investigative costs, which will be considerable. *Report, op. cit*. paras.57–63.

37. Revised Article 6 provides that "Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court".

38. In its 1994 Yearbook, pp.90–91, the ICTY claimed that funding problems meant that it "was operating with one hand tied behind its back".

39. J. T. Holmes, "The Principle of Complementarity" in R. S. Lee (ed.), *The International Criminal Court and the Making of the Rome Statute* (1999) 41. ICTY Statute Article 9(1), Rome Statute, Article 17.

40. See ICTY Rule of Procedure 9(iii).

41. Rome Statute, Article 17(a).

42. Revised Article 1(b).

43. *Statute* Article 8(2).

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with its mandate to prosecute "those who bear the greatest responsibility" for crimes in Sierra Leone.[44] As the Agreement is between the UN and Sierra Leone, its primacy is limited to that State alone, as is the obligation to co-operate with the Special Court.[45] If the Security Council wished to extend the obligation to co-operate to all UN members, it could do so with a Resolution adopted under Chapter VII of the UN Charter.[46]

Where there have been allegations of crimes against international law or Sierra Leonean law by staff of the various peacekeeping forces in Sierra Leone, the Special Court will not have primacy in relation to those allegations. Revised Article 1 provides:

> (b) Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organisations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

There have been various peacekeeping and peace-enforcing missions in Sierra Leone. In addition to UNAMSIL, ECOWAS put in place a peace-enforcing mission (ECOMOG) in 1997 and there has been a U.K. presence there since 2000. It is frequently the case that Status of Forces Agreements provide for either immunity from the jurisdiction of the receiving State, or for concurrent jurisdiction in the sending and receiving States, usually with primary jurisdiction for offences committed in the course of duties residing in the sending State.[47] Respect for this type of provision has been included in the Rome Statute (Article 98).[48] What is interesting about Article 1(b) is that even in the absence of such an agreement, jurisdiction resides not in the Court but primarily in the sending State. The Security Council reinforced Article 1(b) by saying "it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have committed".[49] Its comment not only explains Article 1(b) but also appears to confirm the position adopted at Rome that there is a duty, at least on State parties to that Statute, to investigate and prosecute international crimes committed on their territory or by their nationals.[50] This is supported by Article 1(c) of the Special Court Statute:

> In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

44. Revised Article 1(a).
45. *Agreement*, Article 16.
46. See Article 29 of the ICTY Statute, as bolstered by Security Council Resolution 827.
47. B. J. George, "Immunities and Exceptions" in M. C. Bassiouni (ed.), *International Criminal Law vol. II: Procedural and Enforcement Mechanisms* (1999), 109, pp.134–142.
48. See M. H. Arsanjani, "The Rome Statute for the International Criminal Court" (1999) 93 A.J.I.L. 22, p.41
49. *Letter*, p.1.
50. This is the more limited reading of preambular paragraph 6 of the Rome Statute, Triffterer, *supra* n.6, pp.12–13.

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The phrase "unwilling or unable genuinely to carry out an investigation or prosecution" is clearly modelled on Article 17 of the Rome Statute and sets up a relationship of complementarity between the Special Court and the national courts of the sending State.[51] Nonetheless, the Court may only step in if the Security Council expressly authorises it to do so. These jurisdictional hurdles are high, not least because the required positive decision of the Security Council would be subject to a veto.

(b) Personal Jurisdiction. In Resolution 1315 the Security Council suggested that the Court only deal with those "who bear the greatest responsibility for the commission of crimes". This was taken by the Secretary-General to refer to those in positions of command or directly responsible for the most heinous crimes.[52] The Secretary-General preferred the term "most responsible", to clarify that the Court was to prosecute both.[53] This would also make it clear that the limitation was not a jurisdictional one but merely a direction to the Prosecutor to "aim high" in choosing which suspects to indict.[54] The Security Council was unhappy with the new formulation and in its suggestions returned to the original language,[55] explaining that the focus should be on those who "played a leadership role".[56]

The discussions over these terms relates directly to the responsibility of children and young persons, who have been involved in very serious crimes in the Sierra Leonean conflict. There is no clear fixed minimum age of criminal responsibility in international law. The ICC has no jurisdiction over offenders under the age of 18,[57] but this is without prejudice to the position in general international law.[58] The *Report* sets the minimum age for defendants at 15 (*Statute*, Article 7). It is not coincidental that conscripting children below that age is considered a war crime in the Rome Statute,[59] child combatants under 15 are considered victims of crime rather than perpetrators. Nonetheless, some NGOs have criticised the decision to include jurisdiction over 15–18 year olds.[60] The Security Council was unwilling to foreclose the possibility of 15–18 year olds being put on trial, and recommended that:

> Should any person who was at the time of the alleged commission of the crime below 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into

51. See S. A. Williams, "Article 17" in Triffterer (ed.), *supra* n.6, 383, especially pp.392–394.

52. *Report, op. cit*., para. 29.

53. *Report, op. cit*., para. 30, *Agreement*, Article 1, Statute, Article 1.

54. *Idem*., para. 30.

55. *Agreement*, Revised Article 1, *Statute*, Revised Article 1.

56. *Letter*, p.1. The change in phrasing also implies that the Court should prosecute a smaller number of defendants than the Secretary-General envisaged.

57. Rome Statute, Article 26.

58. See R. S. Clark & O. Triffterer "Article 26" in Triffterer (ed.), *supra* n.6, 493, p.499.

59. Rome Statute, Articles 8(2)(b)(xxvi), 8(2)(e)(vii).

60. See *Mission Report, op. cit*., paras.49–50. Amnesty International, on the other hand, supports trials for those who acted voluntarily and were in control of their actions, Amnesty International *Child Soldiers: Criminals or Victims?*, IOR.50.002/2000.

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and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.[61]

In addition to Article 7, the Statute contains other protections for juvenile offenders. Article 15(5) of the Statute requires the Prosecutor to ensure prosecution does not interfere with the child-rehabilitation programme which is to operate in Sierra Leone, and, where appropriate, the Prosecutor should have resort to alternative measures to prosecution. Finally, Article 19 prevents the Special Court from imposing any sentence of imprisonment on juvenile offenders. These provisions, along with the limitation of prosecution to those bearing the "greatest responsibility" for offences, make it doubtful, although not impossible, that there will be prosecutions of juveniles by the Court.

Temporal Jurisdiction of the Court and the 1999 Amnesty.

Although the Sierra Leonean conflict began in 1991, practical constraints dictate that it would be impossible for the Court to prosecute offences going back to the beginning of the conflict. So the Secretary-General decided that 30 November 1996, the date of the Abidjan Peace Agreement, should mark the starting point of the Court's jurisdiction. The date was chosen as it was apolitical, captured the majority of the most serious crimes and would not result in an unsustainable caseload for the Court.[62] As the conflict in Sierra Leone is not yet over, the jurisdiction of the Special Court for the future is open-ended.[63]

Certain provisions of the Lomé Peace Accord could have caused problems for the Court. Particularly important in this regard was Article IX, which amounted to an amnesty for crimes prior to the date of the signing of the Accord (7 July 1999). The status of amnesties under international law is debatable,[64] although it would seem that since the advent of the Rome Statute, the tide may have turned against their legality under international law. This trend is bolstered by the *Report*, which unambiguously rejects the legality of the Lomé amnesty.[65] The *Report* notes that when the Secretary-General's representative signed the Lomé Accord, he appended a disclaimer asserting that the amnesty in Article IX did not apply to international crimes.[66] The Secretary-General goes further than claiming the non-opposability of the amnesty to the UN though, declaring that "the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes".[67] The Report also states that the amnesty shall be denied legal effect "to the extent of its illegality under international law".[68] Therefore, the amnesty is considered not to affect the jurisdiction of the Special

61. Revised Article 7.

62. *Idem*., para. 27.

63. *Idem*., para. 28.

64. See D. Orientlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Former Regime" (1991) 100 Yale L.J. 2537; J. Dugard, "Dealing With the Crimes of a Past Regime: Is Amnesty Still an Option?" (1999) 12 Leiden J.I.L. 1001.

65. *Report, op. cit*., paras 22–24.

66. *Idem*., para. 23.

67. *Idem*., para. 22. The UN, in the past, has supported amnesty provisions, for example in Haiti, see M. P. Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti" (1996) 31 Texas I.L.J. 1.

68. *Idem*., para. 24.

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Court over international crimes.[69] The rejection of the Lomé amnesty does not extend to crimes under Sierra Leonean law under the jurisdiction of the Special Court. In any event, it is a significant piece of institutional practice for the UN and contributes substantially to the view against the legitimacy of amnesties for international crimes.

D. Material Jurisdiction

The Court is to have jurisdiction over three sets of crimes, two international, one national. The first set of crimes are crimes against humanity.[70] They are defined by Article 2 of the Statute as "the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) Persecution on political, racial, ethnic or religious grounds; (i) Other inhumane acts". Of the six definitions of crimes against humanity contained in Statutes for international (or mixed) courts, not one has been the same. The definition in the Special Court Statute draws upon the definitions in the ICTY and ICTR Statutes but differs from them both. The wording of Article 2 of the *Statute* is most like that of the ICTR Statute (Article 3). However, unlike that provision, and in conformity with customary international law, the Special Court definition does not require a discriminatory *animus* for crimes against humanity (except for those charged as persecution).[71] The list of acts draws upon those in the ICTY and ICTR Statutes,[72] although the inclusion of the acts mentioned after rape in Article 2(g) was obviously inspired by Article 7(g) of the Rome Statute. What is particularly interesting is that Article 2 seems not to follow the Rome Statute definition of crimes against humanity, which was thought by some to represent a modern codification of custom.[73] Importantly, it appears to reject the compromise brokered in Rome between those asserting that the requirements of widespread or systematic nature of the acts were conjunctive and disjunctive.[74] It would appear that the *Statute* reaffirms the disjunctive approach.

The Special Court is also given jurisdiction over violations of Common Article 3 and Additional Protocol II by Article 3 of the *Statute* which, in all material respects, is identical to Article 4 of the ICTR Statute. As the criminality of violations of humanitarian law in non-international armed conflicts is now clearly established,[75] and Sierra Leone is a party to the Geneva Conventions and

69. *Statute*, Article 10.

70. As there was no evidence of genocide in Sierra Leone, and the Security Council did not mention genocide in Resolution 1315, the Secretary-General did not include genocide in the jurisdiction of the Court, *Report, op. cit*., para. 13.

71. The chapeau of Article 3 of the ICTR Statute defines crimes against humanity as "the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

72. *Report, op. cit*., para 14.

73. See, for example, D. Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference" (1999) 93 A.J.I.L. 43.

74. *Idem*., pp.47–50.

75. *Report, op. cit*., para. 14.

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Additional Protocol II, from the perspective of the *nullum crimen sine lege* principle this provision is unobjectionable, although its inclusion is by no means unnecessary. Article 4 of the *Statute* grants the Court jurisdiction over three named violations of international humanitarian law:

> (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 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 international law of armed conflict;
> (c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

The crimes in parts (a) and (b) are retreads of Articles 8(2)(e)(i) and 8(2)(e)(iii) of the Rome Statute. The prohibition of attacks on civilians is clearly established in customary law,[76] and the crime of attacking peacekeepers under subparagraph (b) is little more than a specific application of subparagraph (a), as to fall under its protection, peacekeepers must be entitled to civilian status under international law. Article 4(c) as suggested by the Secretary-General is more narrowly formulated than Article 8(2)(e)(vii) of the Rome Statute.[77] This is because the Secretary-General was dubious of Article 8(2)(e)(vii)'s customary status. By limiting Article 4(c) to cases involving abduction and forced recruitment, the Secretary-General sought to cast it as a specific application of Common Article 3. The Security Council disagreed strongly with the Secretary-General on this point, and requested that the Secretary-General "modify ... [Article 4(c)] ... so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community".[78] The Security Council's suggested modification was to language tracing that in the Rome Statute, and appears to represent a claim that Article 8(2)(e)(vii) is not only customary now, but was also customary law in 1996. Evidence for the latter assertion is rather scant.

Article 5 refers to crimes under Sierra Leonean law. Offences included are those under the 1926 Prevention of Cruelty to Children Act and crimes of arson under the 1861 Malicious Damage Act. The reason for resorting to Sierra Leonean law was that the Secretary-General thought certain acts perpetrated in Sierra Leone, despite being worthy of censure were "either unregulated or inadequately regulated under international law". That may be the case, particularly for crimes under the Malicious Damage Act, but for those under the Prevention of Cruelty Act, there will probably be overlaps between Article 5 and Article 3. This could be problematic if a single act is charged in the alternative under those provisions. For international crimes, the general principles of

76. *Prosecutor* v. *Tadic*, Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72, paras.100–102, 110–113.

77. Article 8(2)(e)(vii), "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities".

78. *Letter*, p.2.

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criminal responsibility are those in international law (set out in Article 6(1–4) of the *Statute*) whereas for crimes against Sierra Leonean law, the applicable rules of individual criminal responsibility are those of Sierra Leonean law (*Statute*, Article 6(5)). This could considerably complicate matters.

The provisions of the *Statute* on the international rules of individual criminal responsibility are almost identical to those in the ICTY and ICTR Statutes.[79] At the Rome Conference a great deal of effort was expended to draft detailed, broadly acceptable parameters of individual criminal responsibility, and commentators have hailed the definitions there as "undoubtedly . . . a major advance in international criminal law".[80] There had been criticism of the UN Tribunals' Statutes on the grounds that they were too vague on these principles.[81] Nonetheless, the relationship between the Rome Statute and customary international law is not necessarily a comfortable one, particularly with respect to the defence of superior orders and the scope of command responsibility.[82] The return to the formulations of the ICTY and ICTR Statutes, which reject the superior orders defence and have a broader formulation of civilian command responsibility, implies a discomfort with the Rome Statute's provisions on these matters, if not an outright rejection of their customary status.

E. Conclusion

The development of international criminal law and its enforcement mechanisms in the past decade has been nothing short of phenomenal. The idea that a Statute for the International Criminal Court would be signed by 139 States by the end of 2000 would have appeared utopian even five years ago. Since then, there have also been moves toward accountability for international crimes in Chile, Cambodia and now Sierra Leone. Nonetheless, in all three situations, the process of accountability is just beginning, and there are many pitfalls to avoid. Although the Security Council has been involved with the creation of tribunals for Cambodia and Sierra Leone, it has not used its Chapter VII powers as it did for Yugoslavia and for Rwanda. Negotiating with States rather than using coercive powers against them prolongs the process and, though there are reports of some progress with Cambodia,[83] neither tribunal is yet operational. Still, the Special Court proposals represent a new approach to prosecution of international crimes, where national and international approaches are commingled. This allows local participation in a procedure that can all too easily become divorced from the

79. The *Statute* repeats, *mutatis mutandis*, Article 7 of the ICTY Statute.

80. A. Cassese, "The Rome Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 E.J.I.L. 144, p.153.

81. C. Blakesley, "Atrocity and its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda" in T. L. H. McCormack & G. J. Simpson, *The Law of War Crimes: National and International Approaches* (1997), 189, p.204.

82. See P. Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court Versus Customary International Law' (1999) 10 E.J.I.L. 172; although see C. Garroway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?" (1999) 836 International Review of the Red Cross 785.

83. See U.S. State Department press statement, 2 Jan. 2001, welcoming the approval by the National Assembly of Cambodia's law to establish "extraordinary chambers" to hear cases against leaders of the Khmer Rouge.

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interests of those it is meant to serve.[84] It must be regarded as an important innovation, although one which may be difficult to operate in practice. The Statute itself raises some interesting questions, particularly in regard to the customary or otherwise status of the definitions of crimes and principles of individual responsibility in the Rome Statute.[85] Although there are some aspects of the Court that remain contentious or problematic, the probability that the Court will be created perhaps shows that President (as he then was) Cassese's comment that "A State-sovereignty-oriented approach has gradually been supplanted by a human-being-oriented approach"[86] was more prescience than wishful thinking.

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84. For an extensive argument on this point see J. E. Alvarez, "Crimes of Hate/Crimes of State" (1999) 24 Yale J.I.L. 365, especially his comment (p.483) "Properly mediated by international law (and fora where necessary) local criminal accountability helps restore the rule of law where it matters most at the local level, where all of us live".

85. For a critical review, see Amnesty International, *Sierra Leone: Recommendations on the draft Statute of the Special Court*, AFR51/083/2000.

86. *Loc. cit*., para. 97.

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