HUMAN RIGHTS WATCH

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SUMMARY OF THE KEY PROVISIONS OF THE ICC STATUTE

Introduction

On July 17 1998, after three years of discussions and a tough final five-week negotiating session, governments assembled for the conclusion of the diplomatic conference in Rome voted to establish a permanent International Criminal Court (ICC). In a move that will transform the human rights landscape, the international community of states agreed, by an overwhelming 120 in favor, 21 abstentions and only 7 against, to embrace this essential institution for bringing the world's worst human rights criminals to justice. When it receives the 60 ratifications necessary for its entry into force, an ICC will be created with enormous potential as an instrument of international justice, and as a deterrent against future atrocities.

In the Introduction to Justice in the Balance, Recommendations for an Effective and Independent ICC, the Human Rights Watch commentary to the Rome conference, we identified seven benchmarks that must be met "if the ICC is to be an independent, fair and effective judicial institution." These were: 1) a jurisdictional regime free of any state consent requirement; 2) independence from the Security Council; 3) an ex officio prosecutor; 4) qualified deference to state claims of jurisdiction (complementarity); 5) authority over war crimes whether committed in international or non-international conflicts; 6) clear legal obligation for state parties to comply with court requests for judicial cooperation; and 7) the highest standards of international justice respecting the rights of the accused and appropriate protection for witnesses.

Assessing the Conference results with these criteria in mind, we have a very good statute. Even the most serious weakness - the jurisdictional regime that requires, in the absence of a Security Council referral, that either the state of territory or nationality of the accused to be a party or consent - can be minimized by widespread ratification. While it is not perfect, its provisions provide a workable starting point for a court that could make a real and lasting difference.

It is a historic step forward for the protection of human rights and enforcement of international law.

This paper summarizes the key provisions of the statute, addressing firstly the above-mentioned seven benchmarks followed by other important aspects of the treaty, with brief commentary on the debate that gave rise to the most controversial of its provisions.

1. ACCEPTANCE OF JURISDICTION

The provisions on jurisdiction lie at the heart of the ICC treaty. They formed the essential elements of the package deal that was struck during the final days of the Rome conference.

When a state ratifies the treaty it thereby accepts the Court's jurisdiction over all crimes within its scope. There is therefore no possibility of a state party accepting jurisdiction over certain crimes and not others, or being required to consent to the exercise of jurisdiction on a case by case basis. The conference's categoric rejection of earlier proposals to this effect, that would have completely disempowered the Court, was a major relief.

The only exception to automatic jurisdiction for state parties lies in the transitional provision of Article 124. This allows states to opt out of the court's jurisdiction over war crimes committed on its territory or by its nationals for a period of 7 years after the entry into force of the statute vis a vis that particular state. States have to chose to avail themselves of this provision, however, and hopefully few if any will. While such a provision is legally and morally unjustifiable, distinguishing as it does between war crimes and others, the opt out is limited to a non renewable period of 7 years.

The most problematic aspect of the whole treaty is the provision relating to the preconditions for the exercise of jurisdiction (Article 12). According to this, in cases other than Security Council referrals, the ICC will only be able to act where the state on whose territory the crimes were committed or the state of nationality of the accused have ratified the treaty or accept the court's jurisdiction over the crime. The deletion of 2 crucial elements of an earlier proposal (the Korean proposal) that would have allowed a state with custody of the accused or a state of nationality of the victims to provide the necessary jurisdictional link, is the major disappointment of the conference. As the state of territory and nationality of the accused will often in practice be one and the same state, and that state may well not be state party, this is likely to be the greatest impediment to the Court's ability to make a difference in the real world. However defective, the provision is not necessarily fatal to the Court and there are ways to circumvent it. In particular, much will depend on the extent of ratification of the treaty: the closer to universal ratification, the less the potential of this provision to disempower the Court.

2. DEFERRAL UPON SECURITY COUNCIL REQUEST

Security Council ability to suspend or delay ICC prosecutions was adamantly opposed by a strong contingent of states throughout the conference. The role of the Security Council, as well as the exclusion of nuclear weapons, was the subject of the Indian motion to amend the Chair's final package, defeated at the eleventh hour of the conference.

The final text of the statute (Article 16) strikes a compromise between this view and the text of the ILC draft that would have given permanent members veto over which cases went before the

Court. It provides that no investigation or prosecution can be commenced or proceeded with for a renewable period of twelve months where the Security Council, acting under Chapter VII, has so decided. Deferral would require a decision of the Council, and therefore excludes the possibility of one state's veto blocking jurisdiction, but it does leave open the possibility of unlimited renewal and perpetual deferral. Before the Rome conference the U.K. was the only permanent member to support this approach, with the other four and Israel supporting permanent member veto power. The opponents gradually revealed their willingness to accept a version of the compromise proposal, the final version of which is in the statute.

Proposals to allow the preservation of evidence in the event of deferral are unfortunately not reflected in the statute.

3. TRIGGERING AN INVESTIGATION

Ex Officio Powers

In a crucial positive outcome, the ICC Prosecutor can investigate allegations of crimes not only upon referral from the Security Council and state parties, but also on information from victims, non governmental organizations or any other reliable source (Article 15). We considered this crucial given probable state and security council reluctance to refer situations to the Court. Moreover, the ex officio provisions are arguably the most important of those that give the victim and survivors a role in the ICC process, by enabling them to trigger investigations.

If the Prosecutor him or herself decides that the case should not proceed, he or she must go back and inform the source of the original information. If the decision is that there is a reasonable basis to proceed with an investigation, this is then subject to pre trial judicial approval. This judicial review mechanism is not, however, an opportunity for state or individual suspects to challenge admissibility. Proposals to this effect that emerged during the conference were rejected. (The possibility of challenge does arise before any investigation is initiated, as noted in the section on admissibility below, but only once the Pre-Trial Chamber has confirmed that there is a reasonable basis to proceed.) Victims, on the other hand, do have a right to make representations to the Pre-Trial Chamber at the stage of this preliminary review, in accordance with the rules of evidence and procedure to be drawn up in the Preparatory Commission.

Referral by State Parties and the Security Council

State parties (but not, in the end, non state parties) and the Security Council may refer situations to the Court in which one or more crimes appear to have been committed. The referral of "situations" was to prevent political entities making accusations against particular individuals, thereby unduly politicizing the process. Rather, it will be for the Court itself to decide which individuals should be investigated and prosecuted and which should not.

Referral by the Security Council will have the unique consequence of binding all member states of the UN, whether or not parties to the statute: the statute itself notes (Article 12(2)) that the preconditions to the exercise of jurisdiction do not apply in the event of Security Council

referral. This makes such referral potentially extremely important tool, ex officio powers notwithstanding.

Investigation And Prosecution

Checks on Prosecutorial discretion

The Statute contains several appropriate checks on prosecutorial discretion that belie claims of an all-powerful ICC prosecutor or a Prosecutor who will be unable to forgo politically motivated or unwarranted investigations (article 53). These checks are additional to those that apply specifically in respect of the exercise of ex officio power. Before initiating an investigation, pursuant to any of the three trigger mechanisms named above, the Prosecutor must satisfy herself that there is a reasonable basis for the investigation. After an investigation is completed, the Prosecutor may conclude there is no basis to proceed. Both decisions include, among other factors, consideration of the broader "interests of justice" which gives the Prosecutor some latitude. If, however, the Prosecutor decides not to proceed further, she is required to inform the Pre-Trial Chamber and, depending on the triggering party, either the referring State Party or the Security Council. At the request of the referring State Party or the Security Council, the Pre-Trial Chamber may review the Prosecutor's decision not to proceed and request that she reconsider. If the decision is based solely on the Prosecutor's consideration of the broader "interests of justice," the Pre-Trial Chamber may, on its own, review it. A decision based on the interests of justice does not in any case become effective until the Pre-Trial Chamber confirms it.

Powers of the Prosecutor

In general terms, the powers of the Prosecutor to conduct an investigation are seriously limited. It was always envisaged that an ICC, lacking as it does an independent enforcement mechanism, would be dependant on cooperation by states to carry out thorough investigations. But at earlier stages it appeared that the Prosecutor would at least have the legal power, subject to practical constraints, to take certain independent investigative measures. These would include going to the site of a crime and talking independently to witnesses, collecting evidence, etc. We argued that this independent power was essential for the independence and authority of the Prosecutor and, given the reality of frequent state complicity in these crimes, an indispensable characteristic.

In the end, independent investigations 'on site' are only possible where the relevant national authorities are not 'available' to themselves take the necessary investigative steps (Article 57(3)). Where there are national authorities, they must be relied upon to take the relevant steps. The Prosecutor will be able to be present and assist the state authorities, but only if this is not prohibited by national law (Article 99(1)). In an important provision on which consensus was painfully difficult, the Prosecutor can take certain "non-compulsory measures," such as interviewing a voluntary witness without the presence of state authorities if it is essential for the request to be executed. He or she can only take these steps, however, after consultations with the state and, in cases where there has been no formal determination of admissibility, the state can impose conditions on the Prosecutor's ability to do so.

In short, the Prosecutor cannot take basic investigative steps, such as interviewing witnesses, for example, without notifying the state. The practical ramifications of these provision give serious cause for concern. They do, however, demonstrate the hollowness of arguments that the powers of the prosecutor will be overreaching or somehow jeopardize state sovereignty.

4. ADMISSIBILITY ("COMPLEMENTARITY")

Consistent with expectations, the ICC will not be a substitute for national systems, but will only be able to act where national systems do not themselves investigate or prosecute, or where they are "unable" or "unwilling" to do so genuinely. There is a statutory definition of what constitutes inability and unwillingness. As part of the prosecutorial obstacle course enshrined in the statute, various opportunities to challenge admissibility on these grounds are set out.

Preliminary Challenge, National Investigations into "Situations"

First, the U.S. proposal (formerly Article 11 bis, now Article 18) found its way into the statute in a much-modified form. This provides that when a situation has first been referred to the court, the Prosecutor must notify all states "that would normally exercise jurisdiction" of the intention to proceed with an investigation. (This would take effect after pre-Trial Chamber approval of the reasonable basis to proceed). Any state--whether party or non-party to the treaty--may then inform the Court that it is dealing with the situation domestically and the Prosecutor will defer to that investigation, unless the Pre-Trial Chamber decides to authorize the investigation. The deferral is open to review by the prosecutor after six months or at any time when there has been a significant change in the state's unwillingness or inability genuinely to carry out the investigation. Very significantly, a state which has challenged a Pre-Trial Chamber ruling under this preliminary provision, is still able to challenge the admissibility of a case on the basis of a state's unwillingness or inability when additional significant facts or significant change of circumstances.

In the event of ICC deferral under this article, there is a provision allowing the Chamber to authorize measures by the Prosecutor for the preservation of evidence. (This is unfortunately not the case in the event of a deferral following a decision on the admissibility of a particular "case," as explained below.)

Challenging the admissibility of Cases

States, again including non parties to the treaty, have another opportunity to block a prosecution by challenging the admissibility of particular cases (Article 17). A case could be challenged not only where the state itself is investigating or prosecuting, or has prosecuted, but also where the state decided not to proceed with a prosecution, unless the decision was due to the inability or unwillingness of the state. (Another ground open to a state of territory or nationality, if a non state party, would be that it had not accepted jurisdiction, as provided for in Article 12). Several parties may challenge the admissibility of a case: an accused person; any state that has jurisdiction over the case because it is investigating or prosecuting the case or has investigated or prosecuted it; or the state of territory or nationality of the accused. In this challenge, the referring state, the Security Council as well as victims may submit observations to the Court. In general, there would be only one opportunity for challenge, which takes place prior to or at the beginning of trial. However, in exceptional circumstances, the Court may allow more than one challenge or permit it later than the start of trial. Decisions on admissibility may then be appealed to the Appeals Chamber. While the investigation is suspended pending the Court's decision, the judges

may allow the prosecutor to take steps to preserve evidence and complete the collection of evidence begun prior to the challenge. However, there is no provision allowing the Chamber to authorize measures to preserve evidence following a deferral. If the Court decides the case is inadmissible, the Prosecutor may submit a request for a review when she believes that new facts have arisen negating the basis of a previous ruling of inadmissibility.

Unfortunately, as a result of the omission of earlier draft provisions, it may be difficult for the ICC, once it has deferred to a state, to exercise jurisdiction in the future if the national proceedings turn out not to be genuine. First, draft provisions that obliged states to notify the Court of the steps taken on the national level have been deleted. Not even state parties are expressly obliged to do so under the present statute. This would have equipped the Court with the information to assess whether the deferral continued to be justified.

5. THE CRIMES

The ICC is being set up to deal with the 'most serious crimes of concern to the international community'. It will have jurisdiction only over genocide, crimes against humanity and war crimes, as defined in the statute. Although in principle aggression also falls within its competence, the Court will not be able to prosecute cases of aggression in the foreseeable future. (Article 5).

GENOCIDE (Article 6)

The definition of genocide is that contained in the 1948 Genocide Convention. This was not the subject of any debate in Rome. No consideration was given to the possibility of extending the definition to cover social and political groups. But similarly, earlier attempts to restrict the definition further than the conventional definition were discarded.

CRIMES AGAINST HUMANITY (Article 7)

Emerging from painstaking negotiations, the definition of Crimes Against Humanity (CAH) embodies a delicate compromise and a complex, ambiguous text. While some of the specific 'acts' that may constitute crimes against humanity are broader than those contained in existing legal instruments, the thresholds determining when those acts do constitute crimes against humanity for ICC purposes are more restrictive.

Thresholds

Crimes against humanity must be committed pursuant to a to a widespread or systematic attack. There was extensive debate in Rome as to whether the attack should instead have to be widespread AND systematic, and as to the definition of attack . While, consistent with established international law, the 'or' language prevailed, "attack" is defined restrictively. It requires both that there be the "multiple commission of acts", and that they be carried out "pursuant to a state or organizational policy". The double criteria of multiple acts and the existence of a policy, coupled with the requirement that the acts be carried out "in the knowledge of the attack" impose an unprecedented threshold for crimes against humanity.

Despite the early insistence by a coordinated group of Arab League states, supported by China and India, that the ICC should only try crimes against humanity committed in armed conflict, with some seeking to limit it further to international conflict, in the end there is no such armed conflict nexus. Any other approach would have been a major step backwards in international law.

Enumerated Acts

The list of acts that constitute CAH for these purposes includes murder, extermination, enslavement, deportation or forcible transfer, severe arbitrary deprivation of liberty, and torture. More controversially, it also includes the following:

"Rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization or any other form of sexual violence of comparable gravity"

The Holy See, backed by the Arab League nations, mounted a concerted attack against the inclusion of this crime, as well as on persecution based on gender (below). In the end, they were unsuccessful in that both forced pregnancy and the term "gender" were included in the treaty.

"Persecution...on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law"

The inclusion of gender persecution in the treaty was achieved in the face of strident opposition. Another controversial inclusion is persecution on "other grounds" beyond those specified in the statute, but the confusing limitation to those "universally recognized" grounds is regrettable. Of real concern is the requirement that persecution must be committed in conjunction with another crime under the statute. This removes the prosecution of persecution per se from the Court's jurisdiction, which is inconsistent with the clearly stated position of the International Criminal Tribunal for the Former Yugoslavia (ICTY) that persecution is in itself a crime against humanity.

"Enforced disappearance of persons"

This crime is included and defined in the statute, negating nervous rumors at the outset of the conference that it would be deleted. A definition is included that is slightly more restrictive than the U.N. and Inter-American Convention definitions, requiring, for example, intent to remove the person from the protection of the law "for a prolonged period of time."

"Apartheid"

is included and defined within the statute. The definition is, however, once again more restrictive that than that in the Apartheid Convention, and appears not to cover certain fundamental aspects of apartheid; for example--preventing political, social, economic or cultural participation of a

racial group, or dividing the population in the creation of separate reserves and ghettos, prohibition of mixed marriages, etc.

"other inhumane acts of a similar character intentionally causing great suffering, or serious injury to... body or health."

Finally, this important and controversial generic category was included. This gives the Court the flexibility to cover other crimes against humanity that may emerge over time, not contemplated in the statute, which is very positive.

WAR CRIMES (Article 8)

The statute gives the Court jurisdiction over an exhaustive list of war crimes, with separate lists for international and non-international conflicts. The international list contains 34 crimes, the non-international 16. It does not contain a generic formulation giving the Court the possibility of exercising jurisdiction over other crimes that may emerge as crimes under customary law in the future. For the Court to have jurisdiction over crimes beyond those set out in the statute, there would have to be amendment to the statute which, as noted in the amendment section below, would be difficult to achieve and apply only to states that accept the amendment (Article 121).

The vast majority of the crimes included are taken directly from, or clearly derive from, established provisions of international law, principally Hague law or the Geneva Conventions and protocols. The crimes of gender violence, for example, do not appear expressly in these conventions but are part of other non gender specific crimes that do, as developed in the statutes and case law of the Tribunals. In several places the ICC formulations are different from and more restrictive than the established definitions on which they are based. The statute is far from comprehensive, having omitted various provisions of Hague and Geneva law, thus excluding them from the Court's jurisdiction.

A chapeau to the war crimes section provides that the Court will prosecute war crimes "in particular when committed pursuant to a plan or policy or as part of the large scale commission of such crimes." This does not impose another jurisdictional limitation on the Court, but makes clear the objective is to prioritize the most serious crimes that demand international prosecution.

International conflict

One of the most significant departures from existing language can be seen in the crime of launching an attack that causes incidental civilian losses, included for international conflicts, entirely omitted for internal. At the initiative of the U.S., the principle of proportionality inherent in this crime is reformulated so that the ICC only has jurisdiction over attacks with a civilian impact that is "clearly excessive" in relation to the "overall" military advantage. While "clearly" seeks to exclude borderline cases, overall military advantage seeks to ensure that such military advantage would not be measured by the consequences of the single attack, but in the context of the broader military operation.

The "transfer, directly or indirectly, by an occupying power of parts of its own civilian population into the territory it occupies" is included for international conflicts. While the language of "directly or indirectly" is new, the crime of transfer by an occupying power of parts

of its own civilian population into the territory it occupies is taken directly from the 4th Geneva Convention and the grave breaches provisions of Protocol I (Art. 85(4)(1)).

One of the most difficult provisions to resolve was that on prohibited weapons. In the course of the conference, when certain states in favor of the inclusion of nuclear weapons realized that there was no prospect of success on this, they unfortunately insisted that chemical and bacteriological weapons also be removed. The resulting list of prohibited weapons is very short - poison or poisoned weapons, asphyxiating or poison gases or liquids, and dum-dum bullets - with no effective catch-all clause for other weapons causing unnecessary suffering. Although there is a provision that specifically contemplates the possibility additions to the list of weapons in the future, the only prospect for expansion of the list is by the difficult amendment process.

At least as controversial was the inclusion of crimes of sexual and gender violence. Focused on the historical failure to address these crimes, the women's caucus successfully campaigned to have "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity" explicitly included as a separate category of war crimes, notwithstanding ferocious lobbying by those opposed to its inclusion. As a result, no longer will these crimes have to be defined only as crimes against honor or as part of some other category.

Another crime which is included for both types of conflict, which the HRW Children's Rights Division strongly pursued, is conscripting or enlisting children under 15 or using them to participate actively in hostilities. In another example of reformulating Geneva language, "recruiting" was replaced with "conscripting or enlisting", principally at U.S. insistence. In the international conflict context the crime is unfortunately limited to conscription or enlistment into "national" armed forces. Human Rights Watch had pressed for alternative language, using 18 as the relevant age for ICC purposes. On this point many key states expressed unwillingness to move beyond the framework of the Additional Protocols to the Geneva Conventions which establishes 15 as the relevant age, although they were willing to depart from the wording of the Protocol on the formulation of this and other crimes. In the end there was broad support for these provisions as reformulated.

Non-International Conflict

The Court's ability to prosecute crimes committed in the context of internal armed conflict was as contentious as it promised to be. As noted above, the list of crimes committed in internal conflict over which the Court has jurisdiction is unsurprisingly more restrictive than those committed in international section. As such, the Court will be able to prosecute crimes such as attacks causing incidental civilians losses, the starvation of civilians, or the use of prohibited weapons, for example, only when committed in international but not in non-international armed conflict. However unacceptable this differential is, the final resolution is better than it threatened to be even in the final days of the conference, and allows for the prosecution of very serious war crimes, whatever the context on which they are committed.

The statute list covers all of Article 3 to the Geneva Conventions and aspects of Protocol II. The list does not, however, include all prohibitions contained in Protocol II, omitting collective punishments, terrorism, slavery; attacks against installations containing dangerous forces.

Some sought to restrict the scope of the Court's jurisdiction beyond the exhaustive list, by imposing a qualifying chapeau to the internal conflict section. A provision was introduced (Article 8(2)(f)) that limits the Court's jurisdiction to situations where there is "protracted" non-international armed conflict, a requirement that is not contained in Protocol II. Another qualifier provides that nothing in the statute shall affect the responsibility of a government to maintain or reestablish law and order in the state or to defend the unity and territorial integrity of the state by all legitimate means. While this provision gave considerable comfort to states otherwise opposed to the inclusion of internal conflicts, its impact is as yet unclear.

AGGRESSION (Article 5(2))

As a result of a last minute addition, the statute provides that the court also has jurisdiction over the crime of aggression. However, this inclusion, which was a critical element in bringing a number of states on board, is more presentational than real. The Court can only exercise jurisdiction over aggression once the statute is amended to include a definition of the crime and the circumstances in which it can be prosecuted. As any crime can be added to the statute by such amendment, this provision has little affect other than as an expression of intent to include aggression in the future. The reference to any future provision being consistent with the UN Charter was intended to indicate that the Security Council would have to have made a prior determination that an act of aggression had occurred before the ICC could prosecute this crime.

Elements of Offences

One of the many ways in which the statute sought to defer to United States interests is the provision on detailed "elements of offences" (Article 9). However, it provides only that elements shall be adopted by the Assembly of State parties, and that they shall provide guidance to the Court. They shall neither delay the entry into force nor bind the Court. When the Preparatory Commission meets one of the items on its agenda will be drawing up the elements of the crimes.

Savings Clause

Given that the statute excludes several important crimes from its scope, imposes definitions at times more restrictive than those in existing international law, and that it allows for the opt out for war crimes (see below), the savings clause is very important (Article 11). It clarifies that nothing in the treaty shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

6. COOPERATION

As noted above, in the absence of an independent police force, state cooperation is essential at all stages and the Cooperation section of the statute is critical to an understanding of how the Court will function in practice. Although the opening article refers to the general duty to "cooperate fully" with the Court, other provisions do make clear that there is in fact a legal

obligation on State parties to comply with requests from the court. Non state parties are not, of course, under any obligation toward the Court.

Despite many proposals to the contrary, there are no exceptions to the duty to transfer suspects to the Court which is a very positive development. The weakness in the cooperation framework lies, however, in two major exceptions to the duty of state parties to provide "other forms of cooperation". First, as a result of U.S. and French insistence, the Court cannot order disclosure of information or prevent an individual from giving evidence if, in the state's view, it would prejudice its national security interests. This proposal prevailed over one from the U.K., which would ultimately have allowed the court to make the determination as to the validity of any claim to national security and to order a state to disclose information if it was found to be acting in bad faith and the claim was manifestly unfounded. Under the present text (Article 71), the court can however find a state to be in breach of its obligation to cooperate in good faith and refer the matter to the Assembly of State parties.

The second exception is where compliance with a request is prohibited on the basis of an existing fundamental legal principle of national law (Article 93(3)). In such case, the statute provides that, after consultation with the state, the Court must amend the request. A preferable approach, and one more solidly based on legal principle, would have been to oblige the state to amend its law, not the ICC to amend its request. These provision reflect the enormous deference to arguments of state sovereignty apparent throughout the statute.

7. RIGHTS OF SUSPECTS/ACCUSED AND VICTIM PROTECTION

The rights of suspects (Article 55) and accused persons (Article 67) are protected to the highest standard in the treaty. It contains all of the guarantees enshrined in international instruments and in certain respects goes beyond. The statute seeks to maintain a balance adequate protection for victims without infringing upon the rights of the accused and is, on its face, quite successful in this respect. The provisions on evidence (Articles 68(2) and 69), which allow for exceptional measures such as in-camera hearings and recorded testimony so far as they do not impinge upon the rights of the accused, are examples. Such special measures shall be taken by the Court where the victim is a child or victim of sexual violence, unless the Court decides otherwise.

In addition to provisions relating specifically to the rights of the accused, the statute obliges the prosecutor to investigate not only incriminating but also exonerating evidence, as well as to make such evidence available to the defense. Moreover, the Pre-Trial Chamber has an important role protecting the rights of the accused and checking the Prosecutor's authority. First, in those situations where there is a unique opportunity to take testimony or collect evidence which might not be available subsequently at trial, the prosecutor must inform the Pre-Trial Chamber (article 56). If, on the Prosecutor's request, the judges believe that measures are necessary to protect the rights of the accused, it may, among other steps, appoint an expert or a judge to supervise the proceeding. If the Pre-Trial Chamber believes the Prosecutor's failure to request such measures is unjustified, the Chamber take measures on its own.

The Pre-Trial Chamber must hold a hearing before trial and confirm the charges against an accused, on the basis that there is sufficient evidence to establish substantial grounds that the accused committed the crime (article 61). The accused has the right to attend and be represented.

Trials in Presence of the Accused

Despite troublesome working group discussions, the final version does not allow for trials in absentia (Article 63). The statute permits trials to proceed without the presence of the accused only if he or she is disruptive, in which case measures must be taken to allow them to "observe the trial and instruct counsel from outside the courtroom." The statute does however allow for the confirmation of charges in the absence of the suspect, and requires the presence of legal counsel for the suspect when "the Pre-Trial Chamber determines it is in the interests of justice."

Note on Victims

To a large extent the ICC statute succeeds in making appropriate provision for victims of the crimes that the ICC is established to address. In a major step forward for victims of atrocities, the court has broad powers to order convicted persons to make reparations to victims (Article 73). Those reparations can take financial or symbolic form. Individual victims are entitled to participate directly in these aspects of the court's proceedings. Earlier French proposals that the ICC should be able to make orders against states to pay were dropped in Rome. However, the possibility of vicarious state liability where the individuals in question were state actors remains open.

The provision on the ex officio powers of the Prosecutor (Article 15) expressly recognizes the legitimate potential role for victims as initiators of ICC investigation. In addition, an article specifically directed at "the protection of victims and witnesses" deals not only with the Court's duty to take appropriate protective measures, and the establishment of the Victim and Witness Unit, but also the right of victims to present their views at various stages of the criminal proceedings where their personal interests are directly affected.

(Other Important Sections)

8. GENERAL PRINCIPLES OF CRIMINAL LAW

Several small victories in this section include no statute of limitations, the principle of legality and the fact that the Court has jurisdiction only over crimes committed after its entry into force.

Minimum Age for ICC Jurisdiction

In a major breakthrough, early agreement was achieved that the Court would only have jurisdiction over persons of 18 years of age or older (Article 26). Many states had previously supported setting an age of criminal responsibility below eighteen, or allowing the court discretion to try minors based on subjective criteria such as the defendant's maturity. Presenting this issue not as one of the age of criminal responsibility but as a jurisdictional limitation made it possible to cut through the earlier stalemate, with the statute finally providing that "[t]he court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."

Command Responsibility

The provisions on the responsibility of commanders, along with superior orders, created the most controversy in this part of the statute.

On command responsibility, the statute distinguishes between military and other commanders. For the former, it sets out the Nuremberg test: he or she must have known, or owing to the circumstances should have known and failed to take reasonable measures to prevent the crimes or to submit them for investigation afterwards. For civilian superiors however, the standard is higher and the approach apparently unprecedented. The superior has to have effective authority and control over the persons and activities constituting the crimes, and must have known or consciously disregarded information that clearly indicated that subordinates were committing or were about to commit crimes, and failed in the manner referred to above.

Defenses, Superior Orders

Regarding superior orders as a defense, the ICC treaty takes a step back from the Nuremberg Charter and the statutes of the ad hoc Tribunals, which contained an absolute prohibition on superior orders as a defense. While the statute is controversial in not ruling out the application of the defense, it does greatly restrict its scope. It only applies where the following criteria are met: there was a legal obligation to obey the orders; the person did not know the order was unlawful and the order was not manifestly unlawful. It expressly cannot apply in cases of genocide and crimes against humanity, which the statute deems inherently manifestly unlawfully.

Other Defenses

In general, after protracted negotiations, the treaty allows for quite a broad range of defenses, each set out in some detail in the statute. Some of these we supported, such as extreme duress, others are broader than we would have liked, such as intoxication. Given the serious nature of the crimes in question, it is troubling that defense of property (as well as self-defense or defense of others) may in certain circumstances constitute a defense to the commission of war crimes, although not genocide or crimes against humanity.

Non Bis In Idem

The important protection against double jeopardy is contained in the statute.

Applicable Law

Article 33 provides that the law to be applied by the court will be firstly, the statute, elements of crimes and the rules of evidence and procedure, secondly, international law and thirdly, general principles derived from national systems so far as consistent with international human rights. In an important and in the event contentious provision, the statute and other sources must be applied and interpreted consistently with internationally recognized human rights and be "without any distinction as to gender, age, race...or other status."

Note on Legal Persons

A proposal was put forward that would have allowed the Court to have jurisdiction over legal as well natural persons but was eventually rejected, largely at U.S. insistence. Therefore the ICC will not have jurisdiction to declare organizations criminal. This is out of line with the Nuremberg precedent.

9. COMPOSITIONS AND ADMINISTRATION

Judicial candidates will be expert in either criminal or international law. They shall be nominated by state parties (though they need not be nationals of state parties) and elected by the Assembly of state parties. States that do not become parties will therefore be left outside the selection process.

As part of the general onslaught against gender references throughout the draft statute, the phrase that "State Parties shall, in the selection of judges, take into account gender balance" came under attack. Even more disturbing was the strong resistance to the inclusion of judges with expertise in sexual and gender violence. Many claimed that this was giving "special preference" to this issue. A compromise was reached in which state parties shall take into account the need for a "fair representation of female and male judges" and the need to include judges with "legal expertise on specific issues, including but not limited to, violence against women and children."

A Victim and Witness Unit is established (Article 43) with responsibility for "protective measures, security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses." In line with our recommendation, the Unit is located within the registry, independent of the Prosecutor's office.

The statute contains provision for the removal from office or other disciplinary measure against any judge or Prosecutor guilty of misconduct (Articles 46 and 47).

The working languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish (Article 50). Its Rules of Evidence and Procedure shall be adopted by the Assembly of state parties (Article 51), after having been drawn up by the Preparatory Commission. Non state parties are therefore not entitled to be involved in the adoption of the Rules as such, though they may be involved in their creation through the preparatory commission. The Regulations, governing the day to day running of the Court, are to be drawn up by the judges themselves.

10. PENALTIES

This statute permits the Court to impose two types of penalties: imprisonment for a specified term or life imprisonment (Article 77). After debate over whether there should be minimum and maximum limits set on the terms of imprisonment, in the end, the article only contains a 30 year maximum. Life imprisonment was opposed by a number of countries, particularly Latin American, whose constitutions prohibit this penalty as a violation of human rights, being cruel, inhumane, and inconsistent with rehabilitation. A provision for a mandatory review of penalties, when the person has "served two thirds of the sentence or 25 years in the case of life imprisonment" (Article 110) was added to mitigate some of the concerns about life

imprisonment. The Court may also order fines and forfeitures. The Statute recognizes that these penalties would be in addition to imprisonment.

There were divergent and strong views on whether the death penalty should be explicitly included as a penalty, with Trinidad and Tobago, the Arab states, Nigeria, and Rwanda in favor of its inclusion. Not only did these states feel that the core crimes should be punished by the maximum penalty, but they feared that the prohibition of the death penalty in the Statute would impact on their domestic laws. The United States, supported by Japan, made an intervention that the principle of complementarity would permit countries to still use capital punishment to punish the core crimes.
The death penalty is not therefore permitted. An article entitled "Non prejudice to national application of penalties and national law,"(Article 80), was offered as a compromise to those states who were pushing for the inclusion of the death penalty; it reads that "nothing in this part of the statute affects the application by States of penalties prescribed by their national law."

11. FINANCING

The Court will be financed from 3 sources: assessed contributions by state parties, contributions by the U.N., as approved by the General Assembly, and voluntary contributions. The relative proportion of UN to state party financing is not resolved in the statute itself.

12. FINAL CLAUSES

Reservations

One very positive aspect of the ICC treaty is the explicit prohibition on reservations (Article 120). The specter of possible reservations, thereby allowing state to opt out of carefully negotiated provisions, continued to loom large until the last day of the Rome conference.

Amendments (Article 121 and 122)

Amendments may be made seven years after the entry into force of the treaty. While the treaty states that they shall be adopted by consensus, failing which by two thirds majority of States Parties, it also provides that for amendments other than those of a purely institutional nature, seven eighths of the state parties have to accept the amendment before it can enter into force. Such a high requirement will ensure that the treaty will not be easily amended.

With regard to amendments to crimes under the Court's jurisdiction (Article 5), the situation is more restrictive still, with the amendment applying only to those state parties that have accepted it. The Court can exercise jurisdiction over a crime only if the state of the territory or nationality of the accused has accepted the particular amendment. This amounts to an opt in for additional crimes.

Ratifications

The statute will enter into force when 60 states ratify (Article 126).