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## The Rome Statute on the International Criminal Court: From 1947-2000 and beyond

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# The Rome Statute on the International Criminal Court: From 1947-2000 and beyond

## Abstract

On 17 July 1998 the International Criminal Court Statute was adopted in Rome by the United Nations Diplomatic Conference of Plenipotentiaries. It will become operative once sixty states have ratified. It will have subject matter jurisdiction over genocide, war crimes, crimes against humanity and in the future aggression once an appropriate definition has been agreed upon. It is the culmination of work that began in United Nations history in 1947. Its intent is to replace the cycle of impunity for some of the most heinous international crimes with accountability. The philosophical and practical underpinnings of the ICC are deterrence, prosecution and justice for victims. This article explores the evolution of the ICC and then concentrates on one of the most controversial issues, the preconditions for the ICC's exercise of jurisdiction over the listed crimes.

## Keywords

Rome Statute of the International Criminal Court (1998 July 17)

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# THE ROME STATUTE ON THE INTERNATIONAL CRIMINAL COURT: FROM 1947- 2000 AND BEYOND<sup>©</sup>

BY SHARON A. WILLIAMS, F.R.S.C.\*

On 17 July 1998 the International Criminal Court Statute was adopted in Rome by the United Nations Diplomatic Conference of Plenipotentiaries. It will become operative once sixty states have ratified. It will have subject matter jurisdiction over genocide, war crimes, crimes against humanity and in the future aggression once an appropriate definition has been agreed upon. It is the culmination of work that began in United Nations history in 1947. Its intent is to replace the cycle of impunity for some of the most heinous international crimes with accountability. The philosophical and practical underpinnings of the ICC are deterrence, prosecution and justice for victims. This article explores the evolution of the ICC and then concentrates on one of the most controversial issues, the preconditions for the ICC's exercise of jurisdiction over the listed crimes.

Le 17 juillet 1998, le Statut de Rome de la cour pénale internationale a été adopté par la Conférence diplomatique des plénipotentiaires des Nations Unies sur la création d'une cour criminelle internationale, et entrera en vigueur dès que 60 nations ratifient le statut. La cour aura compétence en matière de crime de génocide, crimes de guerre, crimes contre l'humanité ainsi que le crime d'agression, dès que l'on s'accorde sur une définition appropriée. La création de la Cour internationale de Justice représente le point culminant de nombreux travaux qui ont été entrepris par les Nations Unies depuis 1947. Le cycle d'impunité, qui est une caractéristique des crimes internationaux les plus odieux, serait remplacé par la notion de devoir répondre à ses propres actes. Les fondements philosophiques et pragmatiques de la CIJ sont la dissuasion, les poursuites judiciaires et le besoin rendre justice aux victimes. Cet article examine l'évolution de la CIJ et se concentre sur la question la plus controversée, soit les préconditions nécessaires pour que la CIJ puisse exercer sa compétence sur les crimes énumérés.

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## I. INTRODUCTION

I am very pleased and honoured to be a contributor to this special issue of the Osgoode Hall Law Journal in honour of my friend, mentor, colleague and co-author Jean-Gabriel Castel. It was his encouragement and forward thinking that fostered my interest, teaching and writing on international criminal law over twenty-five years ago.

An independent, credible, just, and effective international criminal court with broad state support is an imperative for the twenty-first century.

The International Criminal Court (ICC) was established on 17 July 1998 in Rome by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>1</sup> It will have jurisdiction over some of the most serious international crimes. Its value is not only in prosecuting and punishing the alleged perpetrators of the listed crimes, genocide, war crimes, crimes against humanity and potentially aggression, but also in its capacity for deterrence. An impartial international criminal court with an independent prosecutor’s office must discourage those who seek to instigate and perpetrate barbarous atrocities in violation of customary

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<sup>1</sup> *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF.183/9, online: United Nations <[www.un.org/law/icc/doc/n9828144.pdf](http://www.un.org/law/icc/doc/n9828144.pdf)> (date accessed: 17 August 2000) [hereinafter *ICC*].

international and treaty law. The major challenge for the international community is to make it truly effective and not merely symbolic.

It is impossible to turn back the clock and know what would have happened had an international criminal court existed a century ago. Would a real threat of prosecution together with enforcement capability have made a difference to the course of history? In all likelihood the answer is yes. In 1936, in a speech made at a Nuremberg rally, Adolf Hitler addressed the perceived ineptitude on the part of states collectively to take effective action against governments or individuals for committing international crimes. In referring to the Armenian holocaust, where Turkish officials allegedly killed over one and a half million Armenians during the First World War, he asked rhetorically: "Who after all is today speaking about the destruction of the Armenians?"<sup>2</sup> A dangerous signal was sent to Hitler and subsequent ruthless leaders when the Allied Powers failed to bring to justice those allegedly responsible in Turkey. The underlying philosophy was that the international community would do nothing and monstrous crimes could be committed with impunity. Had strong, united, international cooperation existed, perhaps Hitler in Germany and elsewhere in Eastern and Western Europe, Idi Amin in Uganda, Pol Pot in Cambodia, Saddam Hussein in Iraq and Kuwait, Radovan Karadzic and Slobodan Milosevic in the Former Yugoslavia, Jean Kambanda in Rwanda, Hissène Habré in Chad, and Foday Sankoh in Sierra Leone may have been deterred from perpetrating the widespread and systematic atrocities that the world has witnessed. These crimes proscribed by customary and conventional international law attack the very heart of what is civilized and the very foundation of human society.

The world community must be prepared to act. Should deterrence fail it must be ready, willing and able to bring to justice those accused, demonstrating that such conduct will not go unchallenged. It is not a question of high-minded revenge, of the victors dictating their terms to the vanquished, but rather a deep-rooted imperative to advance the rule of law and to enhance the quality of human behaviour at the national and international levels. The world community now knows that it is not sufficient to act on an *ad hoc* basis. To do so requires the selective political consent of the United Nations Security Council, acting under Chapter VII of the *Charter of the United Nations*,<sup>3</sup> and there is a possibility that one of the five permanent members will veto the action.

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<sup>2</sup> J.F. Willis, *Prologue to Nuremberg* (Westport, Conn.: Greenwood Press, 1982) at 173.

<sup>3</sup> 26 June 1945, Can T.S. 1945 No. 7 [hereinafter *U.N. Charter*].

Albeit, the Security Council's necessary actions in this way led to the expeditious formation of the International Criminal Tribunals for the Former Yugoslavia (ICTFY)<sup>4</sup> and Rwanda (ICTR),<sup>5</sup> a permanent court not hampered by geographical limits and time is necessary. However, the ICTFY and the ICTR have clearly bolstered world interest in a permanent international criminal court and are preparing the groundwork through their cases for its operation. The ICC is fundamental to international peace and security and the protection of human rights and dignity. It will, it is to be hoped, promote international stability by ending the cycle of violence and impunity and by deterring future international crimes.

The philosophical and practical underpinnings for the ICC are threefold. The triple function of the ICC is deterrence, prosecution of alleged perpetrators, and justice for victims. The critical factor in the establishment of the court is the capacity to enforce. The goal is to replace impunity with accountability. However, there is also another aspect and that is whether the individualization of guilt, especially in ethnic conflicts within a single state, will assist in peace and reconciliation between the troubled parties.

## II. THE EVOLUTION OF THE ICC

The establishment of an international criminal tribunal has been on the international agenda since at least the time of the League of Nations. Although examples of prosecution of war crimes and crimes against peace may be found since the thirteenth century in Europe,<sup>6</sup> the contemporary idea of establishing an international tribunal may be seen to have stemmed from the 1899 first Hague Convention for the Pacific Settlement of International Disputes. The first allied attempt to

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<sup>4</sup> SC Res. 827, UN SCOR, 1993, Special Supp., UN Doc. S/25626 [hereinafter *ICTFY*].

<sup>5</sup> *Establishment of an International Tribunal and Adoption of the Statute of the Tribunal*, Res. 955, UN SCOR, 1994, Special Supp., U.N. Doc. S/RES/955, online: United Nations <[www.un.org/docs/scres/1994/9443748e.htm](http://www.un.org/docs/scres/1994/9443748e.htm)> (date accessed: 17 August 2000) [hereinafter *ICTR*].

<sup>6</sup> Note the trial and execution of Conradin von Hohenstaufen in Naples in 1262 for initiating an unjust war, and the trial in 1474 of Peter of Hagenbach at Breisach for "tramp[ling] under foot the laws of God and man." See G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (Toronto: University of Toronto Press, 1965) at 462-66; M.H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge & K. Paul, 1965) 23-59; M.C. Bassiouni & C.L. Blakesley, "The Need for an International Criminal Court in the New International World Order" (1992) 25 Vand. J. Transnat'l L. 151; and L.C. Green, "Group Rights, War Crimes and Crimes Against Humanity" (1993) 1 Int'l J. Group Rights 107.

prosecute persons for war crimes occurred in 1919 in the *Treaty of Versailles*.<sup>7</sup> However, even though articles 227-29 provided for the prosecution of the Kaiser Wilhelm II and other members of the German armed forces, none were turned over to the Allied and Associated Powers for prosecution. Instead, the Kaiser remained in the Netherlands where he had sought asylum and other prosecutions were eventually, through agreement with the Allies, heard by the German Supreme Court in Leipzig.<sup>8</sup>

In 1937 there was an attempt by the League of Nations to bring into operation a multilateral *Convention for the Prevention and Punishment of Terrorism* and an annexed Protocol<sup>9</sup> on the establishment of an international criminal court to deal with such offences. The *Convention* and Protocol never came into force. Indeed the only state to ratify was India.

Following the end of the Second World War, the Allied Powers adopted the *London Charter* in 1945<sup>10</sup> and set up the International Military Tribunal (IMT) at Nuremberg. It provided a forum for the prosecution of the major Axis war criminals whose crimes had no particular geographical location. Others accused of war crimes were to

<sup>7</sup> Allied and Associated Powers and Germany, 28 June 1919, in *Treaties of Peace, 1919-1923*, vol. 1 (New York: Carnegie Endowment for International Peace, 1924) 3. In 1919 a special commission was set up by the Allied Powers to address, *inter alia*, crimes against humanity. This was of special significance due to the annihilation of one and a half million Armenians by Turkey. Because of opposition by the United States, crimes against humanity were omitted from a list of offences that an international tribunal would have been given to prosecute. In any event, although the *Treaty of Sèvres*, Allied and Associated Powers and Turkey, 10 August 1920, in *Treaties of Peace, 1919-1923*, vol. 2 (New York: Carnegie Endowment for International Peace, 1924) 789, provided for the surrender of accused persons, the subsequent *Treaty of Lausanne*, Allied and Associated Powers and Turkey, 24 July 1923, in *Treaties of Peace, 1919-1923*, vol. 2 (New York: Carnegie Endowment for International Peace, 1924), gave them amnesty.

<sup>8</sup> See C. Mullins, *The Leipzig Trials* (London: H.F. & G. Witherby, 1921); and M.C. Bassiouni, "Draft Statute International Tribunal" (1993) 10 *Nouvelles Études Penales* 21. A demand had been submitted to Germany by the Allied and Associated Powers for the trial of 901 persons. Germany refused and the compromise reached was that the Allies agreed that Germany would prosecute a selected number of alleged war criminals. Out of this number 45 names were selected. Of these only 13 were actually tried and six were acquitted. The heaviest sentence was four years of imprisonment. See, for example, *The Llandovery Castle Case* (1921), [1923-24] *Annual Digest of Public International Law* 436.

<sup>9</sup> *Convention for the Prevention and Punishment of Terrorism*, 16 November 1937, in M.O. Hudson, ed., 7 *International Legislation* 862 (Dobbsferry, N.Y.: Oceana, 1972) [hereinafter *Terrorism Convention*].

<sup>10</sup> See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 U.N.T.S. 279 [hereinafter *London Charter*]; and *Moscow Declaration on General Security*, 30 October 1943, in *Yearbook of the United Nations, 1946-47*, (Lake Success, N.Y.: United Nations, 1947).

be sent back to the territory of the states where the crimes had been perpetrated. A similar tribunal was set up in Tokyo<sup>11</sup> for the Far East theatre of war. These courts were *ad hoc* tribunals for the trial of specific persons within a determined time frame, that is, crimes committed during the Second World War. They were not truly "international." At Nuremberg, the judges and prosecutors were American, British, French, and Russian. Nevertheless, the Nuremberg Charter, the Judgement, and the Principles<sup>12</sup> extrapolated therefrom by the International Law Commission and accepted by the General Assembly are extremely pertinent in terms of the definition of the offences of crimes against peace, war crimes, and crimes against humanity, as well as on other issues such as individual criminal responsibility, superior orders and command responsibility. Similarly, the decisions of the individual Allied Military Tribunals acting under Control Council Order Number 10 and national criminal courts are of assistance.

In 1947 the International Law Commission was set up by the United Nations General Assembly and it was given the mandate to formulate the Nuremberg Principles,<sup>13</sup> to prepare a draft code of offences against the peace and security of mankind and "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes." The International Law Commission concluded that to do so was both desirable and possible. As a result, in 1950 the General Assembly established a Committee on International Criminal Jurisdiction, to prepare a concrete proposal for such a court. A draft statute was submitted in 1951 and amended in 1953. The 1953 draft statute was not accepted because of a failure to agree on a definition of "aggression." This is not surprising in the context of the cold war, in that an international criminal court mandated to include aggression as a crime was seen as a threat to national sovereignty and security. The General Assembly did adopt by consensus a definition of aggression in 1974.<sup>14</sup> However, it would not be until 1982 that the International Law Commission would return to the subject.

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<sup>11</sup> See *Proclamation of General Order No. 1 by the Supreme Allied Commander*, 19 January 1946, am. 26 April 1946. T.I.A.S. No. 1589.

<sup>12</sup> *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), 11-14.

<sup>13</sup> *Establishment of an International Law Commission*, GA Res. 174(II), UN GAOR, 2nd Sess., UN Doc. A/519 (1947).

<sup>14</sup> *Definition of Aggression*, GA Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/9631 (1974).



During the period that the International Law Commission's project was lying dormant, the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*<sup>15</sup> was adopted. Article V provided, *inter alia*, for an international penal tribunal. It came into force in 1976, but no such tribunal was ever set up. As well, no Western state ratified it.<sup>16</sup>

Another crime-specific attempt occurred at the 1989 fall United Nations General Assembly<sup>17</sup> and at a special session in 1990 concerning the illicit traffic in narcotic drugs. With Trinidad and Tobago assuming a leadership role, fifteen Caribbean and Latin American states supported the establishment of an international criminal court. However, the majority of Western states were opposed at that time and consequently the only result was that the General Assembly mandated the International Law Commission to continue its work on the topic.

The question that immediately comes to mind is why it has taken so long for the international community to agree on the need to establish an international criminal court? Amongst the apparent obstacles were a reluctance to yield up any element of sovereignty to an international tribunal, nationalistic pride in the superiority of domestic criminal law, reticence to participate in establishing another international institution, problems of obtaining consensus on subject matter jurisdiction, applicable substantive and procedural criminal law rules, issues relating to recognition and enforcement of judgments and the cost.

The urgency of the situation in the former Yugoslavia, in particular in Bosnia and Herzegovina, including reports of mass killings, systematic detention, and rape of women and so-called "ethnic cleansing," necessitated immediate action. On 22 February 1993 the Security Council decided that an international tribunal should be established for the prosecution of persons allegedly responsible for committing such crimes since January 1991. The report of then Secretary-General Boutros Boutros Ghali on 3 May 1993 recommended that immediate action on an *ad hoc* basis was needed and that the tribunal should therefore be established by a decision under Chapter VII

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<sup>15</sup> GA Res. 3068, UN GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973).

<sup>16</sup> See the account by Bassiouni, *supra* note 8 at 8, of the attempt to establish such a tribunal and the then lack of political will to do so by "Western" states.

<sup>17</sup> *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over such Crimes*, GA Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/49 (1989), online: United Nations <[www.un.org/gopher-data/ga/recs/44/49](http://www.un.org/gopher-data/ga/recs/44/49)> (date accessed: 17 August 2000).

of the *U.N. Charter*. This measure was taken to maintain or restore international peace or security, following the determination of the existence of a threat to the peace, breach of the peace, or act of aggression and it was therefore effective immediately. It bound member states to take whatever action was required. On 25 May 1993, by resolution 827, the Security Council established the Tribunal and endorsed the thirty-four article statute annexed to the secretary-general's report.<sup>18</sup> The precedent of the former Yugoslavia Tribunal facilitated the establishment by the Security Council on 8 November 1994 by resolution 955, acting again under Chapter VII of the *ad hoc ICTR*.<sup>19</sup>

The International Tribunals for the Former Yugoslavia and Rwanda clearly represent an attempt by the United Nations to establish neutral fora for the prosecution of crimes of such magnitude. However, they have a limited mandate, and deterrence of future genocide, war crimes and crimes against humanity have demanded a permanent global international criminal court.

An important step forward occurred in December 1994 when the General Assembly formed an *ad hoc* committee to review the fundamental issues, both substantive and administrative, arising out of the ICC draft statute prepared by the International Law Commission. It recommended that a Preparatory Committee open to all United Nations member states be set up to draft a statute text which would be widely acceptable. The Preparatory Committee held several meetings in 1996 and 1997 and had its final meeting in March 1998. The Diplomatic Conference was held in Rome from 15 June to 17 July 1998 to consider and finalize the Rome Statute provided for in the Preparatory Committee's negotiating text.

### III. ROME 1998—THE GENERAL FRAMEWORK

On the evening of 17 July 1998 in Rome, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court drew to a climatic end after five solid weeks of intense negotiations, political posturing and, finally, accommodations being struck. Under the rules of procedure, the Rome Statute had to be adopted by midnight. The atmosphere of the chamber where the Committee of the Whole sat was charged with anticipation

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<sup>18</sup> *ICTFY*, *supra* note 4.

<sup>19</sup> *Supra* note 5.

and increasing excitement. Would this happen? The answer was resoundingly—yes! Amendments of any description at that last stage would have collapsed the intricately woven package. Still, the tension heightened as first India and then the United States made last ditch attempts to push for acutely controversial amendments.<sup>20</sup> These were defeated in short order by no-action motions.<sup>21</sup> As the meeting was brought to a close the whole room erupted into a celebration fraught with high emotion, an extraordinary sight at a diplomatic conference.

This was indeed an historic moment for international criminal law, cooperation and human rights. It was also an amazing feat, in that when the conference opened on 15 June 1998 it had to deal with a negotiating text which had approximately 1,400 square brackets indicating bones of contention, some fundamental. The conference achieved the impossible in many ways. Among the key successes of the conference were firstly, the inclusion of automatic jurisdiction over the core crimes of genocide, war crimes, crimes against humanity and aggression, although the latter still has to be defined.<sup>22</sup> Secondly, there is

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<sup>20</sup> See U.N. Doc. A/CONF.183/C.1/94-95, 17 July 1994, for the text of the amendments; and R.S. Lee, "Introduction: The Rome Conference and Its Contributions to International Law," in R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 1 at 24-26, where he discussed the procedural no-action motion in this way. A no-action motion was not specifically mentioned in the Rules of Procedure of the Rome Conference. However, in the practice that has emerged in the United Nations General Assembly, the procedural rule under which such a motion is placed is that dealing with the rule regarding adornment of the debate, Rule 25 of the Rules of Procedure of the Rome Conference.

<sup>21</sup> Under no-action motions, instead of voting on the substance of the proposed amendments to the draft Statute, the vote was on whether states agreed with no action being taken on the amendments. Thus, a formal vote was not taken on the amendments themselves. The no-action motion on the Indian amendments was proposed by Norway and adopted by a vote of 114 in favour to 16 against with 20 abstentions; it had concerned adding the use of nuclear weapons and other weapons of mass destruction to the list of war crimes and abrogating the role of the U.N. Security Council to refer situations to the ICC or to request the court to defer investigation or prosecution where the Council adopted a resolution, both of which issues had been the subject of intense negotiations during the five weeks. The United States proposed amendment concerned article 12 of the draft statute, the preconditions for the exercise of jurisdiction by the ICC and a focal point of controversy in Rome. The United States was insistent that the ICC should only be able to take jurisdiction where the accused's state of nationality had accepted the jurisdiction of the Court. Again, Norway proposed a no-action motion, which was adopted by 113 in favour to 17 against with 25 abstentions.

<sup>22</sup> In accordance with article 5(2), aggression will be within the jurisdiction of the Court once a provision has been adopted in accordance with articles 121 and 123 of the statute, which deal with amendments by the Assembly of States Parties or by a Review Conference: *ICC*, *supra* note 1, article 5(2). Article 121(1) provides that after seven years following the entry into force of the statute any state party may propose amendments thereto: *ibid.*, article 121(1). Under article 121(3) any amendment requires a two-thirds majority of the states parties unless consensus can be reached: *ibid.*, article 121(3). By article 121(5), any amendment to article 5, which includes, therefore, the

the specific inclusion as crimes against humanity of crimes of sexual violence such as rape, sexual slavery, enforced prostitution, forced pregnancy when committed as part of a widespread or systematic attack directed against any civilian population<sup>23</sup> or as war crimes in international conflicts<sup>24</sup> and internal conflicts.<sup>25</sup> Thirdly, the statute applies not only to international armed conflicts but also to internal conflicts that meet the threshold test of being more than internal tensions, riots or sporadic acts of violence.<sup>26</sup> Fourthly, there is provision for impartial investigations and an independent prosecutor who may initiate them *proprio motu* with certain inbuilt checks and balances.<sup>27</sup> Thus, the prosecutorial scheme does not depend solely on the initiation of investigations and consequent prosecutions by states parties<sup>28</sup> and the United Nations Security Council.<sup>29</sup> Fifthly, there are provisions for due process for the accused<sup>30</sup> and victims' rights.<sup>31</sup> Lastly, there are rigorous qualifications for judges,<sup>32</sup> no statute of limitations,<sup>33</sup> and no reservations are allowed.<sup>34</sup>

The ICC is not intended to be a global court of international human rights where, as with the European Court of Human Rights or even the United Nations Committee on Human Rights, individuals seek redress and usually legislative change in the respondent state. What it will provide is a vehicle for deterrence and prosecution. As well, it will

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definition of aggression, shall enter into force only for those states parties which have accepted the amendment one year after they have ratified or accepted: *ibid.*, article 121(5). It provides further that the Court shall not exercise jurisdiction regarding a crime covered by an amendment, with respect to a state party that has not accepted the amendment regarding such a crime committed by that state party's nationals or on its territory. Work on defining aggression, its elements and the conditions for the exercise of jurisdiction by the ICC has begun at the Preparatory Commission (to be contrasted with the earlier Preparatory Committee) set up in accordance by a resolution at the Rome Conference and continues as of October 2000.

<sup>23</sup> *Ibid.*, article 7(1)(g) read in accordance with article 7(2)(f).

<sup>24</sup> *Ibid.*, article 8(2)(b)(xxii).

<sup>25</sup> *Ibid.*, article 8(2)(e)(vi).

<sup>26</sup> *Ibid.*, article 8(2)(e) read in accordance with article 8(2)(d).

<sup>27</sup> *Ibid.*, article 15.

<sup>28</sup> *Ibid.*, article 14.

<sup>29</sup> *Ibid.*, article 13(b).

<sup>30</sup> *Ibid.*, articles 66-67.

<sup>31</sup> *Ibid.*, article 68.

<sup>32</sup> *Ibid.*, article 36.

<sup>33</sup> *Ibid.*, article 29.

<sup>34</sup> *Ibid.*, article 120.

be a forum for assuaging the mental and physical wounds of the victims by providing justice, and for reparation, arguably leading to national reconciliation. It is hoped that the providing of accountability and ending impunity will promote peace and protect the fundamentals of human dignity.

It would be naive to suggest that there are not certain weakness in the statute. There are. Certain states and most NGOs pressed for the ICC to have universal jurisdiction or a variant thereof, over the listed crimes, but the result at the end of the day was restrictive preconditions in the final text of article 12. In fact, until the proverbial eleventh hour in Rome, article 12 was a make or break provision, and it still today retains its notoriety. It is where the remaining concentration of this article lies.

Article 12 deals with the preconditions for the actual exercise of jurisdiction. It is fundamental to the effective functioning of the ICC. The views of states were wide ranging. Article 12 is intimately related to article 5 regarding crimes within the jurisdiction of the ICC,<sup>35</sup> article 13 on exercise of jurisdiction,<sup>36</sup> article 17 on complementarity<sup>37</sup> and article 124 on the transitional provision.<sup>38</sup> In effect, these provisions dealing with the intertwined aspects of jurisdiction “were the most complex and most sensitive, and for that reason remained subject to many options as long as possible.”<sup>39</sup> They “gave rise to some of the most difficult negotiations at the Rome Conference ... and were among the very last to be settled.”<sup>40</sup> They were, beyond doubt, indicative of the necessity to adopt a package-deal. The approach taken is: firstly, that the offence *ratione materiae* is found in the list of core crimes contained in article 5 and defined in articles 6, 7, and 8; secondly, the case must be initiated in accordance with the provisions of article 13; and, thirdly, the

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<sup>35</sup> See A. Zimmerman, “Article 5” in O. Triffterer, ed., *Commentary on the Rome Statute* (Bader-Bader: Nomos Verlagsgesellschaft, 1999) 97; and H. von Hebel & D. Robinson, “Crimes Within the Jurisdiction of the Court” in R.S. Lee, *supra* note 20, 79.

<sup>36</sup> See S.A. Williams, “Article 13” in O. Triffterer, *supra* note 35, 343; S. Fernández de Guremndi, “The Role of the International Prosecutor” in R.S. Lee, *supra* note 20, 175; L. Yee, “The International Criminal Court and The Security Council: Articles 13(b) and 16” in R.S. Lee, *supra* note 20, 143; and F. Lattanzi, “The Rome Statute and State Sovereignty, ICC Competence, Jurisdictional Links, Trigger Mechanism” in F. Lattanzi & W. Schabas, eds., *Essays on the Rome Statute of the International Criminal Court*, vol. 1 (Ripa Fortara Alto: il Sirente, 1999) 51.

<sup>37</sup> See S.A. Williams, “Article 13” in O. Triffterer, *supra* note 35 at 383; and J.T. Holmes, “The Principle of Complementarity” in R.S. Lee, *supra* note 20, 79.

<sup>38</sup> See A. Zimmerman, “Article 124” in O. Triffterer, *supra* note 35, 1281.

<sup>39</sup> P. Kirsch & J.T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) 93 A.J.I.L. 2 at 8.

<sup>40</sup> E. Wilmshurst, “Jurisdiction of the Court” in R.S. Lee, *supra* note 20, 127.

préconditions for the ICC exercising jurisdiction in the specific case must be met.

From the draft statute of the International Law Commission,<sup>41</sup> to the draft statute prepared by the Preparatory Committee<sup>42</sup> and finally to the negotiations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998,<sup>43</sup> a fundamental question remained in all stages of the debate. This question related to cases other than those referred to the prosecutor by the United Nations Security Council, acting under Chapter VII of the *U.N. Charter*.<sup>44</sup> In such cases, would the ICC have inherent jurisdiction to prosecute the core crimes listed in article 5 on account of ratification or acceptance of the statute? Alternatively, would state consent be a precondition to jurisdiction and if so for which crimes, on what basis, and by which state or states?

#### IV. ARTICLE 12—THE ROAD TO ADOPTION

##### A. *The ILC Draft*

The 1994 draft statute<sup>45</sup> for an international criminal court produced by the International Law Commission was complex, and it was geared towards producing a court that would operate on a restrictive consent basis with strict Security Council control under article 23. Article 21(1)(a) provided for inherent jurisdiction in a case of genocide,

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<sup>41</sup> *Report of the International Law Commission on the Work of its Forty-sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), online: United Nations <[www.un.org/gopher-data/ga/recs/49/9450057e.txt](http://www.un.org/gopher-data/ga/recs/49/9450057e.txt)> (date accessed: 17 August 2000) [hereinafter *ILC Draft*].

<sup>42</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add1 (1998), online: United Nations <[www.un.org/law/icc/n9810105.pdf](http://www.un.org/law/icc/n9810105.pdf)> (date accessed: 17 August 2000).

<sup>43</sup> See *Bureau Discussion Paper*, Part 2 (Jurisdiction, Admissibility and Applicable Law), Committee of the Whole, U.N. Doc. A/CONF.183/C.1/L.53, 6 July 1998, 11-12 [then article 7]; and *Bureau Proposal*, Part 2 (Jurisdiction, Admissibility and Applicable Law), Committee of the Whole, U.N. Doc. A/CONF.183/C.1/L.59, 9 July 1998, 10-12 [then articles 7 bis and 7 ter].

<sup>44</sup> See *Charter of the United Nations and Statute of the International Criminal Court*, article 13(b), in *Yearbook of the United Nations, 1996*, E.K. Flynn-Connors, ed., (The Hague: Martinus Nijhoff, 1998) 1449.

<sup>45</sup> *ILC Draft*, *supra* note 41.

with no additional requirement of acceptance.<sup>46</sup> However, article 21(1)(b) stipulated a type of “ceded jurisdiction”<sup>47</sup> for crimes other than genocide referred to in article 20, including aggression, war crimes, crimes against humanity, and certain treaty crimes.<sup>48</sup> In cases of these crimes, the court could exercise jurisdiction where the complaint was brought in accordance with article 25(2), by a state party which had accepted the jurisdiction of the court over the particular crime under article 22, that is, by the custodial state and by the state in the territory of which the act or omission in question occurred. The crimes listed were, therefore, broader than article 5 of the Rome Statute. As well, in a case where the custodial state had received a request<sup>49</sup> under an international agreement from another state to surrender a person for the purposes of prosecution, unless the request was rejected, the acceptance by the requesting state was required. Under article 22, the International Law Commission draft statute detailed the modalities of acceptance by states parties. It can be classified as an “opting in” system with states specifying the crimes for which jurisdiction was accepted.<sup>50</sup> The court did not have inherent jurisdiction, therefore, based on a state ratifying or acceding but needed a special declaration by a state either at the time of becoming a party or at a later stage. The International Law Commission was of the view that this best reflected its general approach to the court’s jurisdiction,<sup>51</sup> that it is based on state consent with the “Court intervening upon the will of the States concerned, rather than whenever

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<sup>46</sup> The complaint was to be brought under *ibid.*, article 25(1), by a state party which was also a contracting party to the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, 12 January 1951, 78 U.N.T.S. 277, as envisaged by article 4.

<sup>47</sup> It must, however, be recognized that the *ILC Draft*, *supra* note 41, reduced the conditions for the exercise of jurisdiction set out in its earlier 1993 Draft: see *Report of the International Law Commission on the Work of its Forty-fifth Session*, UN GAOR, 48th Sess., Supp. No. 10, U.N. Doc. A/48/10 (1993); J. Crawford, “The ILC’s Draft Statute for an International Criminal Tribunal” (1994) 88 A.J.I.L., 140; C. Warbrick, “Current Developments: Public International Law” (1995) 44 *Int’l and Comp. L. Q.* 466; and C.L. Blakesley, “Jurisdiction, Definition of Crimes and Triggering Mechanism” (1997) 13 *Nouvelles Études Penales* 177 at 204.

<sup>48</sup> Article 20(e) and annex. Examples included the anti-terror/violence conventions such as the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 1972 Can. T.S. No 23; and the 1988 *U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1990 Can. T.S. No. 42.

<sup>49</sup> ICC, *supra* note 1, article 21(2).

<sup>50</sup> See *supra* note 41, “Commentary to Article 22.” In the 1993 Draft, the ILC Working Group had proposed two alternatives to this article, which were based on “opting out”: *ibid.* Under the “opting out” approach, the court’s jurisdiction would have been accepted by all states parties except for those crimes expressly designated.

<sup>51</sup> *Ibid.*

required for protecting the interests of the international community.”<sup>52</sup> Article 23(1) provided for referral to the court by the United Nations Security Council acting under Chapter VII of the *U.N. Charter* for crimes referred to in article 20. With respect to aggression, article 23(2) detailed the prerequisite that the Security Council determine that a state had committed aggression before a complaint of, or directly related to, an act of aggression could be brought. In conclusion, the consent regime in the International Law Commission draft statute was criticized as being “complicated and cumbersome at best,”<sup>53</sup> and likely “to cripple the proposed Court at worst.”<sup>54</sup> However, it is clear from statements made by states over the years in the Sixth (Legal) Committee of the General Assembly during the debate on the annual report of the work of the International Law Commission that the International Law Commission was cognizant that the “instrument providing for an international criminal jurisdiction [had to] take into account [then] current international realities ... that the establishment and effectiveness of the court required the broad acceptance of the statute by States.”<sup>55</sup>

### B. *The PrepCom Draft*

In both the Ad Hoc Committee<sup>56</sup> set up by the United Nations General Assembly to review the International Law Commission 1994 draft statute and in the Preparatory Committee established in 1996,<sup>57</sup> the same fundamental questions were raised. In the Preparatory Committee there was widespread, albeit not uniform, agreement that

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<sup>52</sup> M. Politi, “The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects After the First Session of the Preparatory Committee” (1997), 13 *Nouvelles Études Pénales* 115, 149. See *Report of the Ad Hoc Committee* U.N. GAOR, 50th Session, Supp. No. 22, U.N. Doc. A/50/22 (1995).

<sup>53</sup> L.S. Wexler, “First Committee Report on Jurisdiction, Definition of Crimes and Complementarity” (1997) 13 *Nouvelles Études Pénales* 163 at 173.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Report of the International Law Commission on the Work of its Forty-sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) 31, para. 48.

<sup>56</sup> *Establishment of an International Criminal Court*, UN GAOR, 49th Sess., Supp. No. 49, UN Doc. A/RES/49/53, 9 December 1994, online: United Nations <[www.un.org/documents/ga/res/49/a49r053.htm](http://www.un.org/documents/ga/res/49/a49r053.htm)> (date accessed: 16 August 2000).

<sup>57</sup> *Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/RES/50/46 (1995), online: United Nations <[www.un.org/law/icc/gares/50\\_46.htm](http://www.un.org/law/icc/gares/50_46.htm)> (date accessed: 17 August 2000).



there should be inherent jurisdiction over genocide.<sup>58</sup> However, as in the Ad Hoc Committee, there were different views on whether war crimes and crimes against humanity should be so treated.<sup>59</sup> The states that supported inherent jurisdiction for all core crimes underscored the need for it because of the gravity of the crimes. On the other hand, the states that were opposed to inherent jurisdiction stressed the consensual nature of the court and the necessity of the International Tribunal obtaining maximum state support. The maintenance of state sovereignty was key to this position. In fact, some states argued that the preconditions of state consent set out in article 21(1)(b) of the 1994 International Law Commission draft statute should have been more expansive including also the mandatory consent of the states of nationality of the accused and the victim.

In the draft report of the Intersessional Meeting in Zutphen,<sup>60</sup> which was produced to facilitate the last Preparatory Committee session, the options on jurisdictional preconditions were contained in articles 6 [21] and 7 [21 bis] as produced by the Working Groups of the Preparatory Committee.<sup>61</sup> The articles had square brackets indicating various alternatives and the diverse views of states.

### C. Rome 1998—*The Options*

Several options contained in the draft statute,<sup>62</sup> finalized at the last session of the Preparatory Committee on 3 April 1998, were put before delegations in the Committee of the Whole. Broadly speaking these options can be categorized as “the German Proposal,” “the United Kingdom Proposal,” “the Korean Proposal,” “the opt-in” regime, the “case-by-case” consent regime,<sup>63</sup> and “the United States’ Proposal.” These proposals ranged from inherent universal jurisdiction for the ICC

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<sup>58</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Session, Supp. No. 22, U.N. Doc. A/51/22, vol. 1, para. 120.

<sup>59</sup> See Politi, *supra* note 52, 149-50.

<sup>60</sup> *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands*, U.N. GAOR, U.N. Doc. A/AC.249/1998/L.13 (1998).

<sup>61</sup> *Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands*, U.N. GAOR, U.N. Doc. A/AC.249/1997/L.8/Rev. 1 (1997).

<sup>62</sup> U.N. Doc. A/CONF.183/2/Add.1, articles 6(b), 7, 9 (further option), and further option for article 7.

<sup>63</sup> For a useful background paper, see International Commission of Jurists, “Exercise of Jurisdiction and Complementarity” I.C.J. Brief No. 2 June 1998 [hereinafter *ICJ Brief*].

proposed by Germany and a broad jurisdictional basis at one end of the spectrum, to the restrictive mandatory consent of all interested states proposed by some delegations at the other. The Bureau Discussion Paper tried to narrow the options and its subsequent proposal likewise did so, while still retaining alternatives.<sup>64</sup> The final package struck a compromise. Nevertheless, the then entrenched positions of some delegations proved to be irreconcilable. The result was that the consensus approach to adoption was thwarted and an unrecorded vote was called for late on 17 July 1998 by the United States. Article 12 as adopted is not as restrictive as it could have been but it still provides for special requirements where the prosecutor acts *proprio motu*, or where states, rather than the United Nations Security Council acting under Chapter VII of the *U.N. Charter*, refer a situation to the prosecutor. These require party status for either the territorial state that is the locus of the crime or the state of nationality of the accused parties, unless non-state parties have accepted the exercise of jurisdiction by the ICC.

### 1. The German Proposal

It is a well-established rule of customary and conventional international law that certain criminal conduct is against the universal interest, offends universal conceptions of public policy and is universally condemned. The perpetrators are viewed as *hostis humanis generis*, enemies of humankind, and any state which obtains custody over them has a legitimate ground to prosecute in the interest of all states on account of universal jurisdiction over the offence, even if the state itself has no direct connection with the actual crime. Thus, jurisdiction over the person and jurisdiction over the offence are merged.<sup>65</sup> In this way such heinous crimes will not escape justice by falling into a jurisdictional vacuum. There is no requirement of consent by any other states involved in some way through territorial location of the crime, nationality of the accused or victims. The origins of the principle of universal jurisdiction can be traced to international piracy,<sup>66</sup> the slave trade,<sup>67</sup> and more

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<sup>64</sup> Kirsch & Holmes, *supra* note 39 at 9.

<sup>65</sup> See H. Lauterpacht, "The Law of Nations and the Punishment of War Crimes" (1944) 21 *Brit. Y.B. Int'l L.* 58 at 61.

<sup>66</sup> As to the right of every state to seize a pirate ship or aircraft on the high seas or otherwise outside the jurisdiction of any state and arrest the persons on board, see *United Nations Convention on the Law of the Sea*, 7 October 1982, A/CONF.62/122, article 19, in *U.N. Convention on the Law of the Sea 1982*, K.R. Simmonds, ed. (Dobbsferry, N.Y.: Oceana, 1983) [hereinafter *Law of the Sea*]; (1982) 21 *I.L.M.* 1245, *The SS Lotus* case (1927), *P.C.I.J. Series A*, No 10, 70 per Justice Moore; and

recently to war crimes, crimes against humanity,<sup>68</sup> and genocide.<sup>69</sup> The prosecutions before the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda illustrate this fundamental principle. For example, as explained in the *amicus curiae* brief presented by the United States of America in the *Tadic* case<sup>70</sup>:

The relevant law and precedents for the offences in question here—genocide, war crimes and crimes against humanity—clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have

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*Re Piracy Jure Gentium*, [1934] A.C. 586 (Sp. Ref. J.C.P.C.).

<sup>67</sup> See L.C. Green, *International Law: A Canadian Perspective*, 2nd ed., (Toronto: Carswell, 1988) at 212. The assimilation of the slave-trader to the pirate probably stems from the fact that slave trading was declared by an Imperial Statute of the British Parliament to be piracy: *An Act to Amend and Consolidate the Laws Relating to the Abolition of the Slave Trade* (1824), 5 Geo. IV, c. 113, s. 9. See *R. v. Zulueta*, 1 Cox C.C. 20 (Central Crim. Ct.); and *LeLouis* (1817), 2 Dods. 210. There is no indication that the *Slavery Convention*, 25 September 1926, 60 L.N.T.S. 253, as amended by the *Protocol*, 7 December 1953, 182 U.N.T.S. 51, or the *Supplementary Convention* of 1956, Can.T.S. No. 7, subjected alleged perpetrators to universal jurisdiction. But for rights of visit on the high seas of suspected slave-trading ships, see *Law of the Sea*, *supra* note 66, 70, article 110(1)(b).

<sup>68</sup> As with war crimes, the IMT had jurisdiction over crimes against humanity: see *IMT Charter*, article 6(c). However, because of the grammatical construction the IMT restricted its jurisdiction to crimes against humanity connected to the conduct of the war: *Trial of the Major War Criminals Before the International Military Tribunal*, vol. 1, 17; Secretary General of the United Nations, "Memorandum: The Charter and Judgment of the Nuremberg Tribunal" (1949) 66. Conversely, prosecutions by the Allied Military Tribunals acting under Control Council Order No. 10 were not so restricted: see *Alstoetter et al.* "The Justices Trial" (1947), 6 L.R.T.W.C. 1 at 45-46. Domestic consideration includes *Attorney-General of Israel v. Eichmann* (1961), 36 I.L.R. 18 at 39 (Dist. Ct.), *aff'd* (1962), 36 I.L.R. 277 at 304 (Sup. Ct.) [hereinafter *Eichmann*]; *Demjanjuk v. Petrovsky et al.* (1985), 776 F. 2d 571 at 582 (U.S.C.A., Sixth Cir.); *Fédération Nationale des Déportés et Internés Résistants et Patriotes et al. v. Barbie* (1983), 78 I.L.R. 125 at 130 (Cass. Crim.); and *R. v. Finta*, [1994] 1 S.C.R. 701. See also: *Apartheid Convention*, *supra* note 15, article 4; and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1987 Can. T.S. No. 36, article 5(2).

<sup>69</sup> *The Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277, article 4 does not provide for universal jurisdiction *per se*, but for jurisdiction by the state where the offence was committed or by an international penal tribunal. However, the *Convention* does not prohibit states from using other bases of jurisdiction and it has been argued that universal jurisdiction may be exercised on the basis of customary international law. As to what is not prohibited, see the *SS Lotus Case* (France v. Turkey) *supra* note 66, 70. Concerning genocide as a crime under customary international law, see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] I.C.J. Rep. 15 at 23; *Case Concerning the Barcelona Traction, Light and Power Company Ltd.* (Belgium v. Spain), [1970] I.C.J. Rep. 4 at 32; U.N.G.A. Res. 961; *Eichmann*, *supra* note 68; and American Law Institute, *Restatement of the Law (Third) Foreign Relations Law of the United States* (1987), Reporter's Note on §404, 256. Note L.R. Beres, "Genocide and Genocide-Like Crimes" in M.C. Bassiouni, ed., *International Criminal Law: Crimes*, vol. 1 (1986) 271 at 275.

<sup>70</sup> *The Prosecutor of the Tribunal v. Dusan Tadic* (Case No. IT-94-I-T) 20, 25 July 1995, as quoted in *ICJ Brief*, *supra* note 63 at 5.

already been the subject of international prosecutions by the Nuremberg and Tokyo Tribunals.

The German proposal centred on the proposition that if states individually have a legitimate basis at international law to prosecute the core crimes listed in article 5 on account of universal jurisdiction, then the ICC should not have the same capacity as contracting states. By adopting this proposal, states would have given to the ICC only the rights that they themselves had. This was determined to be appropriate for a permanent international criminal court being founded for the good of the international community of states as a whole. This proposal was contained in article 9(1), which was a further option of the Draft Statute before the Committee of the Whole.

The German proposal attracted strong support from some delegations<sup>71</sup> and from many of the NGOs.<sup>72</sup> The view central to this proposal was that to limit the potential of the ICC by requiring some form of state consent beyond ratification would detract from the effectiveness of the court and even its rationale and philosophical underpinnings. Thus, the impact of the German proposal would have been to give the ICC inherent jurisdiction<sup>73</sup> over the listed crimes with no need for a separate consent of interested states. As Germany indicated,<sup>74</sup> the universal principle's application would eliminate loopholes. For example, if consent of the territorial state was necessary and if genocide was committed in State X against nationals of State X and X is not a party to the statute and the United Nations Security Council does not refer the matter to the ICC acting under Chapter VII of the *U.N. Charter*,<sup>75</sup> the crime would not be within the jurisdiction of the court. Similarly, it is true that in the case of internal armed conflicts that the territorial state and state of nationality will often be one and the

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<sup>71</sup> *The Rome Treaty Conference Monitor*, 10 July 1998, 1-2 [hereinafter *Conference Monitor*].

<sup>72</sup> For example, International Committee of the Red Cross, International Commission of Jurists, Lawyers Committee for Human Rights, Amnesty International, and Human Rights Watch.

<sup>73</sup> Note that Germany also called this "the German version of automatic jurisdiction": statement by H.-P. Kaul, Acting Head of the German Delegation in the CW, 9 July 1998, 1. Thus, Germany used "inherent" and "automatic" to mean that the ICC was vested with universal jurisdiction upon ratification by states. This must be contrasted with the term "automatic" as used in the Korean Proposal, the United Kingdom Proposal, the Bureau Proposal, and in the final text of the statute where although acceptance of the court's jurisdiction is required in different manners it does not require a second state consent as do the opt-in and state consent regimes.

<sup>74</sup> Statement by H.-P. Kaul, Acting Head of the German Delegation, Rome Conference, 19 June 1998.

<sup>75</sup> *ICC*, *supra* note 1, article 13 (b).

same. The ICC would have jurisdiction only if that state had long before the conflict become a state party or, if not, through political domestic parties agreeing *ad hoc* or, again, if the Security Council acted under Chapter VII.<sup>76</sup> As well, the restrictions of state consent would mean that even where the custodial state was a party to the Rome Statute and wanted to surrender the accused to the ICC, the court would not be able to exercise jurisdiction without the consent of the other involved states.

If the German proposal had been marketable in Rome, the end result would have been the deletion of article 12 (article 7 in the Draft Statute) on preconditions. Related to this issue, what must be emphasized is the safeguard contained in article 17 on complementarity. The ICC would have exercised such universal jurisdiction only where a national system was unwilling or unable to investigate and/or prosecute effectively. Therefore, the universal principle would not have divested national criminal courts of their primary role in prosecutions of listed crimes.

Clearly, the universal principle would have given jurisdiction to the ICC if the core crimes were committed in the territory of any state, whether or not a party to the statute. However, non-state parties would have been under no international legal obligation to cooperate with the court. Therefore, the second prong of the German Proposal contained in article 9(2) Further Option, was that non-state parties may accept the obligation to cooperate on an *ad hoc* basis, with respect to any listed crime.<sup>77</sup>

## 2. The United Kingdom Proposal

The United Kingdom<sup>78</sup> in Further Option for article 7(1) provided for jurisdiction by states parties of the ICC for crimes listed in article 5, with the same in-built safeguard of complementarity. However, in article 7(2), where the situation was referred by a state party to the court or where the prosecutor initiated a prosecution *proprio motu*, the further requirement was that both the custodial state and the state where the crime occurred consented to the jurisdiction of the ICC by being

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<sup>76</sup> J.F. Bertram-Nothnagel, *Report to the Union Internationale des Avocats*, 12 August 1998, 10.

<sup>77</sup> Contrast the statutes of the Ad Hoc Tribunals for the Former Yugoslavia, *supra* note 4, and Rwanda, *supra* note 5, acting under Chapter VII of the *U.N. Charter*, which obligate all states to cooperate.

<sup>78</sup> U.N. Doc. A/AC.249/WG.3/DP.1.

states parties. Concern was expressed that acquisition of cumulative consents would be difficult.<sup>79</sup>

### 3. The Korean Proposal

The Republic of Korea's Proposal<sup>80</sup> was a compromise position. Korea did not favour the inherent universal jurisdiction approach of Germany in that it overlooked the fact that the ICC "is a treaty body to be created through the consent of States," and that it "is State consent that justifies the jurisdictional link between the States Parties and the Court."<sup>81</sup> Neither did it favour the state consent regime to be discussed below as that would require consent at two stages. The Korean view was that for the ICC "to be as effective as possible, State consent should be called for only once, when a State became party to the Statute." Thus, by becoming a party to the statute a state is considered to have accepted the jurisdiction of the court. The Korean Proposal viewed this as automatic rather than inherent jurisdiction. The jurisdictional nexus, therefore, was that any one or more of four directly involved states have consented to the ICC exercising jurisdiction over a case by being a state party: either the territorial state, the custodial state, the state of nationality of the perpetrator or the state of nationality of the victim. The Korean Proposal thus distinguished itself from the United Kingdom Proposal by allowing for selective consent of one of the four states and by a conceptual difference in that it did not view ICC jurisdiction as based on universality but on state consent upon ratification or agreement. The German Delegation supported the Korean initiative and viewed it as finding "the middle of the road mood of the participants"<sup>82</sup> of the Conference and being "court friendly."<sup>83</sup> This proposal enjoyed wide support but was not popular with those states that had wanted inherent

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<sup>79</sup> See, for example, Lawyers Committee for Human Rights, "Exercise of ICC Jurisdiction: The Case for Universal Jurisdiction" (1998) 1:8 Int'l Crim. Ct. Briefing Series 5.

<sup>80</sup> U.N. Doc. A/CONF.183/C.1/L.6, 18 June 1998. A similar proposal had been made earlier by Sweden: *ICJ Brief, supra* note 63, 4.

<sup>81</sup> *Conference Monitor, supra* note 71, where it states that 18 states supported an opt-in regime.

<sup>82</sup> See statement by H.-P. Kaul, Acting Head of the German Delegation in the CW, 9 July 1998; and H.-P. Kaul, "Special Note: The Struggle for the International Criminal Court's Jurisdiction" (1998) 6 *Eur. J. of Crime, Crim. L. & Just.* 364 at 369.

<sup>83</sup> *Ibid.*

jurisdiction of the ICC without any such consent.<sup>84</sup> Neither was it acceptable to many states who wanted a second layer of state consent.<sup>85</sup>

#### 4. State “opt-in” Proposal

This proposal is found in article 6(2), article 7, option 1, and article 9, option 1 of the Preparatory Committee’s Draft Statute that was before the Rome Conference. This is markedly different from the previous proposals as it required an actual second consent in addition to the requirement of being a party to the statute. This declaration of consent over specified crimes could have been placed at the time of ratification or at a later stage. The thrust of the proposal was that before the ICC could assume jurisdiction, as many as five states potentially would have had to have consented to the exercise of jurisdiction by the court over the crime in question: the custodial state, the territorial state, the state that had requested extradition of the person from the custodial state, unless the request was rejected, the state of nationality of the accused and the state of nationality of the victim. This approach clearly would have rendered the ICC ineffective in the majority of cases. The ICC would have had a narrower competence under this proposal than states have currently under conventional and customary international law to prosecute domestically, where the consent of other involved states is not necessary.<sup>86</sup>

#### 5. Case-by-case Consent Proposal

The case-by-case approach contained in article 7, option 2 of the draft statute would have needed states to consent for the specific case. The ICC would in each case have needed the specific consent of the states outlined above in the opt-in Proposal. Ratification would, therefore, have had little meaning in practical reality as states would have been able to render immune from consideration of the court any individual when it was deemed politically desirable. This proposal would have rendered the ICC ineffective in many cases.

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<sup>84</sup> *Terra Viva (The Daily Conference Paper at the Rome Conference)*, “Seoul Floats a Compromise on Jurisdiction” 22 June 1998, No. 6, 7. See also *Conference Monitor*, *supra* note 71, 10 July 1998, 1, where it states that 79 per cent of the states supported the Korean Proposal.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Lawyers Committee for Human Rights*, *supra* note 79.

In effect, both the opt-in and case-by-case proposals would have been jurisdiction “à la carte.” In practical terms this would have resulted in a significantly weakened court with most often the ICC having jurisdiction only when the United Nations Security Council referred a situation to it, not to mention the potential problem due to the veto power of the five permanent members of the Security Council. This would have been particularly so if both proposals had been adopted and states had preferred to follow the case-by-case approach. States as a result could have ratified with no intention of ever allowing cases to go before the court. This would have created an ineffectual court and as well would have “foment[ed] selectivity and arbitrariness.”<sup>87</sup>

## 6. The United States’ Proposal

Insofar as a case was referred to the ICC by a state party or the prosecutor had initiated an investigation, the United States supported<sup>88</sup> article 7, which affirmed that the consent of the territorial state and the state of nationality of the accused person, or at a minimum only the consent of the state of nationality,<sup>89</sup> was fundamental. The United States insisted that the ICC have no jurisdiction over the nationals of states that had not become a party to the statute. It was argued that to do so would violate article 34 the 1969 *Vienna Convention on the Law of Treaties*,<sup>90</sup> as treaties cannot be binding on non-party third states. The position was that it would not be acceptable for United States citizens to be accountable in a court not accepted by the United States. The United States made it clear that it could not adhere to a text that allowed for United States forces operating abroad to be brought even conceivably before the ICC, even where the United States had not become a party to the statute. The United States’ position was that this would derogate from its ability to act as a major player in multinational humanitarian and peacekeeping operations. Protection against frivolous and arbitrary

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<sup>87</sup> H. Duffy, “Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court” in W. Taylor, D. PoKempner & M. McClintock, eds., *Section B: The Jurisdiction of the Court* (Human Rights Watch, 1998), online: Human Rights Watch, <[www.hrw.org/hrw/reports98/icc/index.htm#TopOfPage](http://www.hrw.org/hrw/reports98/icc/index.htm#TopOfPage)> (date accessed: 14 August 2000).

<sup>88</sup> U.N. Doc. A/CONF.183/C.1/L.70, 14 July 1998.

<sup>89</sup> See testimony of Ambassador D. Scheffer, Head of the United States Delegation in Rome, before Senate Foreign Relations Committee, 23 July 1998.

<sup>90</sup> *Vienna Convention on the Law of Treaties*, 27 January 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].



charges and other forms of inappropriate investigations and prosecution was called for. On 16 July 1998 the United States introduced an amended proposal<sup>91</sup> which concerned article 7 ter in the Bureau Proposal with respect to acceptance by non-state parties. It provided that the ICC would only have jurisdiction over such states with respect to acts committed in their territories or committed by officials or agents of such states “in the course of official duties and acknowledged by the State as such, only if the State or States in question have accepted jurisdiction in accordance with this article.” The United States had also argued for automatic jurisdiction of the court for genocide, but the ICC had implemented a ten year transitional period following the entry into force of the statute, during which any state party could opt out of the court’s jurisdiction over war crimes and crimes against humanity.

Of course, the United States’ position still left open the referral of a situation by the United Nations Security Council acting under Chapter VII of the *U.N. Charter* as provided for in article 13(b) of the statute, subject of course to the veto of one of the five permanent members of the Security Council. This, in the United States’ view, was the only way to impose the court’s jurisdiction on a non-party state.<sup>92</sup> This proposal would have resulted in an ICC controlled by the Security Council, a type of permanent *ad hoc* criminal tribunal.<sup>93</sup>

This proposal, which contains the indispensable requirement of the acceptance of the state of nationality of the accused, was not acceptable to the overwhelming majority of states as it was seen as causing a probable paralysis of the ICC. The United States’ concerns were not assuaged by the provisions on complementarity contained in article 17 of the statute or in the provisions in article 98(2) included at the insistence of the United States, dealing with judicial cooperation that requires consent of the sending state as a precondition for the surrender to the ICC by the “host” state of persons present in that state pursuant to international agreements.<sup>94</sup>

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<sup>91</sup> U.N. Doc. A/Conf.183/C.1/L.90, 16 July 1998.

<sup>92</sup> Scheffer, *supra* note 89.

<sup>93</sup> J. Podgers, “War Crimes Courts Under Fire” (1998) September A.B.A.J. 64 at 67.

<sup>94</sup> See, for example, *North Atlantic Status of Forces Agreements*, 1951, 1953 Can. T.S. No. 13.

## 7. The Bureau Compromise

The Bureau Discussion Paper<sup>95</sup> “had narrowed the range of options but had deliberately taken a cautious approach.”<sup>96</sup> The Proposal<sup>97</sup> retained several options. Both of these had dropped the German Proposal.<sup>98</sup> The Bureau Proposal in article 7(1) adopted the Korean Proposal for genocide alone. For war crimes and crimes against humanity, three options were presented in article 7(2): (1) the Korean Proposal, (2) the acceptance by the territorial and custodial states and (3) the acceptance by the state of nationality of the accused alone. Some states voiced strong objections against the Korean Proposal, stating that it was quasi-universal jurisdiction. It gave the ability to four states including the custodial state as a state party to give the court jurisdiction. However, this would in reality have been in keeping with the ability at international law of the custodial state to prosecute itself for international crimes, *stricto sensu*. Other states viewed the other options as too restrictive, in particular option 3 based on active nationality. As well, article 7(bis), on acceptance of jurisdiction in both the discussion paper for treaty crimes (and possibly for one or more of the core crimes) and in Option 2 of the Proposal for crimes against humanity and war crimes, was controversial because it replicated the opt-in regime. Article 7(bis) in Option 1 reproduced the automatic jurisdiction over all core crimes by states parties. Thus, as late as 10 July 1998, with only one week left, there was no consensus. The United States and other states emphasized that “universal jurisdiction or any variant of it” was unacceptable.<sup>99</sup>

The result was the introduction into the final package by the Bureau of a new article on preconditions on 17 July 1998, the present article 12 in the statute. It reads:

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<sup>95</sup> U.N. Doc. A/CONF.183/C.1/L.53, 6 July 1998, 11-13.

<sup>96</sup> Kirsch & Holmes, *supra* note 39, at 9.

<sup>97</sup> U.N. Doc. A/CONF.183/C.1/L.59, 10 July 1998, 10-12.

<sup>98</sup> According to *Conference Monitor*, *supra* note 71, 10 July 1998, 2, “23 states displayed their dismay that universal jurisdiction was not reflected.” Note also the reaction of the German Delegation, as expressed in a statement by H.-P. Kaul, Acting Head of Delegation in the CW, 9 July 1998, which was also one of dismay and reiterated the belief that their approach was legally sound “and acknowledged in international legal doctrine as well as through extensive state practice”: see statement by H.-P. Kaul, *supra* note 82, 370.

<sup>99</sup> P. Kirsch, “The Rome Conference on the International Criminal Court: A Comment” Nov. - Dec. 1998 A.S.I.L. Newsletter, online: American Society of International Law, <[www.asil.org/newsletter/novdec98/home.htm](http://www.asil.org/newsletter/novdec98/home.htm)> (date accessed: 14 August 2000).

## Preconditions to the exercise of jurisdiction:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
  - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft:
  - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

This article combines state acceptance of jurisdiction for the crimes of genocide, crimes against humanity, war crimes, and aggression when defined, with preconditions for the exercise of jurisdiction by the ICC, in cases where a situation is referred to the prosecutor by a state party or where the prosecutor has initiated an investigation *proprio motu*. It allows by state parties the disjunctive acceptance of one or more of the territorial state or the state of nationality of the accused. The transitional provision contained in article 124 was also part of the accommodation made to gain France's agreement to the statute.

As discussed above, this complex and controversial issue resulted in a compromise put to the Committee of the Whole in the final package. The compromise was between the "like-minded states," who had for the most part a preference for inherent jurisdiction or for a list of alternative states (territorial state, state of nationality of the accused or the victim, and the custodial state) where it was sufficient that one had accepted the jurisdiction of the court by ratifying, and the "non-like-minded states." The latter insisted on either state party acceptance of the state of nationality of the accused or the even stricter requirement that there be acceptance conjunctively from a list of states as had been proposed in the ILC draft statute.<sup>100</sup> Article 12 as adopted by the conference is the accommodation that was struck. It reduced the preconditions to the territorial state or the state of nationality of the

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<sup>100</sup> At the outset of the Conference many delegations including China, France, India, Mexico, and several non-aligned states had supported the "state consent" proposal, requiring consent even from states parties for each prosecution.

accused being states parties. These are the two primary bases of jurisdiction over the offence in international criminal law.<sup>101</sup>

a) *State with territorial jurisdiction*

The territorial basis of jurisdiction is a manifestation of state sovereignty.<sup>102</sup> A state has plenary jurisdiction over persons, property, and conduct occurring in its territory, subject only to obligations or limitations imposed by international law.<sup>103</sup> This is the main working rule in international criminal law. The territory of a state includes its land mass, internal waters, the twelve nautical mile territorial sea, and the airspace above all of the former. Jurisdiction is recognized under customary and conventional international law as also extending to conduct committed on board maritime vessels and aircraft registered in a state.<sup>104</sup> Thus if a listed crime is committed in State A, a state party to the Rome Statute by a national of State B, whether or not State B is a state party, State A will have enabled the ICC to take jurisdiction, whether the alleged offender is present in State A or in another custodial state party.<sup>105</sup> The ICC is not, as has been argued by the United States, therefore taking jurisdiction potentially over non-state

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<sup>101</sup> The various United Nations conventions dealing with international terrorism use these bases of jurisdiction along with passive personality and the presence of the accused (custodial state) to allow for extradition or prosecution by domestic criminal courts: see *International Convention Against the Taking of Hostages*, 17 December 1979, 1316 U.N.T.S. 205, article 6 [hereinafter *Hostages Convention*]; and *International Convention on the Suppression of Terrorist Bombings*, 15 December 1997, U.N. Doc. A/RES/52/164, article 6.

<sup>102</sup> *Compania Naviera Vascongado v. Steamship Cristina*, [1938] A.C. 485 at 496-97. The ambit of the territorial principle has been interpreted in some domestic courts to allow for criminal prosecution when a significant portion of the elements, if not all, of the crime occur in the state. It is a real and substantial-link test that is applied and it is in accord with the principle of international comity: see *Libman v. R.*, [1985] 2 S.C.R. 178.

<sup>103</sup> See *North Atlantic Status of Forces Agreement*, 1951, 1953 Can. T.S. No. 13; and *Exchange of Letters Constituting an Agreement Between the United Nations and the Government of the Republic of Cyprus Concerning the Status of the United Nations Peace-Keeping Force in Cyprus*, 31 March 1964, 492 U.N.T.S. 57.

<sup>104</sup> See, for example, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (1988), in 27 *International Legal Materials* 672, article 6(1)(a). Note L. Sadat Wexler, ed., "Model Draft Statute for the International Criminal Court" (1998) 13 *Nouvelles Etudes Penales* 25, includes also the state of registration of space craft or space stations.

<sup>105</sup> Once the preconditions of ICC, *supra* note 1, article 12(2) have been met other states parties are obliged to cooperate with the ICC: see C. Kress, "Article 86," in O. Triftterer, *supra* note 35, 1051, on the general obligation to cooperate; and C. Kress & K. Prost, "Article 89," in O. Triftterer, *supra* note 35, 1071, on the surrender of persons to the court.

parties. It is not violating article 34 of the *Vienna Convention on the Law of Treaties*.<sup>106</sup> On a domestic level, it is accepted that when an alien commits a crime, whether a domestic common crime or an international crime, on the territory of another state, a prosecution in the latter state is not dependent on consent of the state of nationality or its being a state party to a pertinent treaty criminalizing the conduct.<sup>107</sup> It is thus not a case of a non-state party being bound, but rather the individual being amenable to the jurisdiction of the ICC because of alleged crimes committed in the territory of a state party.

b) *State of nationality of the accused*

The active nationality basis of jurisdiction over the offence is well entrenched in the domestic law of the majority of states. By virtue of such state practice and *opinio juris* it is a permissive rule derived from international custom that establishes extraterritorial jurisdiction.<sup>108</sup> Civil law countries provide for its use extensively and relate it to common crimes of a domestic nature as well as to crimes against the common interests of states. It is a corollary to their rules concerning the non-extradition of nationals. Common law states, on the other hand, use it almost exclusively for international crimes that comprise the core crimes in article 5 of the Rome Statute and international treaty crimes such as are contained in the international terrorism conventions.<sup>109</sup> They have not, however challenged its use more generally by other states.

c) *Non-state parties*

In the case of non-state parties article 12(3) follows the ILC draft statute, the Preparatory Committee draft statute,<sup>110</sup> and the Bureau

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<sup>106</sup> *Vienna Convention*, *supra* note 90.

<sup>107</sup> See, for example, *U.S. v. Fawaz Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), where the United States prosecuted for hijacking and hostage-taking that occurred in Lebanon on the basis of the passive personality principle. Lebanon, the state of nationality of the accused was not a party to the *Hostages Convention*, *supra* note 101, or the 1970 *Hague Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105.

<sup>108</sup> *The Steamship Lotus* (France v. Turkey) (1927), P.C.I.J. Ser. No. 10.

<sup>109</sup> See *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, 1977 Canada T.S. No. 43, article 3(1)(b).

<sup>110</sup> See article 7(4), article 9, option 1, para.3, option 2, para. 4, and further option para. (2).

Discussion Paper<sup>111</sup> and Proposal<sup>112</sup> in providing that such a state, if its acceptance is required under the preceding paragraph may declare *ad hoc* its acceptance with respect to the crime in question.<sup>113</sup> Such a state is then obligated to cooperate with the ICC in accordance with Part 9 of the statute. Thus, the statute does not infringe upon the sovereignty of non-party states and is in compliance with customary and conventional rules on the law of treaties. It is, therefore, a misconception that the statute binds non-parties. Rather, it uses the traditionally accepted territorial and active nationality bases of jurisdiction over the offence coupled with the additional *ad hoc* consent process in this paragraph.

Those states that had lobbied for the opt-in acceptance and the preconditional conjunctive approach or the state of nationality of the accused alone remained opposed. From the outset issues of jurisdiction had been a key concern for the United States.<sup>114</sup> For the United States, it was the four words "one or more of" that caused the ultimate dissent. It was on this issue that the United States proposed an amendment during the last hours of the Conference in the Committee of the Whole. The amendment was similar to an earlier United States proposal discussed above.<sup>115</sup> The amendment was resoundingly defeated by a no-action motion.<sup>116</sup> In the plenary session that followed immediately, the United States requested an unrecorded vote. The result was 120 votes in favour, to 7 against, with 21 abstentions. Those voting against the motion included China, Israel, and the United States.<sup>117</sup>

## V. CONCLUSION

The text of article 12 is a product of compromise. It endeavours to satisfy the many interests that were in operation in the Rome Conference and before. The content is far from perfect but was all that was possible at the time. It is a serious gap that the acceptance of the

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<sup>111</sup> Article 7 ter.

<sup>112</sup> Article 7 ter.

<sup>113</sup> ICC, *supra* note 1, article 12(3).

<sup>114</sup> *Conference Monitor*, *supra* note 71, 18 July 1998, No. 26, 2.

<sup>115</sup> U.N. Doc. A/CONF.183/C.1/L.90.

<sup>116</sup> The motion was proposed by Norway. Sweden and Denmark spoke for the motion and China and Qatar against it. The motion was adopted with 113 in favour, and 17 against, with 25 abstaining: see ICC, *supra* note 1, article 7(1)(g) read in accordance with article 7(2)(f).

<sup>117</sup> Only these three states publicly stated that they voted against and gave their reasons.

statute by the custodial state does not act as a precondition for the exercise of jurisdiction by the ICC.<sup>118</sup> It is this provision that would have ensured that atrocities will not go unpunished if the territorial state or state of nationality are not parties or do not consent *ad hoc* and there is no United Nations Security Council referral. In all probability it may be assumed that the states likely to be the places where such crimes will be committed or whose nationals are suspect will not be among the first to ratify or otherwise agree to be bound by the statute. Initially, at least once the ICC is operative, after the 60 ratifications have been deposited, reliance will have to be in the hands of the Security Council. Unfortunately, article 12 means that the ICC lacks inherent universal jurisdiction (the German Proposal) or automatic jurisdiction (the Korean Proposal), for it requires the acceptance of the custodial state as a state party. It is ironic that many states that had initially promoted strict preconditions for the exercise of the ICC's jurisdiction were adamant after article 12 passed that the article lacks universal and automatic jurisdiction.<sup>119</sup> The result is that the ICC does indeed have less jurisdiction than domestic courts of any state would have as a result of not adopting the German or Korean Proposal to prosecute persons accused of the core crimes.

It is safe to say that the ICC will come into operation within the next two years or so. As of October 2000 there are 114 states that have signed and 21 that have ratified, including Canada.<sup>120</sup> Now that the rules of evidence and procedure and elements of crimes have been completed since 30 June 2000, it seems certain that many more states will ratify. As well, apart from awaiting the conclusion of the Preparatory Commission established since Rome on these issues, many states are in the process of enacting domestic legislation, or as a preliminary step debating what is, in substance, involved in order to be able to fulfill their obligations to

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<sup>118</sup> Lawyers Committee for Human Rights, "The Rome Treaty for an International Criminal Court: A Brief Summary of the Main Issues," 2:1 International Criminal Court Briefing Series, online: Lawyers Committee for Human Rights <[www.lchr.org/ficc/v2n1prin.htm](http://www.lchr.org/ficc/v2n1prin.htm)> (date accessed: 15 August 2000).

<sup>119</sup> T. Meron, "The Court We Want" *Washington Post* (13 October 1998), reprinted in A.S.I.L. Newsletter Nov.-Dec. 1998, 9, online: American Society of International Law, <[www.asil.org/newsletter/novdec98/home.htm](http://www.asil.org/newsletter/novdec98/home.htm)> (date accessed: 14 August 2000); and D. Scheffer, "Americas's Stake in Peace, Security and Justice," Sept.-Oct. 1998 A.S.I.L. Newsletter, online: American Society of International Law, <[www.asil.org/newsletter/septoct98/home.htm](http://www.asil.org/newsletter/septoct98/home.htm)> (date accessed: 14 August 2000).

<sup>120</sup> Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, Belize, Belgium, Botswana, Canada, France, Gabon, Iceland, Lesotho, Luxembourg, Mali, New Zealand, Sierra Leone, Venezuela, and Tajikistan have already ratified the agreement.

cooperate with the ICC in good faith. This process necessarily takes time. In some states it requires not ordinary domestic legislation but constitutional change. Among the contentious issues are the surrender to the ICC of nationals by those states that ordinarily do not extradite such persons, the negation of immunity of heads of state, other high ranking government officials, and even members of parliament and the acceptance of life imprisonment as a penalty.

In the Preparatory Commission sessions during 1999 and March and June 2000, the United States together with other participating states worked actively and constructively. Suggestions made after Rome that the preconditions to jurisdiction could be changed by the states parties in a "binding interpretative statement" were not pressed.<sup>121</sup> This was also the case with the suggestion that a declarative statement could be made whereby third party jurisdiction would be suspended in the case where the state of nationality of the alleged offender is both able and willing to assume responsibility for criminal conduct which amounted to an official act.<sup>122</sup> This would, it has been argued, have simply moved "the problem from the level of individual responsibility to that of exclusive state responsibility" and consequently involve "a total change of the parameters of responsibility"<sup>123</sup> that were envisaged in Rome. The United States appeared to have realized that to seek an amendment of the Rome Statute to abrogate the perceived problem that it has with article 12 was unrealistic and would not meet with support. However, before the March 2000 Preparatory Commission, the United States made a *démarche* to other states in their capitals in which it recalled that it had identified in its mind a number of flaws in the statute, but it was of the view that they could be dealt with in the rules of evidence and procedure and elements of crimes. It reiterated its fundamental difficulty with article 12 and how it would make it nearly impossible for the United States to give the ICC any measure of support if the statute remained as it is. It focussed its concerns again on the official decisions of a sovereign non-state party being subjected to the jurisdiction of the court in cases where states that oppose United States' actions abroad make unfounded accusations. However, it was also the position of the United States that it shared the concern of other states that any provision dealing with the consent of such a non-state party should not

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<sup>121</sup> R. Wedgwood, "The International Criminal Court: An American View" (1999) 10 Eur. J. Int'l L. 93 at 102.

<sup>122</sup> *Ibid.*

<sup>123</sup> G. Hafner, K. Boon, A. Rübesame & J. Huston, "A Response to the American View as Presented by Ruth Wedgwood" (1999) 10 Eur. J. Int'l L. 108 at 119.



act as a vehicle for the alleged perpetrators of grave atrocities to escape justice before the new court. This concern is indeed valid, but it is difficult to envisage how distinctions can be drawn between non-state parties, so-called “rogue” states or otherwise. All non-state parties could use the United States argument. What the United States was promoting was a clarification of the preconditions issue in a supplemental document to the Rome Statute and in a rule of procedure. The supplemental document envisaged was the Relationship Agreement Between the United Nations and the ICC. This Relationship Agreement did not have to be completed on 30 June 2000. However, the rules of procedure and evidence had to be and were in fact so completed, by general agreement.<sup>124</sup> The United States did not at that juncture formally table such a proposal but rather informally circulated it at the March session. The proposal for the procedural rule related to article 98(2) of the statute dealing with cooperation and consent to surrender to the ICC. Article 98(2) reads:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States proposal required an addition to the rule of procedure to article 98. The currently informal proposal reads:

The Court shall proceed with a request for surrender or an acceptance of a person into the custody of the Court only in a manner consistent with its obligations under the relevant international instrument.

This then related to a future proposal by the United States for the supplemental document to be included in the Relationship Agreement Between the United Nations and the ICC which would utilize the possibility presented in the above proposal to the rules of procedure. This proposal read:

The United Nations and the International Criminal Court agree that the Court may seek the surrender or accept custody of a national who acts within the sovereign direction of a U.N. Member State, and such directing State has so acknowledged, only in the event (a) the directing State is a State Party to the Statute or the Court obtains the consent of the directing State, or (b) measures have been authorized pursuant to Chapter VII of the U.N. Charter against the directing State in relation to the situation or actions giving rise to the alleged crime or crimes, provided that in connection with such authorization the Security Council has determined that this subsection shall apply.

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<sup>124</sup> See U.N. Doc. PCNICC/2000/L.3/Rev.1; and U.N. Doc PCNICC/2000/INF/4/Add.1-2.

This was acutely controversial. Relying on an overly wide interpretation of article 98(2), that would have meant that international agreements would have included not only bilateral extradition treaties between states and States of Forces Agreements, but also agreements entered into by the ICC itself. The position on this later articulated by the United States at the June session was that the statute did not limit the relevant agreement and such are yet to be envisaged and negotiated. Obviously, the best case scenario is for the United States to become a state party. Nevertheless, although many states want to keep the United States positively engaged in the process of bringing the ICC into operation, among the like-minded states and others there were definite concerns, notably not wanting the delicate balance achieved in Rome to be circumvented through an oblique back-door rule of procedure to be followed at some later stage by the Relationship Agreement article. In reality, the end result would be that the ICC would only have jurisdiction with the consent of the state of nationality of the accused or the United Nations Security Council. The United States proposal appeared to remove or at least restrict the jurisdictional provision concerning the state where the offence was committed. As was discussed earlier, article 12 is in fact much narrower than what most states wanted in Rome and the proposal to produce a "procedural fix" to enable the United States to cooperate with the ICC, at a minimum as a "good neighbour"<sup>125</sup> created more concerns about further restrictions. Furthermore, there will be implications if war crimes and crimes against humanity committed "within the sovereign direction of a U.N. Member State" are not in accord with the principle of international law as encapsulated in the Nuremberg Principles, which affirm that the "act of state" plea is no defence.

The mandate of the Preparatory Commission is not to revise the Rome Statute but to elaborate on it and thereby to encourage general support by states. The rules of procedure and evidence must be consistent with the statute. Actual amendments to the statute can only be done by a review conference of the Assembly of States Parties after the expiry of seven years from the entry into force of the statute.<sup>126</sup> Another major fear was that the United States' proposal would encourage certain states not to ratify as it would give them the power to block the ICC's jurisdiction and that it would also negate a key compromise in Rome concerning the role of the Security Council in that

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<sup>125</sup> Statement by Secretary of State Madeleine Albright, as reported in *The Desert News [Salt Lake City]* (6 May 2000) A4.

<sup>126</sup> ICC, *supra* note 1, article 121.

the ICC would be subject to the veto of the five permanent members of the Security Council over prosecutions of non-state party nationals, which would undermine the legitimacy of the court as an impartial and independent judicial body.

Thus, the major problem was how to accommodate the concerns of the United States without undermining the integrity, credibility and effectiveness of the ICC. With such a “procedural fix,” the United States indicated that its “good neighbour policy” towards the ICC could “mature over the years into the real possibility of signature and ratification.”<sup>127</sup>

At the Preparatory Commission in June 2000 the United States formally introduced its proposal but concentrated solely on the addition to the rule of procedure for article 98(2). The United States position as presented in the debate was that the proposal for Rule 9.19(2) was “a separate and distinct proposal,” which “stood on its own merits” and “should not be interpreted as requiring or in any way calling for the negotiation of provisions in any particular international agreement by the Court or any other international organization or State.”<sup>128</sup>

The June proposal by the United States was refined and stated to stand alone and separate from any provision in the Relationship Agreement to be negotiated at the 27 November 2000 - 8 December 2000 session. Many other delegations regarded this as in contradiction to the two-step United States March proposal. The accommodation that was struck in the final days of the June session to resolve the concerns of the United States was contained in Rule 9.19(2) which provides:

The Court may not proceed with a request for the surrender of a person without the consent of a sending State, if under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.<sup>129</sup>

At the insistence of the European Union and the like-minded group of states, there was included an understanding in the Proceedings of the Preparatory Commission’s June session that Rule 9.19 should be interpreted not to require or in any way call for the negotiation of provisions in any agreement by the court itself or by another

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<sup>127</sup> Statement of Ambassador David Scheffer, as reported in *The Desert News [Salt Lake City]* (6 May 2000) A4.

<sup>128</sup> U.S. Statement on Proposed Rule 9.19(2) by Amb. D. Scheffer, U.N. Doc. PCNICC/2000/WGRPE(9)DP. 4, 19 June 2000.

<sup>129</sup> U.N. Doc. PCNICC/2000/WGRPE/L.14/Add.2.

international organ or state. This was viewed as a carefully balanced means of getting around a very difficult issue. As was discussed earlier, the rules of evidence and procedure cannot change the Rome Statute itself and in the event of any conflict, the Rome Statute will prevail. This is implicit in the reference in Rule 9.19(2) to article 98 of the Rome Statute. The rules of evidence and procedure are “an instrument for the application of the Rome Statute ... to which they are subordinate in all cases.”<sup>130</sup>

This accomodation enabled the United States to be a party to the consensus adoption of the rules of evidence and procedure at the culmination of the June 2000 session. However, the future path is far from uncertain. At the upcoming Preparatory Commission session in New York that runs from 27 November 2000 to 8 December 2000, it is apparent that the United States will return to the table to negotiate an exception by way of the Relationship Agreement between the court and the United Nations. It remains to be seen how other states will react to, and deal with this. At the present time it is difficult to envisage how a resolution of this issue will be achieved.

This being said, the momentum is building and efforts worldwide are being made to ensure ratification and domestic implementation and consequent early entry into force of the Rome Statute. It would be an affront to humanity, the international rule of law and to the modern struggle since 1947 to establish a permanent international criminal court, if it was to be rendered a nullity by procedural manoeuvres.

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<sup>130</sup> U.N.Doc. PCNICC/2000/INF/3/Add.1, 12 July 2000, 1.