



On the Record for a Criminal Court

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From the AP Editorial Desk

The Compromise Package: Analysis

US Launches Long-awaited Preemptive Strike on ICC Statute

New proposal would require US consent for the ICC to prosecute American nationals

The United States government has launched its long-awaited preemptive strike against the international court that is beginning to emerge from the Rome Conference.

With ten days of the conference still remaining, and key elements of the text still undecided, David Scheffer, the US Ambassador for War Crimes and head of the US delegation, has reportedly rejected the first attempt by the Bureau of the Conference to identify the elements of a compromise statute.

Meeting with Philippe Kirsch, the Conference Chairman, on Monday, Scheffer said that more must be done to accommodate American concerns. Specifically, Scheffer is said to have asked that the ICC should request the consent of a state before prosecuting one of its nationals. The US is also insisting that states should be given the chance to prosecute a case first, before the ICC. States could also challenge the admissibility of a case in the event that the court finds a state unwilling or unable to prosecute.

On Tuesday, Kirsch released a new text on behalf of the Bureau that clearly addresses these American concerns. (Reproduced below in this issue of *On the Record*)

Kirsch's new draft does not totally reflect the American position. For example, it contains a reference to a Cuban demand that an economic blockade should be declared a crime against humanity. Kirsch's text also lists the use of nuclear weapons and landmines as possible war crimes, and does not rule out the possibility that the ICC could also prosecute aggression. Both provisions would be strongly resisted by the US.

Overall, however, Kirsch's current draft is significantly weaker and more accommodating to the US than the draft that was prepared by the Bureau for a select Sunday meeting of 28 delegations. Participants at the Sunday meeting included the five permanent members of the Security Council, as well as Iran, Mexico, Singapore and Jamaica.

As expected, Kirsch has concentrated on the core issues of the definition of crimes and the court's jurisdiction. Both will define the Court's relationship with states, which will in turn determine its effectiveness and ability to deter crimes.

At first sight, a comparison between Kirsch's Sunday and Tuesday drafts reveals retreat on all fronts:

Crimes (applicable law): The Sunday paper proposed to retain aggression as a core crime of the ICC, albeit in a qualified manner. The Tuesday redraft allows for aggression to be dropped altogether.

War Crimes: Kirsch's Sunday paper stipulated that the court would have jurisdiction over war crimes "in particular" when committed as part of a plan or policy. His Tuesday paper includes a higher threshold, by substituting "only" for "in particular."

In a concession to the United States, Kirsch's latest draft would not outlaw attacks that might be expected to lead to civilian casualties if there was a clear "overall" military advantage. NGO's describe this as introducing a "highly dangerous" loophole.

The Use of Weapons as War Crimes: There has been intense discussion whether to list the use of indiscriminate weapons, such as nuclear weapons and landmines, as war crimes. The Sunday draft identified two options, one of which would outlaw both nuclear weapons and landmines. Tuesday's draft has widened this to three options. It also states that any decision on whether to include new weapons systems under the ICC should rest with the assembly of states parties, and not the court's judges.

Internal Armed Conflict: In what appears to be a major concession to larger nonaligned countries, Kirsch's new draft opens the possibility that war crimes committed in internal armed conflict could be excluded from the ICC statute. This possibility was not mentioned in the Sunday draft.

Prosecutor: The Sunday paper listed the three ways in which cases could be referred to the ICC: through the UN Security Council; by states; or by a prosecutor acting on his or her own initiative (ex officio). The new draft reinserts the option to drop the ex officio

prosecutor altogether. This may indicate a weakening of support for the idea, which is considered essential by some NGOs.

Jurisdiction: Both of Kirsch's drafts propose a compromise on whether and how states would be allowed to consent before the Court could take up a case. The vast majority of delegations feel that if a state ratifies the ICC statute, it should be bound by it. On Sunday, however, France reportedly insisted that a state should be able to "opt in" on every case taken up by the court, even if it has ratified the statute. To the surprise and alarm of many, this would even include genocide and crimes against humanity. Many feel that this too is reflected in Kirsch's latest draft, which says that states should be able to opt in for "one or more core crimes" as well as crimes already covered by existing treaties.

Both drafts omit a major proposal by Germany, to the effect that crimes against humanity, war crimes, and genocide are already subject to universal jurisdiction – so the ICC should not have to seek consent before prosecuting them. Instead, the new draft contains four different options that would allow states to withhold consent if the ICC took up a case. A Korean proposal would require consent by any of the four states (state of nationality of the accused, victim, custodial state, territorial). A new proposal, thought to come from the United States would require the agreement of the state of the nationality of the accused, before the court could prosecute. This would allow the US to block any chance of the ICC prosecuting an American. Even if it does not emerge in the final statute, its inclusion at this stage increases the chance of the Korean proposal being abandoned as part of the compromise.

The UN Security Council: Sunday's draft contained two provisions on the Security Council, both of which favoured the Court over the Council. One said that the Court could not exercise its jurisdiction in a case of aggression unless permitted to do so by the Council. The second said the Council could only request that a case be withheld from the court under its Chapter 7 (enforcement) mandate. The chairman's latest draft is basically unchanged, although it would allow the Council to hold onto a case for 12 months and request a renewal. Many fear that this would give a government time to hide the traces of a crime.

Admissibility: The statute allows a state to challenge the admissibility of a case. But the United States has insisted on the insertion of a new step, which would require the prosecutor to notify all interested states before starting investigations, and giving them the opportunity to conduct a case nationally. Only if the state is unable or unwilling could the ICC then take it up. This remains in the latest draft, and is seen as yet another concession to the Americans.

With two drafts now on the table, the final negotiations are well and truly under way. The next few days are expected to see some frantic compromising over the issues of jurisdiction and definition. Among the subsidiary issues still to be decided are the recruitment of children, attacks on aid workers, and forced pregnancy.

Kirsch has asked delegations to discuss his latest draft, with a view to completing a final text that can be sent out to governments on Friday. The hope is that delegations could then return next Monday for the final week of the conference. It is quite unclear whether the conference would then reach a consensus on the entire package, or whether critical issues would have to be put to a vote.

Kirsch's new draft is already being pored over in minute details by observers and nongovernmental campaigners. The Canadians are upbeat and optimistic. Many feel that the shape of a treaty is indeed starting to emerge.

But this is also the time when NGOs may have to face the unthinkable – and decide whether a weak court is better than no court at all. There are growing signs that some delegations might support abandoning the idea of an ex officio prosecutor if they could weaken the power of states to reject cases and challenge the court's jurisdiction. Their reasoning is simple: however independent the prosecutor might be, he or she will achieve little if states are required to give their permission before any case is launched.

Were this to happen, the US would achieve one of its major objectives here, which is to kill the idea of an ex officio prosecutor. That would be particularly galling to many because few expect the US to ratify the ICC treaty in the near future.

The Compromise Package: Text

DISCUSSION PAPER

BUREAU

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) Option 1: The crime of aggression;
Option 2: No such provision;
- (e) Option 1: Treaty crimes (terrorism, drug trafficking, United Nations and associated personnel).
Option 2: No such provision.

Genocide

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

Convention.

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Further discussion needed;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (i bis) The crime of apartheid;
- (j) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Other proposals have been made on the topics of terrorism and economic embargoes, and further discussion may be required.

2. For the purpose of paragraph 1:

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

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

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

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

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

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

(d bis) "The crime of apartheid" means inhumane acts of a character similar to those

referred to in paragraph 1 above, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

War crimes

Option 1

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

Option 2

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

Option 3

No such provision.

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

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

- (a) Willful killing;
- (b) Torture or inhuman treatment, including biological experiments;
- (c) Willfully causing great suffering, or serious injury to body or health;
- (d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (g) Unlawful deportation or transfer or unlawful confinement;
- (h) Taking of hostages.

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

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (a bis) Intentionally directing attacks against civilian objects, that is, objects, which are not military objectives;
- (b) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly

excessive in relation to the concrete and direct overall military advantage anticipated;

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

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

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

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

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

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

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) Option 1

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

(i) Poison or poisoned weapons,

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

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

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

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

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

Option 2

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

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

Option 3

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

- (p) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (p bis) (drafting subject to further discussion)
- (q) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (r) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law the distinctive emblems of the Geneva Conventions;
- (r bis) (on United Nations personnel) (drafting subject to further discussion)
- (s) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
- (t) (definition still under discussion)

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

Option 1

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the

following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (c) Taking of hostages;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees, which are generally recognized as indispensable.

Option 2

No section C.

Option 1

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

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;
- (b bis) (on United Nations personnel) (drafting subject to further discussion)
- (c) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (d) Pillaging a town or place, even when taken by assault;
- (e) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (e bis) (definition still under discussion)
- (f) (definition still under discussion)
- (g) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (h) Killing or wounding treacherously a combatant adversary;
- (i) Declaring that no quarter will be given;
- (j) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;
- (k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (l) (subject to further discussion).

Option 2

No section D.

Article Y

Drafting subject to further discussion.

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

Aggression

Option 1

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

(a) Initiating, or

(b) Carrying out

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

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

(a) Planning,

(b) Preparing, or

(c) Ordering

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

Option 2

No such provision.

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

Treaty crimes

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

Article 6

Exercise of jurisdiction

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

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

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

Option 1

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

Option 2

No paragraph (c).

Article 7

Acceptance of jurisdiction

Paragraph 1 governs preconditions to the exercise of jurisdiction (the need for acceptance by States). N.B. If the Statute were to provide for automatic jurisdiction for some crimes but an "opt-in" or "State consent" regime for other crimes, then consequential amendments to paragraph 1 would be required, and the placement of the following provisions would be reconsidered.

1. Option 1

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

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

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

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

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

Option 2

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

Option 3

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

accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter:

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

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

Option 4

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

Modes of acceptance (automatic jurisdiction, opt-in, State consent)

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

Automatic jurisdiction

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

Article 7 bis

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

1. A State Party to this Statute may:

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

(b) At a later time, by declaration lodged with the Registrar, accept the jurisdiction of the Court with respect to such of the crimes of ... referred to in article 5 as it specifies in the declaration.

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

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

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

Article 7 ter

Acceptance by non-States Parties:

If the acceptance of a State that is not a Party to this Statute is required under article 7, paragraph 1, that State may, by declaration lodged with the Registrar, consent to the

exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.

Article 8

Temporal jurisdiction and non-retroactivity

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

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

2. If the law as it appeared at the commission of the crimes is changed prior to final judgment in the case, the law more favourable to the accused shall be applied. Article 8 combines current articles 8 and 22; placement could be considered.

Article 9

DELETED

Article 10

Role of the Security Council

Aggression

1. Option 1

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

Option 2

No such provision.

Deferral

2. Option 1

No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, acting under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Option 2

(A revised version of option 1)

Option 3

No such provision.

Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

3. Option 1

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

Option 2

No paragraph 3.

Article 12

Prosecutor

Option 1

1. The Prosecutor may initiate investigations proprio motu on the basis of information on alleged crimes within the jurisdiction of the Court obtained from States, organs of the United Nations, international intergovernmental and non-governmental organizations, victims, associations on their behalf, or any other reliable source.
2. Upon receipt of information relating to the commission of a crime within the jurisdiction of the Court, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, international intergovernmental or non-governmental organizations, victims or their representatives or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules.
4. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction of the case pursuant to article 17.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 to 3, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.

Option 2

No such article.

Article 13

Information submitted to the Prosecutor

DELETED

Article 14

Duty of the Court as to jurisdiction

FURTHER CONSULTATIONS

Article 15

Issues of admissibility

1. Having regard to paragraph 3 of the preamble, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 3 of article 18;

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

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

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

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

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

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

Article 16

Option 1

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the

matter, the Prosecutor shall make such referral known by notification to all States Parties and any non-States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis where necessary to protect persons or prevent destruction of evidence.

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

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

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

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

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

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17. (Subject to further discussion, including with respect to article 17)

Option 2

No such article.

Article 17

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

FURTHER CONSULTATIONS

Article 18

Ne bis in idem

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

convicted or acquitted by the Court.

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

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

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

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

Article 19

DELETED

Article 20

Applicable law

1. The Court shall apply:

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

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

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

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

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

Coalition Reports on: Penalties, Trial, Appeal and Review, Trigger Mechanism and Admissibility, and Finance

The NGO Coalition for an International Criminal Court continues to work diligently towards the establishment of a court at the end of the UN conference begun in Rome, Italy on June 15, 1998. This is an update for events on July 6 and 7, 1998. For more detailed information on the teams and the negotiations, please refer to the reports written by the CICC Teams which have been following the conference in detail. They can soon be found on the CICC website.

Penalties Team

Arab states' concerns over the inclusion of the death penalty continues with Rwanda as well as many Caribbean states supporting its inclusion in the statute. Furthermore, debates continue over life imprisonment. Some states cannot accept it without the option of parole.

Trial, Appeal, and Review Team

In regards to the issue of trials in absentia, the Swedish chair continues to push for the required presence of the accused in question. Furthermore, there is consideration underway for the French proposal, which calls for the ability for trials in absentia under extreme circumstances.

Trigger Mechanism and Admissibility Team

Some of the largest political concerns surrounding the conference center on the issues of trigger mechanism and admissibility (i.e. problem with the role of the Security Council) and therefore may be deferred until the end of the conference. Many, especially states within the Like-Minded group, continue to oppose the U.S. proposal. The U.S. has reportedly begun revisions in order to make it more acceptable. Furthermore, the movement of the ex-officio prosecutor to the pre-trial chamber appears favorable.

Finance Team

The debate over finance continues to center over the 3 funding options:

1. State funding
2. United Nations funding
3. Combination of 1 and 2.

A general consensus has been reached over the feasibility of option 2 although no action has thus far been taken. The implementation of option 3 has reportedly been stalled in order to use it as a political bargaining chip as the conference draws to a close.