NOT JUST A WAR CRIMES COURT: THE PENAL REGIME ESTABLISHED BY THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

On 17 July 1998, the 160 states participating in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court concluded their five-week meeting in Rome, Italy with the adoption of the Rome Statute of the International Criminal Court[1].

The Statute is now open for signature[2]. When it enters into force on the first day of the month following 60 days after the date of deposit of the 60th instrument of ratification, acceptance, approval or accession[3], the International Criminal Court will be the most important international judicial institution to be created since the establishment of the International Court of Justice in 1946. It will also be the first permanent international criminal tribunal exercising prospective criminal jurisdiction over individuals accused of crimes of grave concern to the international community.

This article begins with a brief account of the historical developments which have led to the Rome Statute. It then proceeds to provide an overview of the Statute and, in particular, the key components of the penal regime which it establishes, viz. the Court's jurisdiction, its procedure and the obligations imposed upon states parties to render cooperation to the Court and to enforce its orders. Specific provisions which, in the view of the author, give rise to problems of interpretation are also examined.

Historical Background

The concept of individual criminal responsibility imposed directly by international law is a fairly recent one and dates back to the Treaty of Versailles[4] which was concluded at the end of World War I and which provided for the establishment of international criminal jurisdiction to prosecute the German Emperor and others for crimes against peace and war crimes[5]. No prosecutions however took place pursuant to the Treaty.

* This article is written in a wholly personal capacity and the views expressed in it are not the views of the Attorney-General's Chambers or the Government of Singapore.

1 The text of the Statute UN Doc A/CONF.183/9 is at <http://www.un.org/icc>. The text was adopted by an unrecorded vote with 120 states voting in favour, 7 against and 21 abstaining, see UN Press Release L/ROM/22, 17 July 1998.

2 Until 31 December 2000, see Art 125(1).

3 Art 126(1). As at 7 October 1998, 53 states have signed the Statute, see <http://www.igc.apc.org/icc/rome/html/ratify.html> (visited 13 October 1998).

4 UKTS 4 (1919), Cmd 153; 13 AJIL Supp 151; 16 AJIL Supp 207.

5 Arts 227 and 228.

International prosecutions did take place at the end of World War II with the establishment of international military tribunals at Nürnberg and Tokyo to try individual members of the defeated Axis powers for crimes against peace, war crimes and crimes against humanity[6].

At about the same time, efforts were also made to establish a permanent international criminal court under the auspices of the United Nations. The International Law Commission (ILC) was requested by the U.N. General Assembly in 1947 to develop a Code of Offences Against the Peace and Security of Mankind and to elaborate a statute for international criminal jurisdiction[7]. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide[8] even contained provisions envisaging the prosecution of genocide before an international tribunal[9].

Little progress was however made because of the advent of the Cold War. Difficulties were encountered over the definition of the crime of aggression and the establishment of an international criminal jurisdiction was often de-linked from the ILC's work on the renamed Draft Code of Crimes Against the Peace and Security of Mankind.

Interest in a permanent international criminal court was rekindled only in 1989 when a special session of the General Assembly on international drug trafficking was held and the idea of establishing such an institution to prosecute major drug traffickers was mooted.

It was the widespread commission of atrocities in the former Yugoslavia and in Rwanda in the early 1990s which gave real impetus for the initiatives which have now resulted in the Rome Statute. The carnage which took place in both countries received extensive media coverage and led to public opinion calling for those responsible to be brought to justice. This resulted in the establishment by the U.N. Security Council of the International Criminal Tribunal for the former Yugoslavia[10] in the Hague, the Netherlands in 1993, and the International Criminal Tribunal for Rwanda[11] in Arusha, Tanzania in the following year. It also led to the ILC resuming and completing in 1994 its draft Statute for an International Criminal Court[12].

6 The Charter of the Nurnberg Tribunal is at 82 UNTS 284. The International Military Tribunal for the Far East at Tokyo was established in 1948 by special proclamation by General MacArthur as Supreme Commander of the Allied Forces in the Far East.
7 UN Doc A/RES/2/177.
8 78 UNTS 277.
9 Art VI.
10 The text of the Tribunal's Statute is at 32 ILM 1192.
11 The text of the Tribunal's Statute is at 33 ILM 1602.
12 UN Doc A/49/10.

In 1994, the General Assembly established an Ad Hoc Committee to look into the issues related to the establishment of the Court on the basis of the ILC draft Statute[13]. The work of the Ad Hoc Committee led to the subsequent setting up of the Preparatory Committee on the Establishment of an International Criminal Court in 1995[14]. The Committee's mandate was, in 1996, extended by the General Assembly[15] so that a further four sessions would be held in 1997 and 1998 to finalise the consolidated text of a convention establishing the Court which would be (and indeed was) adopted at the Rome Diplomatic Conference.

The Rome Statute

The Statute consists of 128 articles divided into 13 parts. The opening article gives in a nutshell a description of what the Court is, viz. "a permanent institution" with "the power to exercise its jurisdiction over persons for the most serious crimes of international concern". The seat of the Court will be at the Hague in the Netherlands[16].

Crimes Within the Court's Jurisdiction

The key provisions of the Court can be found in Part 2 entitled "Jurisdiction, Admissibility and Applicable Law". Contrary to popular perceptions, the Court is not just a war crimes court[17] or even a Court which takes cognisance only of crimes committed in armed conflict. Article 5(1) of the Statute provides that it shall have jurisdiction over the following crimes:

a. the crime of genocide;

b. crimes against humanity;

c. war crimes; and

d. the crime of aggression.

(a) Genocide

The definition of genocide[18] is taken from Article II of the Convention on the Prevention and Punishment of the Crime of Genocide[19], viz. killing, causing serious bodily or mental harm etc. carried out with intent to

13 UN Doc A/RES/49/53.
14 UN Doc A/RES/50/46.
15 UN Doc A/RES/51/207.
16 Art 3(1).
17 See, for example, the article entitled " 'Yes' to War-Crimes Court", *The Straits Times*, *20* July 1998.
18 Art 6.
19 78 UNTS 277.

destroy, in whole or in part, a national, ethnical, racial or religious group as such. A list of modes of participation in genocide taken from Article III of the Convention, which was contained in the text of the draft Statute submitted by the Preparatory Committee to the Diplomatic Conference[20], no longer appears. However, the various modes of participation would, with the exception of conspiracy, probably be covered by the general provisions dealing with individual criminal responsibility under the Statute[21].

(b) Crimes Against Humanity

Article 7(1) provides that any one of the following 11 acts constitutes a crime against humanity if it is "committed as part of a widespread or systematic attack directed against any civilian population, 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. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity;

h. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender[22] or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this list of acts or any crime within the jurisdiction of the Court;

i. enforced disappearance of persons;

j. the crime of apartheid; and

k. other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

20 UN Doc A/CONF.183/2/Add. 1, Art 5 and footnote 4.

21 Art 25, discussed *infra*.

22 This has been given a defined meaning in paragraph 3 so that it refers to the two sexes, male and female.

The Article 7(1) list is somewhat longer than that contained in Article 6(c) of the Nurnberg Tribunal's Charter[23]. There is also no requirement that the acts must be committed in situations of armed conflict[24], so the atrocities committed by the Pol Pot regime may, if they are repeated after the entry into force of the Statute for Cambodia[25], be brought within the scope of crimes against humanity[26].

The phrase "attack against any civilian population" is given a defined meaning[27], viz. "a course of conduct involving the multiple commission of acts (which are listed in Article 7(1)) ..... against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack".

This definition resolves a dispute over whether the terms "widespread" and "systematic" should be conjunctive or disjunctive (as they now are in the Statute)[28]. The threshold of seriousness for the Court to have jurisdiction is based first on the existence of both the element of multiplicity (which is of a lower order than "widespread") and the element of a policy (which is of a lower order than "systematic") to commit the attack. The threshold is then met if the commission is, in addition, either widespread or systematic.

It is also interesting to note that the definition refers to the "multiple commission of acts" which are listed. There is therefore no need for there to be a multiplicity of any single one of the acts. It may suffice, for example, if isolated incidents of murder, rape, torture and enslavement were committed provided that these formed part of a systematic attack against the civilian population.

Eight of the 11 acts in the Article 7(1) list are given defined meanings[29].

The definition of enslavement[30] is taken from Article 1(1) of the 1926 Slavery Convention[31] but expressly includes the exercise of powers attaching to the right of ownership over persons in the course of trafficking in them.

23 viz. "murder, extermination, enslavement, deportation and other inhumane acts ..... and persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal".

24 A nexus to armed conflict did appear as an option in Art 5 of the Preparatory Committee's draft Statute. It should be noted that the nexus exists in the definition of crimes against humanity in the Statute of the Tribunal for the Former Yugoslavia (Art 5) but is replaced in Art 3 of the Rwanda Tribunal's Statute by the notion of an attack against a civilian population.

25 See Art 11, the provision on temporal jurisdiction.

26 There would be some difficulty classifying them as acts of genocide because they were not targeted at a particular national, ethnic, racial or religious group as such.

27 Art 7(2).

28 See the discussion in the 1996 Preparatory Committee's Report, UN Doc A/51/22 Vol I at paragraph 81.

29 See paragraph 2(b)–(i).

30 Paragraph 2(c).

31 60 LNTS 253; UKTS 16 (1927), Cmd 2910.

Torture has been given the definition[32] contained in Article 1(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[33] except that the pain or suffering need not be inflicted by a "public official or other person acting in an official capacity", i.e. acts of torture committed by private individuals fall within the definition.

The definition also contains the proviso in Article 1(1) that torture does not include "pain or suffering arising only from, inherent in or incidental to, lawful sanctions". This could cover, for example, certain punishments meted out by the Islamic penal system.

Persecution, which has already been set out in some detail in Article 7(1) itself, is further defined[34] as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

The phrase "by reason of the identity ..... " is probably intended to make it clear that where, for example, the Japanese authorities take measures to ban the Aum Shinrikyu cult[35], such measures do not fall within this definition, notwithstanding that they apparently curtail the right to religious belief. This is because the motivation behind these measures would presumably be the need to preserve public order and safety and not the identity of the cult as such.

Such policies would in any event clearly fall outside the scope of persecution under the Statute because of the requirement in Article 7(1) that the persecution must be committed "in connection with" either another act listed in Article 7(1) or any crime within the jurisdiction of the Court[36]. A similar nexus to other crimes is also contained in the Niirnberg Charter's definition of crimes against humanity[37] and provides a useful measure of certainty in this regard. The reference to an "act" listed in Article 7(1) in addition to any crime within the Court's jurisdiction means that persecution in connection with a single act of, say, torture may suffice for this purpose notwithstanding that that single act would not, because of a failure to meet the threshold conditions of having been committed as part of a widespread or systematic attack etc.[38], amount to a crime against humanity within the Court's jurisdiction.

32 Paragraph 2(d).
33 UN Doc A/RES/39/46; 23 ILM 1027; 24 ILM 535.
34 Paragraph 2(g).
35 The religious cult responsible for the Sarin poison-gas attack at a subway station in Tokyo in 1995.
36 Paragraph l(h).
37 Art 6(c). No such nexus exists in Art 5(h) of the Former Yugoslavia Tribunal's Statute or Art 3(h) of the Rwanda Tribunal's Statute.
38 Contained in the chapeau of paragraph 1.

The crime of apartheid has been defined[39] so that it does not refer to the imposition of an institutionalised regime of racial domination and oppression as such but to "inhumane acts of a character similar to those referred to" in the Article 7(1) list committed in the context of such a regime[40].

"Enforced disappearance of persons" is meant to cover some of the worst incidents to have taken place during the so-called "dirty war" in many Latin American countries in the seventies and is given a definition[41] similar to the description contained in the third preambular paragraph of the 1992 U.N. Declaration on the Protection of All Persons from Enforced Disappearances[42]. The Statute's definition however goes beyond the Declaration in that it covers acts carried out by or with the acquiescence of not only states but also any political organisation.

Finally, the list contains a residual category of "other inhumane acts of a similar character"[43]. The open-endedness of this formulation is not particularly satisfactory in the context of a penal Statute because it offends the principle of certainty in criminal law and may, in effect, permit *ex post facto* determinations of what conduct entails criminal responsibility[44]. It does however have its precedents in the Statutes of the Niirnberg, Former Yugoslavia and Rwanda Tribunals[45]. The Court will probably have to interpret this residual provision restrictively[46] and strictly on the basis of the *ejusdem generis* principle. It would, for example, follow that if the definition of torture has expressly excluded certain forms of punishment meted out under Islamic penal laws[47], these are unlikely to fall within the scope of crimes against humanity by virtue of the "other inhumane acts" formulation.

39 Paragraph 2(h).

40 A similar approach is taken in Art II of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1015 UNTS 243.

41 Paragraph 2(i).

42 UN Doc A/RES/47/133. The Inter-American Court of Human Rights in its *Judgment on Velasquez Rodriguez case (forced disappearance and death of individual in Honduras)*, 29 July 1988, 28 ILM 291, at paragraph 153 considered this as a crime against humanity recognised by international practice and doctrine although there had yet to be a specific treaty in respect of it.

43 Paragraph 1(j).

44 The principle *nullum crimen sine lege*, viz. no criminal liability can arise without a law providing for it, must be applied.

45 Arts 6(c), 5(i) and 3(i) respectively.

46 It should be noted that Art 22(2) in the part on General Principles of Criminal Law requires that in cases of ambiguity, the definition of a crime shall be interpreted in favour of the accused.

47 See the discussion on the definition of torture *supra*.

(c) War Crimes

The definition of war crimes is broadly divided into those applicable to international armed conflicts and those applicable to internal armed conflicts. There are, in addition, various threshold conditions which apply to different situations and classes of crimes.

A threshold which applies to all cases stipulates that the Court's jurisdiction is in respect of "war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes"[48]. What "in particular" probably means is that the Court may be conferred jurisdiction in exceptional circumstances over war crimes even in the absence of plans or policies and where there is no large-scale commission of the crimes. It is however difficult to envisage if, as a practical matter, such situations will be serious enough to warrant the Court's intervention.

In the case of international armed conflicts, the definition includes a consolidated[49] list of acts which would make breaches of the four Geneva Conventions[50] "grave breaches"[51]. This is followed by a list of "other serious violations of the laws and customs applicable to armed conflict"[52] which contains elements taken mainly from the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[53] and Protocol I Additional to the Geneva Conventions[54]. It includes, among other things, prohibitions against attacks against civilians as such[55] and attacks against civilian objects[56].

The employment of the following weapons is also specifically banned[57]:

a. poison or poisoned weapons[58];

b. asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices[59];

48 Art 8(1).
49 The list of acts constituting grave breaches is not identical in each of the four Conventions.
50 75 UNTS 31.
51 Art 8(2)(a).
52 Art 8(2)(b).
53 The text can be found at UKTS 9 (1910), Cd 5030; 2 AJIL (1908), Supplement 90–117.
54 1125 UNTS 3.
55 This is taken from Art 51(2) of Geneva Protocol I. Art 85(3)(a) makes this a grave breach of the Protocol.
56 This is defined in paragraph 2(b)(ii) to mean objects which are not military objectives, see Art 52(1) of Geneva Protocol I.
57 In paragraphs 2(b)(xvii) to (xx).
58 This is taken from Article 23(a) of the Hague (IV) Convention.
59 This is taken from the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, UKTS 24 (1930), Cmd 3604; 25 AJIL Supplement 94–96.

c. bullets which expand or flatten easily in the human body[60]; and

d. "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 the international law of armed conflict[61], provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123".

The last catch-all provision is an odd one. It was probably inserted to leave the door open to the possible inclusion in the future of chemical weapons, biological weapons, nuclear weapons, anti-personnel landmines and blinding laser weapons[62]. The necessity for such a specific mechanism governing the inclusion of new weapons or methods of warfare is however questionable. Articles 121 and 123 are already general provisions dealing with amendments to the Statute[63]. This means that while the simple addition of a sub-paragraph in the definition to include, for example, nuclear weapons would only require an amendment to the war crimes article, the inclusion of such weapons in the annex to the Statute, as envisaged by the residual provision, would not only need an amendment but would also have to satisfy the stipulated conditions governing the nature of the weapons and the fact that they must be the subject of a "comprehensive prohibition".

In the case of armed conflicts which are not of an international character, war crimes are divided into two categories:

a. those committed in serious violation of common Article 3 of the Geneva Conventions[64]; and

b. other specifically listed serious violations of the laws and customs applicable to armed conflict not of an international character[65]. The list is much shorter and generally less onerous than that

60 Also known as Dum-Dum bullets. The formulation is taken from the 1899 Hague Declaration (IV, 3) Concerning Expanding Bullets, UKTS 32 (1907), Cd 3751; 1 AJIL Supplement 155–7.

61 This seems to merge concepts contained in Art 23(e) of the Hague (IV) Convention and Art 35(2) of Geneva Protocol I.

62 See paragraph (o) in section B of the war crimes definition contained in the Preparatory Committee's draft Statute which lists these weapons as proposed inclusions in the text.

63 The amendment provisions are discussed *infra.*

64 Art 8(2)(c), which is consonant with the Former Yugoslavia Tribunal's judgment in the case of *The Prosecutor* v *Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, case IT-94-1-ART2, 2 October 1995 (reported in 35 ILM 32), at paragraphs 88–89.

65 Art 8(2)(e).

> for international armed conflicts. The prohibited weapons provisions are, for example, not mirrored here. It is submitted however that, as a matter of principle, this should not be the case. An act which is prohibited in international armed conflicts should not be any more acceptable just because it occurs in an internal armed conflict situation.

There are, in addition, specific conditions which must be met for the Court to have jurisdiction over such crimes. First, it is made clear that "armed conflicts not of an international character" excludes "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature"[66]. Second, in the case of the non-common Article 3 category of serious violations, there is a further requirement that these must take place "in the territory of a State when there is a protracted armed conflict between governmental authorities and organised groups or between such groups"[67]. Finally, for all war crimes arising out of non-international armed conflicts, the definitional provisions do not affect "the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means"[68]. It is doubtful if this qualification really adds anything to the definition. If a State has used "legitimate means", it is unlikely that any war crime can be said to have been committed anyway.

(d) Aggression

The crime of aggression is included in the list of crimes within the Court's jurisdiction but the Court cannot exercise jurisdiction over this crime until a provision is adopted in accordance with the provisions on the amendment of the Statute which defines the crime and sets out the conditions under which the Court shall exercise jurisdiction[69].

The definition of aggression, especially in relation to the role of the Security Council, gave rise to considerable difficulties in the negotiations[70]. The relevant provision in the ILC draft Statute[71] prevented the bringing of a complaint of aggression in the absence of a determination by the

66 Arts 8(2)(d) and (f). This is taken from Art 1(2) of Protocol II Additional to the Geneva Conventions, 1125 UNTS 609.

67 Art 8(2)(f). This is mainly taken from Art 1(1) of Protocol II. Unlike Protocol II, however, it can apply to conflicts between organised armed groups to which a state's armed forces are not a party. There is also an additional qualification that the armed conflict must be a "protracted" one.

68 Art 8(3). This is taken from Art 3(1) of Protocol II.

69 Art 5(2).

70 See, for example, paragraphs 70–73 and 137–139 of the 1996 Preparatory Committee Report Vol I.

71 Art 23(2).

Security Council that a state had committed the act of aggression (so that the Court would only be involved in a subsequent exercise of ascertaining individual criminal responsibility for aggression found to have been committed by a state). The Rome Statute only stipulates that the provision on aggression to be adopted should be "consistent with the relevant provisions of the Charter of the United Nations". This must mean consistency with Article 39 of the Charter pursuant to which the "Security Council shall determine the existence of any..... act of aggression .....". It could be argued that consistency simply means not making a finding which contradicts a determination made by the Council on the existence or non-existence of an act of aggression by a state. The mandatory language of Article 39 would, however, appear to indicate that a primary role must be given to the Council to determine the existence of aggression as a pre-condition to the institution of criminal proceedings against individuals by the Court.

(e) Elements of Crimes

Provision is made[72] for the adoption of more detailed elements of genocide, crimes against humanity and war crimes by the Assembly of States Parties[73] but the articulated elements are only for the purposes of assisting the Court in interpreting and applying the definitions of these crimes.

Jurisdiction

This is one limb of what was known in the Preparatory Committee as the "trigger mechanism"[74], i.e. the pre-conditions which must be satisfied before the Court can have and exercise jurisdiction by investigating and prosecuting a crime.

Article 12(2) of the Statute provides that unless the matter has been referred to the Court by the Security Council acting under Chapter VII of the U.N. Charter[75], the Court shall have jurisdiction with respect to a crime if one or more of the following states are parties to the Statute or, being non-parties, have declared acceptance of the Court's jurisdiction with respect to the crime in question pursuant to paragraph 3 of the same article:

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 nationality of the person accused of the crime.

72 Art 9.
73 The provisions governing the Assembly of States Parties are discussed *infra*.
74 See paragraph 116 of the 1996 Preparatory Committee Report Vol I.
75 Discussed *infra*.

Under Article 12(1), all states parties accept the jurisdiction of the Court with respect to all the crimes referred to in Article 5[76]. This resolves a long-standing dispute during the preparatory process over whether there should be the automatic acceptance of jurisdiction[77], which is what Article 12(1) now provides for, or an opt-in or opt-out regime pursuant to which states parties can choose the crimes in respect of which they accept the Court's jurisdiction.

Article 12(1) should in principle make the reference in Article 12(2) to states parties (instead of just states accepting the Court's jurisdiction) redundant were it not for the possible impact of this latter formulation on a transitional provision, viz. Article 124.

Article 124 provides for a seven-year opt-out for states parties with respect to war crimes viz.

> Notwithstanding article 12, paragraph 1, a State, on becoming a party to this Statute, may declare that for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to (war crimes) .....when a crime is alleged to have been committed by its nationals or on its territory .....

It should be noted that the provision speaks of the non-acceptance of the Court's jurisdiction as an exception to Article 12(1) and not Article 12(2), which deals with the Court's exercise of jurisdiction. A proposed technical amendment to the text to include a reference to Article 12(2) has been circulated to the signatory states for objections, if any, to be raised by 6 November 1998.[78]

Even with the amendment, the fact remains that Article 12(2) links the exercise of jurisdiction with certain specified states being parties to the Statute and not with the acceptance by those states parties of the Court's jurisdiction with respect to the crimes in question.[79]

An argument can therefore still be made, based on a strict interpretation of its terms, that in cases where nationals of State A, being a party which has made an Article 124 declaration, commit war crimes on the territory of State B —

a. if B is a state party which has not made an Article 124 declaration, the Court may exercise jurisdiction under Article

76 viz. genocide, crimes against humanity, war crimes and aggression.

77 This was, quite erroneously, referred to as "inherent jurisdiction" in the Preparatory Committee, see paragraphs 117–120 of the Committee's 1996 Report.

78 Depositary Notification C.N. 502.1998. TREATIES-3 which relies on the procedure set out in Art 79 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331.

79 Acceptance of jurisdiction is relevant to the Court's exercise of jurisdiction under Art 12(2) only in the case of non-states parties.

12(2) over A's nationals by virtue of State B being the territorial state;

b. if B is a non-state party or is a state party which has made an Article 124 declaration, the Court may, on a strict construction of Article 12(2), exercise jurisdiction over A's nationals because of the reference in Article 12(2) to the territorial state (B) or the national state (A) being parties to the Statute (instead of being states which have accepted the Court's jurisdiction).

The results, especially in the latter situation, are probably unintended and it remains to be seen if the Court will give Article 12(2) a purposive interpretation in favour of its not being entitled to exercise jurisdiction in such circumstances.

The non-acceptance of jurisdiction over war crimes by a state party may nevertheless constitute a ground for refusing to cooperate[80] with the Court in the investigation and prosecution of war crimes committed by its nationals or taking place on its territory. It should be noted that the non-acceptance of jurisdiction as a ground for refusal to cooperate was expressly set out as an option in the Preparatory Committee's draft Statute[81] but this no longer appears in the final version of the Statute. It seems implicit however that if a state party is entitled not to regard the Court as having the right to assert jurisdiction in particular circumstances, it would not be obliged to comply with requests for cooperation arising out of the purported exercise of such jurisdiction.

Nor are the provisions of Article 12(2) entirely satisfactory as such. What constitutes the territory of a state can be fraught with difficulties, not least of a political nature, and it has to be borne in mind that territorial disputes may form the backdrop to many of the crimes which the Court is intended to take cognisance of. As for the state of registration of a ship or aircraft, the crimes over which the Court will have jurisdiction are unlikely to be committed "on board" a ship or aircraft. The shooting down of a civilian aircraft in international air space, for example, will not take place in the territory of a state or "on board" the aircraft itself.

Nor is it sufficient merely to refer to the state of which the accused is a national. A temporal element needs, at the very least, to be included especially in cases where there are changes of nationality which can arise from the break-up of an existing state or where there is a significant lapse of time between the crime and the apprehension of the suspect, as in the case of several Nazi war criminals who fled and settled in third states. Does Article 12(2) refer to the state of nationality of the person

80 Pursuant to the obligations set out in the part on international cooperation and judicial assistance, the provisions of which are discussed *infra.*

81 Art 87(3) Option 2 paragraph (a) and Art 90(2) Option 2 paragraph (a).

at the time the crime was committed (which might be logical) or at the time when the Court exercises jurisdiction (which seems to be implied from the chapeau of Article 12(2))? If it is the latter, is there one point in time which is used to determine nationality bearing in mind that the exercise of jurisdiction by the Court is a continuum of activities rather than a single event?

Apart from spatial jurisdiction, there is also the question of temporal jurisdiction. The Statute makes it clear that the Court has jurisdiction only with respect to crimes committed after entry into force of the Statute[82]. As for the effect of the entry into force of the Statute for individual states, Article 11(2) provides that:

> If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

The formulation "with respect to crimes committed after entry into force of this Statute for that State" does not fit well with the approach taken in Article 12(2), which links the exercise of jurisdiction with relevant states being parties to the Statute. What is meant presumably is that the Court cannot exercise jurisdiction over crimes committed prior to the fulfilment of all the conditions required for the exercise of jurisdiction under Article 12(2), which includes the entry into force of the Statute for the state party concerned.

There is also the issue of whether a non-state party can, by an Article 12(3) declaration, confer upon the Court jurisdiction over crimes committed prior to the lodging of the declaration. The terms of Article 12(3), by referring to acceptance of the Court's "exercise" of jurisdiction with respect to "the crime in question", seem to point in that direction. Where neither the territorial state nor the state of nationality of the accused is a state party, this interpretation does raise the problem of an *ex post facto* imposition of criminal liability upon individuals since, there would be no connection at all between the affected states and the Court at the time of the alleged crime in such cases.

Triggering Proceedings

The second limb of the trigger mechanism is the issue of which entities have locus standi to initiate proceedings before the Court. The Statute presents this in the form of conditions for the exercise of jurisdiction by the Court[83] but it is in fact conceptually quite different from what is

82 Art 11(1). The principle is also repeated in the provision on non-retroactivity in relation to persons, see Art 24(1).

83 See the chapeau of Art 13.

contained in Article 12. Article 12 deals with the substantive conditions for the exercise of jurisdiction whereas the focus here is on the procedural triggering of proceedings before the Court.

There are three entities which have been given such triggering powers[84]:

a. any state party;

b. the Security Council acting under Chapter VII of the Charter of the United Nations; and

c. the Prosecutor *proprio motu* (on his or her own motion)[85].

In the first two cases, the referral is of a "situation in which one or more" of the crimes within the jurisdiction of the Court appears to have been committed[86]. It will then be for the Prosecutor, upon investigation, to determine whether individuals should be charged for specific crimes.

The exercise of *proprio motu* powers by the Prosecutor is based upon information which he or she may receive from any source[87]. The Prosecutor must then analyse the information given and determine if there is a reasonable basis to proceed with the investigation. If there is, he or she must seek the authorisation of the Pre-Trial Chamber to commence investigations[88].

The Pre-Trial Chamber is a concept more familiar to the civil law systems (where the judge takes a more pro-active role in investigations) rather than the common law systems. The Chamber consists of either one or three judges[89], although for the purposes of authorising the Prosecutor to commence investigations, it is probably a three-judge Chamber which sits[90]. It exercises various supervisory powers over the conduct of investigations and deals with most interlocutory applications[91].

The Chamber acts as a check on the exercise of *proprio motu* powers by the Prosecutor in the commencement of investigations. It will, upon an application for authorisation by the Prosecutor, determine if there is a reasonable basis to proceed with an investigation and if the case appears

84 Art 13.

85 This was erroneously described as the *ex officio* power of the Prosecutor during the proceedings of the Preparatory Committee, see paragraph 149 of the 1996 Preparatory Committee Report Vol I.

86 Arts 13(b) and 14(1).

87 Art 15(1).

88 Art 15(3). The relationship between this provision and Art 53(1), which deals with the initiation of investigations in general, is discussed *infra*.

89 Art 39(2)(b)(iii).

90 This is implicit from the fact that orders under Art 15 must be concurred in by a majority of the judges of the Chamber, see Art 57(2)(a), whereas a single judge may exercise the Chamber's functions in other cases not specified in that sub-paragraph.

91 See Arts 18, 19, 53 and 56–61. There is further discussion of the role of the Pre-Trial Chamber *infra* in the context of the provisions on investigation and prosecution.

to fall within the Court's jurisdiction. If so, it will authorise the commencement of investigations[92].

There is a power given to the Security Council to stop either the commencement or the continuation of proceedings in the Court for a period of 12 months by a resolution adopted under Chapter VII of the U.N. Charter[93]. This provision is known as the "Singapore compromise" because it is derived from a proposal by Singapore in the August 1996 session of the Preparatory Committee[94] to change the Council's "negative veto" power contained in the ILC's draft Statute into what is now a veto which must be affirmatively exercised[95]. In the ILC text, if the situation was being dealt with by the Council under its Chapter VII powers, no proceedings could commence unless the Council so authorised[96], whereas under the "compromise", a positive decision is required to halt or prevent proceedings.

The qualification of a renewable 12-month period for Council decisions in the Rome Statute is an addition to the original compromise text. It does give rise to some potential for conflict if there is a Council resolution of indefinite duration or a duration in excess of 12 months. In those circumstances, the primacy of U.N. Charter obligations[97] would require U.N. member states to give effect to decisions of the Security Council pursuant to Article 25 of the Charter over conflicting rights and obligations under the Statute. Hence, while the Court itself might not be bound to refrain from proceeding after the expiry of the 12-month period, states parties might, depending on the terms of the Security Council resolution, be prevented by the provisions of the Charter from either triggering proceedings before the Court or rendering cooperation to the Court under the Statute.

Complementarity and Admissibility

Even if the Court is entitled to exercise jurisdiction over a case, a further hurdle must be crossed in that the case must not be inadmissible because of proceedings dealing with the same matter which are taking place or have taken place in a national jurisdiction. The relationship between the Court's jurisdiction and national criminal jurisdictions is governed by the principle of complementarity[98]. This principle is expressed in the tenth

92 Art 15(4).
93 Art 16.
94 UN Doc A/AC.249/WP.51.
95 UN Doc A/49/10.
96 Art 23(3).
97 Under Art 103.
98 Although this word is not found in the text of the Statute, it has featured prominently in the negotiations, see, *inter alia*, paragraphs 29–38 of the 1995 Ad Hoc Committee Report, UN Doc A/50/22, and paragraphs 153–164 of the 1996 Preparatory Committee's Report Vol I.

preambular paragraph of the Statute, viz. that the Court shall be complementary to national criminal jurisdictions. States parties continue to have primary responsibility for the prosecution and punishment of crimes within the jurisdiction of the Court but the Court will step in where national criminal justice systems fail to do so[99].

What then are the circumstances which would render a case admissible so that the Court could intervene even though states are dealing with or have dealt with the case? Article 17(1) requires the Court to 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 and the state has decided not to prosecute the person, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute;

c. the person has already been tried for conduct which is the subject of the complaint and a trial by the Court is not permitted under Article 20(3); or

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

The situation envisaged by the last paragraph is not one in which the principle of complementarity arises. It simply reflects the fact that the seriousness of the crime is a condition which must be satisfied if the Court is to exercise its jurisdiction in any given case.

As for the first two situations, it should be noted that the reference is made to a "state" and not a state party. It is not material that the case has been or is being dealt with by a non-state party. So long as the national proceedings are conducted properly by any state, no impunity for the perpetrator would ensue which would justify intervention by the Court.

99 This principle is more comprehensively stated in the third preambular paragraph of the ILC's draft Statute, viz. "such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".

Unwillingness or inability genuinely to deal with the case are elements which are common to both situations. Genuineness carries with it a notion of good faith. So does "unwillingness", which is given a defined meaning[100] viz.

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, 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 .....;
>
> (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, 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.

It follows that a state cannot be said to be "unwilling ..... genuinely" to deal with a case only upon an assertion that it is pursuing the matter in an inept manner, so long as it is doing so in good faith. Ineptness at its extreme might however be indicative of a lack of genuineness.

Inability is also given a defined meaning, viz.

> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial 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[101].

This addresses the situation where, for example, a civil war has left the judicial institutions and the enforcement agencies of a state in ruins. Although the qualifier "genuinely" used in Article 17(1) would still impart some degree of good faith even in a case of inability, this condition would probably be satisfied if it is clear that the national legal framework is not in any position to bring the perpetrators to justice.

100 Art 17(2).
101 Art 17(3).

The third situation of inadmissibility, viz. where a person has been tried for conduct which is the subject of the complaint to the Court, is one which concerns an exception to the principle of double jeopardy or *ne bis in idem* in Article 20. Article 20 deals with several situations but complementarity is relevant where there has been a prior trial before the national courts and proceedings are now brought before the International Criminal Court.

The test prescribed in Article 20(3) bears a close resemblance to the definition of unwillingness in Article 17, viz.:

> No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8[102] shall be tried by the Court with respect to the same conduct 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 recognised by international law and were conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

The state's proceedings must therefore be tainted with some element of bad faith in order for the exception to apply. It should also be noted that the formulation refers to "conduct" rather than "crime"[103]. This covers the situation where the state chooses to characterise the crime differently from its description in the Statute, e.g. as mass murder instead of genocide.

Various procedures provide for preliminary rulings on admissibility to be sought prior to the commencement of an investigation. The Prosecutor must first give notice of the intended investigation to all states parties and non-states parties which would "normally"[104] exercise jurisdiction over the crimes in the following circumstances[105]:

102 The specific reference to the three articles alone may cause problems in that it leaves open the argument that if a person has been tried before a national court for aggression (which is not proscribed under either Arts 6, 7 or 8), Art 17(1) stipulates that he or she cannot be tried again by the Court because there are no circumstances which would permit this subsequent trial under Art 20.

103 This term is also used in Art 17(1)(c).

104 This probably addresses the situation where a crime could be subject to universal jurisdiction, e.g. grave breaches under the Geneva Conventions, but only a few states would realistically be in a position to assert criminal jurisdiction.

105 Art 18(1).

a. where a state party has referred a situation to the Court and the Prosecutor has determined that there is a reasonable basis to commence an investigation[106]; or

b. where the Prosecutor initiates an investigation[107] *proprio motu.*

If, within one month of the notification, a state informs the Court that it is investigating or has investigated the matter, the Prosecutor must, on request by that state, defer to its investigations for a period of at least six months. This is unless the Pre-Trial Chamber, on an application by the Prosecutor, authorises the investigation to proceed in spite of the request for deferral[108]. During the period of deferral, a state party would be obliged to provide information on the progress of its proceedings[109] and the Prosecutor may, in exceptional circumstances, obtain the Pre-Trial Chamber's authorisation to take measures to preserve evidence[110].

Article 19 governs the bringing of challenges to either jurisdiction or admissibility in the ordinary course of the proceedings. Locus standi to mount such challenges is given *inter alia* to the accused or a person for whom a warrant of arrest or a summons to appear has been issued[111] (since this would be the first time that the individual is directly affected by the Court's proceedings) or to a state (and not just a state party) which has jurisdiction on the grounds that it is investigating or prosecuting the case or has done so[112]. The Prosecutor may also seek a ruling on jurisdiction or admissibility from the Court[113].

Unless leave of the Court is obtained, challenges may only be made once by each party and must be made prior to the commencement of the trial[114]. Before the confirmation of the charges[115], such challenges shall be heard by a three-judge Pre-Trial Chamber[116] and thereafter by the Trial Chamber, which also consists of three judges[117].

106 It is not clear if this is intended to be a prior step to the "initiation" of an investigation which must be done unless the Prosecutor considers that there is "no reasonable basis" to proceed, see Art 53(1), discussed *infra.*

107 The reference to the Prosecutor's power to "initiate an investigation" in Art 15(1) suggests that notification must be given before he or she analyses the seriousness of the information received under Art 15(2). It is not linked with the authorisation to "commence an investigation" given by the Pre-Trial Chamber pursuant to Art 15(4).

108 Art 18(2) and (3).

109 Art 18(5).

110 Art 18(6).

111 See discussion on Art 58 *infra.*

112 Art 19(2).

113 Art 19(3).

114 Art 19(4).

115 See the discussion on Art 61 *infra.*

116 This seems implicit from Art 57(2)(a).

117 Art 39(2)(b)(ii).

Applicable Law and General Principles of Criminal Law

Article 21 sets out a hierarchy of sources of law which the Court has to apply, and which is somewhat similar to that contained in Article 38 of the Statute of the International Court of Justice[118]. The Court must first apply the Statute, the elements of crimes[119] and the Rules of Procedure and Evidence. This is followed by applicable treaties and the principles and rules of international law, failing which it applies "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime"[120].

Whether the last formulation is correct is doubtful. The principles which the Court applies must be independent of links to the individual case in question. To provide otherwise would be to risk breaching the principle of equality before the law[121] in that different principles might be applied depending on which states would "normally exercise jurisdiction" in that particular case. What the Court should be doing is deriving these general principles from an overall survey of the legal systems of the world without giving particular attention to any one national legal system. It should be noted that Article 38(1)(c) of the ICJ's Statute refers to "the general principles of law recognised by civilised nations" and it is submitted that this approach, shorn of its archaic reference to "civilised" nations, is the correct one.

An entire part of the Statute consisting of 12 articles sets out the general principles of criminal law to be applied by the Court.

Various modes of participation in a crime entail responsibility under the Statute. These include aiding and abetment[122] and attempts[123]. Incitement is a mode of criminal participation only for the crime of genocide and, even then, it has to be committed directly and publicly[124].

Conspiracy in the traditional sense of an agreement together with an overt act in furtherance of the agreement is not included[125]. In its place is the notion of contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose[126], which is somewhat difficult to distinguish from aiding, abetment and the other modes of participation already provided for.

118 UKTS 67 (1946), Cmd 7015.
119 Discussed *supra.*
120 Paragraph 1(c).
121 This is enshrined in *inter alia* Art 7 of the Universal Declaration of Human Rights (adopted by the U.N. Genera! Assembly in Resolution 217A(III)).
122 Art 25(3)(c).
123 Art 25(3)(f).
124 This is the formulation used in Art III(c) of the Genocide Convention.
125 This was reflected as an option in Art 23(e)(ii) of the Preparatory Committee's draft Statute.
126 Art 25(3)(d).

Persons under the age of 18 at the time of commission of the crime are excluded from the jurisdiction of the Court[127]. The formulation does not say that they are not criminally responsible since they may well be in their respective national criminal systems.

As in the case of the Statutes of the Niirnberg, Former Yugoslavia and Rwanda Tribunals[128], there is also a clear statement of the principle of the irrelevance of official capacity, i.e. the fact that a person acts in an official capacity does not exempt him or her from criminal responsibility nor does it constitute a ground for mitigating punishment[129].

Commanders and superiors are criminally responsible for the crimes of their subordinates if they do not exercise proper control over them but the threshold for attributing such responsibility is higher for civilian superiors than it is for military commanders and civilians acting as military commanders[130]. The concept of command responsibility attained prominence in the trial of General Yamashita after World War II[131] but its extension to civilian superiors is already recognised in the Statutes of both the Former Yugoslavia and Rwanda Tribunals[132].

There is no limitation period for crimes within the Court's jurisdiction[133].

Grounds for excluding criminal responsibility are dealt with in several articles. These essentially refer to defences which can be raised before the Court but the formulation "grounds for excluding criminal responsibility" avoids a debate over whether a specific ground merely negates certain elements of the offence or is a defence in its own right.

The Statute expressly recognises six grounds for excluding criminal responsibility[134]:

a. insanity;

b. intoxication;

c. self-defence;

d. duress;

e. mistake of fact or law; and

f. superior orders.

127 Art 26.
128 Arts 7, 7(2) and 6(2) respectively.
129 Art 27.
130 Art 28.
131 IV WCR 3.
132 Arts 7(3) and 6(3) respectively.
133 Art 29.
134 In Arts 31(1), 32 and 33.

The inclusion of superior orders[135] as a possible ground for excluding criminal responsibility reflects the views of those who advocate that the defence might be available in limited circumstances, *inter alia* where the order is not manifestly unlawful, as opposed to those who do not recognise superior orders as a defence at all[136]. It should be noted that the Statutes of the Nurnberg, Former Yugoslavia and Rwanda Tribunals all expressly exclude the defence of superior orders[137], although the Nurnberg Tribunal in its judgment indicated that the absence of moral choice might negate criminal responsibility[138].

Each of the grounds for excluding criminal responsibility is nevertheless circumscribed in varying degrees. Self-defence of persons may be pleaded for all crimes but self-defence of property applies only to war crimes[139]. Mistake of fact can only pleaded if it negates the mens rea of the crime[140], i.e. it is not, strictly speaking, a defence as such. A mistake of law as to whether particular conduct amounts to a crime within the Court's jurisdiction cannot be pleaded[141]. And superior orders cannot be pleaded as a defence if the order is to commit genocide or crimes against humanity[142].

In addition, the Court must still determine the applicability of the specified grounds to the case before it[143]. It therefore retains the discretion to rule that a ground cannot be relied on for a specific class of crimes or in a specific set of circumstances notwithstanding that the Statute provides for it. A person might not, for example, be able to plead duress in cases of voluntary exposure of himself or herself to the threat of imminent death or serious bodily harm[144].

The Court also retains the power to consider other grounds for excluding criminal responsibility which are not specifically provided for[145] in accordance with the article on applicable law[146]. This could be used to include other defences known in domestic law such as necessity and public international law defences such as military necessity[147].

135 Art 33.
136 The two opposing views on this issue are reflected in Y Dinslein, *The Defence of Obedience to Superior Orders in International Law*, Leyden, 1965, and L C Green, *Superior Orders in National and International Law*, Sijthoff, 1976.
137 In Arts 8, 7(4) and 6(4) respectively.
138 See Trial of the Major War Criminals before the International Military Tribunal, Nurnberg, 1948, Vol XXII at p 466.
139 Art 31(1)(c).
140 Art 32(1).
141 Art 32(2).
142 Art 33(2).
143 Art 31(2).
144 This restriction appeared as an option in Art 31(1)(d) of the Preparatory Committee's draft Statute.
145 Art 31(3).
146 Art 21, discussed *supra.*
147 See Art R in the 1996 Preparatory Committee Report Vol II.

Composition and Administration of the Court

The Court consists of 18 judges[148] headed by a President and two Vice-Presidents[149]. Provision is however made for the states parties to increase the number of judges if necessary[150]. Judges shall be elected by states parties from two lists of candidates viz.:

a. those with competence in criminal law and procedure and relevant experience in criminal proceedings; and

b. those with competence in international law and experience "in a professional legal capacity which is of relevance to the judicial work of the Court"[151].

At least nine of the 18 judges must be elected from the first list and at least five from the second[152]. Five judges will serve on the Appeals Chamber and at least six each in the Pre-Trial and Trial Divisions from which Pre-Trial and Trial Chambers will be formed. There must be a pre-dominance of judges with criminal trial experience in the Pre-Trial and Trial Divisions[153].

The Office of the Prosecutor is a separate, independent organ of the Court. It is headed by the Prosecutor who is assisted by one or more Deputy Prosecutors, the Prosecutor and the Deputy Prosecutors are elected by the states parties[154].

Investigation and Prosecution

Article 53(1) requires the Prosecutor to initiate an investigation on the basis of information received unless he or she determines that there is no reasonable basis to proceed. In so doing, the Prosecutor must consider —

a. if the information provides a reasonable basis to believe that crimes within the jurisdiction of the Court have been or are being committed;

b. the admissibility of the case; and

c. whether there are substantial grounds to believe that an investigation would not be in the interests of justice, taking into account the gravity of the crime and the interests of victims.

148 Art 36(1).
149 Art 38(1).
150 Art 36(2).
151 Art 36(3).
152 Art 36(5).
153 Art 39(1).
154 Art 42(1), (2) and (4).

This is a provision which is intended apply irrespective of which entity has triggered the proceedings. In the case of referrals by states parties or the Security Council, the information which the Prosecutor must consider is contained in the referral in question[155]. The provision is however far less easily reconciled with Article 15 which governs the *proprio motu* powers of the Prosecutor to initiate an investigation. This is because there are also references in Article 15 to the Prosecutor initiating an investigation on the basis of information received and making a determination that there is a "reasonable basis" to proceed with an investigation[156]. This latter determination appears to be a stage which is subsequent to the initiation of an investigation. It involves making a more stringent finding than that required by Article 53(1) (which is a "no reasonable basis" determination).

Where the triggering event is the exercise by the Prosecutor of *proprio motu* powers, the chronology of events is, it is submitted, probably based upon a reversal of the order in which Articles 15 and 53 appear in the Statute viz.:

a. the Prosecutor receives information;

b. the Prosecutor considers if there is no reasonable basis to proceed (Article 53(1));

c. if not (i.e. if there is some basis to proceed), the Prosecutor initiates an investigation *proprio motu* but this is limited for the time being to analysing the seriousness of the information (Article 15(2));

d. if the Prosecutor then concludes that there is a reasonable basis to proceed, he or she will seek the Pre-Trial Chamber's authorisation for an investigation (Article 15(3)).

Irrespective of the mode of triggering the investigations, once these have been carried out, the Prosecutor must consider if there is no "sufficient basis" for a prosecution because —

a. there is an insufficient basis to seek a warrant of arrest or a summons[157]. This probably refers to the adequacy of evidence such that there are reasonable grounds to believe that an individual who may be the object of the warrant or summons has committed a crime within the Court's jurisdiction[158];

b. the case is inadmissible; or

155 This would include the supporting documents which accompany the referral, see Art 14(2).

156 Art 15(2) and (3).

157 Discussed *infra.*

158 This is the evidential threshold for seeking a warrant of arrest, see Art 58(1), discussed *infra.*

c. a prosecution is not in the interests of justice, taking into account all the earlier factors affecting the same determination for the purpose of initiation of the investigation as well as the age or infirmity of the perpetrator and his or her role in the alleged crime[159].

The Pre-Trial Chamber exercises supervisory jurisdiction over the case throughout the investigations. Where a state party or the Security Council has made the referral, the Chamber may, at the request of that state or the Council, as the case may be, review the decision of the Prosecutor not to initiate with an investigation or not to proceed with the prosecution[160]. In addition, the Chamber may, on its own motion, review a decision of the Prosecutor not to proceed if it is based solely on the "interests of justice" criterion[161].

The Pre-Trial Chamber is also empowered to take measures to protect witnesses and preserve evidence and to issue orders necessary for the purposes of an investigation. This includes authorising the Prosecutor to conduct specific investigations on the territory of a state party if it determines that the state is clearly not able to execute a request for cooperation[162] because of the unavailability of any authority or any component of its judicial system competent to execute a request for cooperation[163].

In the case where a unique opportunity to obtain evidence arises which may not be available subsequently for the purposes of the trial, the Pre-Trial Chamber may, upon application by the Prosecutor, take appropriate measures to "ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence"[164]. The Chamber may even take such measures on its own motion if the Prosecutor unjustifiably fails to make the application and the Chamber considers that the measures are essential for the Defence at trial[165]. Its role, in such situations, is therefore also to ensure that there is equality of arms between the Prosecution and the Defence.

At any time after the initiation of an investigation, the Pre-Trial Chamber may, upon application by the Prosecutor, issue a warrant of arrest if it is satisfied that there are reasonable grounds to believe that the person committed a crime within the Court's jurisdiction and that his or her arrest is necessary *inter alia* to ensure appearance at trial[166].

159 Art 53(2).
160 Art 53(3)(a).
161 Art 53(3)(b).
162 The international cooperation and judicial assistance regime is discussed *infra*.
163 Art 57(3).
164 Art 56(1).
165 Art 56(3).
166 Art 58(1).

The Pre-Trial Chamber may however issue a summons to appear instead of a warrant of arrest if it is of the view that a summons would be sufficient to ensure the person's appearance (which, in all likelihood, will be a voluntary one) before the Court[167].

The execution of a warrant of arrest and the subsequent surrender of the person to the Court is then carried out by the state party on whose territory he or she is found, pursuant to that state's obligations to render assistance to the Court under Part 9 of the Statute[168]. The person arrested may, pending surrender to the Court, be released on bail by the state in exceptional circumstances[169]. After surrender to the Court, it is the Pre-Trial Chamber which oversees the detention of the person, including taking decisions on applications for interim release pending trial[170].

Within a reasonable time after the person's surrender to or voluntary appearance before the Court, the Pre-Trial Chamber must hold a hearing to confirm the charges upon which the Prosecutor intends to proceed to trial[171]. This confirmation hearing is akin to the preliminary inquiry proceedings for criminal cases to be tried in our High Court.

The person charged must be present at these proceedings except when he or she —

a. waives the right to be present; or

b. flees or cannot be found and all reasonable steps have been taken to secure appearance before the Court and to inform the person of the charges and of the confirmation hearing[172].

It should be noted however that the trial cannot proceed in the absence of the accused[173].

At the confirmation hearing, the Prosecutor must support each charge with "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged"[174]. This is a higher evidential standard than those required for any of the earlier proceedings and is probably similar to the common law threshold of a *prima facie* case.

The Defence must be informed beforehand of the evidence which will be led at the confirmation hearing and may, at the hearing itself, challenge the evidence presented by the Prosecutor or present its own evidence[175].

167 Art 58(7).
168 Art 59(1).
169 Art 59(3) and (4).
170 Art 60.
171 Art 61(1).
172 Art 61(2).
173 Art 63(1).
174 Art 61(5).
175 Art 61(3) and (6).

The Pre-Trial Chamber shall, if it is satisfied that the evidential standard has been met, confirm the charges in question. Once the charges have been confirmed, the Pre-Trial Chamber's role in the case comes to an end because a Trial Chamber will then be constituted to conduct the trial, to make necessary directions for this purpose[176] and to exercise the powers of the Pre-Trial Chamber after the confirmation of the charges[177].

The Trial

At the commencement of the trial, the charges are read to the accused who may then either plead not guilty or make an admission of guilt[178], which is the equivalent of a guilty plea.

The procedure which governs an admission of guilt represents a compromise between common law systems which recognise a guilty plea and some civil law systems which do not but which nevertheless accept that a simplified trial procedure could apply where the accused makes such an admission[179]. The end result does however resemble more of the former than the latter. In the compromise procedure, the Trial Chamber cannot convict the person based on an admission of guilt unless it is satisfied *inter alia* that the admission is supported by the facts of the case as contained in the charges which the accused admits, the materials supplementing the charges which the accused accepts and any other evidence which may be tendered by the Prosecution or the Defence[180]. If the Trial Chamber is not satisfied, it may either require the presentation of additional evidence by the Prosecutor or order that the trial proceed as an ordinary trial[181].

There are extensive provisions in the Statute dealing with the rights of persons and suspects during an investigation as well as the rights of the accused during the trial[182]. In the case of the rights of the accused, these are, to a large extent, similar to those set out in Article 15 of the International Covenant on Civil and Political Rights[183], but they also include the right to make an oral or written statement in Court without giving an undertaking as to the truthfulness of the testimony (i.e. to make an unsworn statement)[184].

Witnesses at trial must give their testimony in person. This is however subject to measures which the Court may take for their protection where necessary and subject to the Court's power to permit evidence to be given

176 Art 64(3).
177 Art 61(11).
178 Art 64(8)(a).
179 See paragraphs 261–263 of the 1996 Preparatory Committee Report Vol I.
180 Art 65(1)(c).
181 Art 65(3) and (4).
182 Arts 55 and 67.
183 999 UNTS 171.
184 Art 67(1)(h).

by video or audio link. But these exceptional procedures cannot be prejudicial to the rights of the accused[185], which would include *inter alia* the right of cross-examination of witnesses[186].

The issue of whether and how the Court should be empowered to deal with perjury and other offences against the administration of justice has not been an easy one to resolve. Such offences are minor in comparison with the crimes within the Court's jurisdiction and it would be difficult to justify the whole weight of a machinery designed to deal with crimes of grave concern to the international community being brought to bear to bring the offenders to justice. There are nevertheless strong arguments in favour of the Court exercising jurisdiction over these offences based on the principle that it should be the master of its own procedure[187].

The compromise reached in the Statute draws a distinction between —

a. offences against the administration of justice, e.g. perjury, falsification of evidence, bribing a witness, tampering with evidence and impeding, interfering or corruptly influencing a Court official in the performance of his or her duties; and

b. misconduct by persons present before the Court, e.g. the disruption of its proceedings and the deliberate refusal to comply with its orders. These are akin to contempt of the Court.

In the case of offences against the administration of justice, states parties must extend their criminal laws governing similar offences to cover those offences under the Statute when these are committed on their territory or by their nationals[188]. Upon request by the Court, whenever it deems it proper, states parties must submit such cases to their competent authorities for prosecution[189]. The Court does however also have jurisdiction over such offences[190] and may, in the exercise of such jurisdiction, try the offender and seek the surrender of him or her to the Court if necessary. International cooperation and judicial assistance to be provided by states parties in these cases is, however, governed by the domestic laws of the requested state[191]. It follows that if, for example, such laws do not provide for surrender to the Court in respect of these offences, the state is probably not obliged to do so. This does not however affect that state's obligation to prosecute the offender before its own courts if the offence is committed on its territory or by its nationals.

185 Art 69(2).
186 Art 67(1)(e).
187 See paragraphs 287–288 of the 1996 Preparatory Committee Report Vol I.
188 Art 70(4)(a).
189 Art 70(4)(b).
190 Art 70(1).
191 Art 70(2). Compare this with the more limited role of domestic law in the other aspects of international cooperation and judicial assistance, discussed *infra*.

In the case of misconduct before the Court, it is the Court which imposes sanctions on the person concerned. This is sensible because the person is present before the Court in all these cases. The Court may however only impose administrative measures, such as fines, and cannot sentence the offender to imprisonment[192].

Fairly complex procedures govern the treatment of national security information since this covers situations ranging from the Court having possession of classified documents which are to be tendered in its proceedings to where a request for cooperation has been made by the Court which would involve the disclosure of classified information by the requested state.

The Statute provides that in all cases where the disclosure of national security information is an issue, the state claiming confidentiality must go through a process of consultation with the Court in order to find an appropriate solution to the problem. This may include modifying or restricting disclosure of the information[193]. If the matter cannot be resolved, then different procedures apply depending on whether the Court has or does not have possession of the information which the state seeks to prevent the disclosure of.

Where the Court is not in possession of the information, the matter is treated as one where the cooperation of the state in question is sought to agree to disclosure and the state has invoked national security information as a ground to refuse such cooperation under Article 93(4)[194]. This would be the case irrespective of whether the disclosure of the information itself is the subject of a request for cooperation made by the Court to the state or whether it is a witness before the Court who has been asked to provide the information (although in this latter case, the procedural step of seeking the state's cooperation to consent to disclosure is implicit rather than apparent from the text)[195].

Where the state relies on the national security ground of refusal and the Court concludes that, in doing so, it is "not acting in accordance with its obligations under the Statute", e.g. if it relies on Article 93(4) in bad faith[196], the Court may invoke the procedure[197] governing failure by states parties to comply with requests to cooperate contrary to the provisions of the Statute and refer the matter to the Assembly of States Parties[198] or, in the case of a Security Council referral, to the Council.

192 Art 71(1).
193 Art 72(5).
194 Discussed *infra.*
195 Art 72(2) and (7)(a).
196 A state must perform its treaty obligations in good faith, see Article 26 of the Vienna Convention on the Law of Treaties, 1155 UNTS 331.
197 Art 87(7).
198 See the discussion on the Assembly *infra.*

The Court would, apart from invoking the non-compliance procedure, also be entitled to draw inferences, which could include adverse inferences, at the trial "as to the existence or non-existence of a fact, as may be appropriate in the circumstances"[199].

In cases where the Court already has possession of the information, e.g. because the Prosecutor has obtained it in the course of investigations, and the state is in fact intervening to stop disclosure, the Court may, if it determines the evidence to be relevant and necessary for the establishment of the guilt or innocence of the accused, make an order for disclosure or draw inferences[200]. It should be noted that the Court's power to order disclosure is limited only to this category of situations, viz. where it has possession of the information. Unlike the Former Yugoslavia Tribunal, it is not empowered to make orders against states but only requests for cooperation (which a state would, in the appropriate circumstances, be obliged to comply with)[201].

Where the information sought has been obtained by the requested state in confidence from another state, an inter-governmental organisation or an international organisation (e.g. it is classified information received from U.N. peacekeeping forces), then the Court must seek the consent of the originating state or organisation for disclosure[202].

Turning to the quorum required for a trial, the three judges of the Trial Chamber must be present at each stage of the trial. Alternate judges may be appointed to sit in a case. An alternate judge who has been present at every stage of the trial may replace a member of the Trial Chamber for that case if he or she is unable to continue attending[203].

The judges shall attempt to reach all decisions unanimously but if this is not possible, the decision may be taken by a majority of the judges[204]. Since there will only be three judges in the Trial Chamber, this means that a decision to convict can in fact be taken by a majority of 2 to 1. The very narrow divide between this and a 2 to 1 majority in favour of acquittal is a somewhat unfortunate one, notwithstanding that it does have its precedents in the Former Yugoslavia and Rwanda Tribunals[205].

199 Art 70(7)(a)(iii).
200 Art 70(7)(b).
201 Art 29 of the Former Yugoslavia Tribunal's Statute empowers the Court to issue an order against states requiring *inter alia* the production of evidence, see the decision of the Appeals Chamber in *The Prosecutor* v *Timohir Blaskic*, *Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, Case IT95-14-AR108bis, 29 October 1997, at paragraphs 26–31. The Court emphasised that the binding force of Art 29 orders upon states was based upon Art 25 and Chapter VII of the U.N. Charter, pursuant to which the Security Council established the Tribunal.
202 Art 73.
203 Art 74(1).
204 Art 74(3).
205 See Arts 23(1) and 22(1) of their respective Statutes.

It should be noted that the Nürnberg Tribunal's Charter provided for affirmative votes of at least three of its four members for a conviction or sentence[206].

The provision for majority verdicts sits uneasily with the need for a very high degree of certainty of the accused's guilt which must be attained before a conviction can be handed down. Indeed the Statute itself provides (as a component of the presumption of innocence) that "in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt"[207]. Bearing in mind that the reference here is to "the Court" as a whole and not just to the individual judges of the Trial Chamber, it is questionable if a 2 to 1 majority for a conviction is consonant with the Court being convinced of the accused's guilt beyond reasonable doubt in any given case.

The Court is empowered upon convicting a person to make an order directly against him or her specifying reparations to be made to victims. Such reparations may include restitution, compensation and rehabilitation[208] and states parties must enforce these orders as they would enforce fines and forfeiture measures ordered by the Court[209]. What rehabilitation entails is as yet unclear but it may encompass taking measures which do not involve the restoring of ownership or possession of property or a payment of money, e.g. an order to make a public apology. If this is the case, then problems of enforcement by states parties may well arise since the provision on enforcing fines and forfeiture orders (which are akin to compensation and restitution orders respectively) does not deal with the enforcement of rehabilitative orders which are non-pecuniary and cannot be readily converted into pecuniary remedies. It is submitted that where no equivalent domestic remedies are available for the rehabilitative measures, what a domestic court should do in such circumstances is to endeavour nevertheless to give a monetary value to such orders (similar to damages in lieu of specific performance) and enforce them accordingly as debts or monetary penalties[210].

206 Art 4(c).
207 Art 66(3).
208 Art 75(2).
209 Art 75(5), which refers to the enforcement obligations of states parties under Article 109 (discussed *infra*). Although the obligation in Art 75(5) is to "give effect to a decision under this article", this probably refers to an order of reparations under Art 75(2) rather than the "decision" in paragraph 1. The "decision" in paragraph 1 is the decision of the Court on the guilt or innocence of the accused under Art 74 and although the Court is empowered in that decision to "determine the scope and extent of any damage, loss and injury to, or in respect of, victims", the express reference in Art 75(5) to the enforcement provisions of Art 109 makes it clear that it is enforcement of a reparations order which is envisaged. The loss and damage suffered by victims must necessarily be considered in determining the reparations to be ordered.
210 This is arguably envisaged in the reference to Art 109, in particular paragraph 2 of that provision.

Penalties

The Court may sentence a convicted person to imprisonment for life or for a specified number of up to 30 years[211]. It may, "in addition" to imprisonment, order the imposition of a fine or the forfeiture of assets derived directly or indirectly from the crime[212], i.e. fines and forfeiture orders are not stand-alone penalties but are imposed in conjunction with sentences of imprisonment.

When a person is convicted of more than one crime, the Court will pronounce individual sentences for each crime and a joint sentence which must be no less than the highest individual sentence pronounced and no more than 30 years' imprisonment or life imprisonment, as the case may be[213]. The concept of a joint sentence and the ceiling of 30 years' or life imprisonment is one which is taken from certain civil law jurisdictions. It operates as a limited equivalent of a court's discretion which exists in many common law jurisdictions to order the consecutive or concurrent serving of multiple sentences[214].

There is, at the end of the part on penalties, a provision that the part does not affect the application by states of penalties under their national laws or the non-application in national laws of penalties prescribed by the Statute[215]. This provision makes the obvious point that the non-inclusion of a penalty under the Statute, e.g. the death penalty[216], does not prejudice the right of states to provide for such penalties under their national law. Conversely, the fact that a penalty may be imposed by the Court, e.g. life imprisonment, does not imply that states must provide for life imprisonment in their national penal systems,

Appeal and Revision

The Prosecutor does have a right of appeal against an acquittal by the Trial Chamber[217]. The accused will generally be released pending the hearing of the appeal by the Appeals Chamber unless there are exceptional circumstances which would justify his or her continued detention[218].

211 Art 77(1).
212 Art 77(2).
213 Art 77(3).
214 The two approaches are reflected in the options contained in Art 77(3) of the Preparatory Committee's draft Statute.
215 Art 80.
216 This article appeared together with other texts dealing with the non-inclusion of the death penalty, see UN Doc A/CONF.183/C.l/WGP/L.14/Add.3.
217 Art 81(1)(a).
218 Art 81(3)(c).

In the case of appeals of an interlocutory nature, whether by the person investigated or prosecuted or by a state (e.g. against a ruling on admissibility), these do not have the effect of staying proceedings pending the determination of the Appeals Chamber[219]. It follows that where an appeal has been lodged against a decision that a case is admissible, the Court may continue to exercise jurisdiction until the Appeals Chamber has overturned that decision.

Decisions of the Appeals Chamber may be made by a majority verdict[220] and do not have to be handed down in the presence of the accused[221].

There is an express provision for "an enforceable right to compensation" for anyone who is a victim of an unlawful arrest or detention[222]. The scope of this provision is however far from clear. It probably covers arrests and detention by national authorities at the Court's request since an arrest will hardly ever be made by the Court's officers directly. If such actions are carried out by national authorities, is lawfulness to be determined according to the Statute or the national laws of the arresting or detaining state? And against whom can the right be enforced — the Court or the state? It is submitted that either party can be made liable pursuant to this provision. A state which violates the provisions of its national laws or acts inconsistently with the provisions of the Statute in making the arrest or detention would be required to pay compensation and the Court would have to do likewise if it was responsible for improperly issuing requests for arrest and detention[223].

An acquittal or a termination of proceedings against the person does not entitle him or her to compensation unless a "grave and manifest miscarriage of justice" is conclusively shown and even then what the Court has is a discretion to award compensation[224]. A right to compensation does however arise if, through no fault of the accused, the conviction is reversed because of new facts being discovered which show conclusively that there has been a miscarriage of justice[225].

International Cooperation and Judicial Assistance

The Statute contains extensive and detailed provisions on cooperation to be rendered by states parties to the Court and the enforcement by states parties of sentences imposed by the Court. This is hardly surprising. First,

219 Art 82(3).
220 Art 83(4).
221 Art 83(5).
222 Art 85(1).
223 That such liability is intended to extend to the state is supported by the fact that the express qualification contained in Art 84(1) of the Preparatory Committee's draft Statute that such right of compensation is "from the Court" no longer appears in the text.
224 Art 85(3).
225 Art 85(2).

unlike the majority of the provisions governing jurisdiction and procedure, the cooperation and enforcement regimes impose specific obligations upon states parties to the Statute. Second, because the Court does not have its own enforcement agencies, the effectiveness of any exercise of jurisdiction on its part depends to a very large extent on national authorities assisting it in the obtaining of evidence, the arrest and surrender of suspects and the enforcement of its penalties[226].

The Statute's regime for international cooperation ought, it has been argued, to be a *sui generis* one in that it should not be based upon existing multilateral and bilateral agreements and arrangements between states[227]. The usual grounds for refusal to cooperate, e.g. because the crime for which surrender is sought is a political offence, the person to be surrendered might face an unfair trial[228] or there is a breach of the double criminality rule[229], should therefore not apply.

The Statute does, to some extent, reflect this sentiment. There is only one express ground for refusal to cooperate, viz. where the request is for forms of cooperation other than the arrest and surrender of a person and it concerns the disclosure of sensitive national security information[230]. But many of the obligations contained in the part on international cooperation are qualified by conditions, e.g. a request for arrest and surrender needs to contain evidence to meet the national legal requirements for surrender in the requested state[231]. If these conditions are not fulfilled, the obligation to cooperate does not arise. The overall effect would, it is submitted, be exactly the same if the qualifying condition were formulated as a ground for refusing to comply with an otherwise valid request.

Nor are elements of the existing multilateral and bilateral mutual legal assistance regimes entirely absent from the Statute. The principle of *ne bis in idem* or double jeopardy[232] exists in Article 20 as an admissibility provision[233] and the rule of specialty, i.e. the prohibition against prosecution or punishment by the requesting party for crimes other than

226 See the discussion in paragraph 310 of the 1996 Preparatory Committee Report Vol I.
227 *ibid.*
228 See, by way of illustration, sections 8, 20(1) and 21(1) of the Extradition Act (Cap 103, 1985 Ed).
229 viz. that the conduct for which extradition is sought must constitute an offence in both the requesting state and the requested state.
230 Art 93(4) but the procedure set out in Art 72 (discussed *supra*) must be followed in this case.
231 Art 91(2)(c), discussed *infra.*
232 This principle is contained in sections 7(4) and 20(3) of the Extradition Act.
233 See the discussion on Complementarity and Admissibility *supra.*

that for which surrender is sought[234], also applies, albeit in a modified form[235].

(a) Arrest and Surrender of Persons

Warrants of arrest may be applied for at any time after an investigation has been initiated and, if they are issued by the Court, may form the basis of a request made to a state for the arrest and surrender of the person[236]. States parties must comply with such a request[237], but while the Statute presents no express grounds for a refusal to do so[238], the obligation to comply is nevertheless qualified in a number of ways.

First, compliance by states parties must be "in accordance with the provisions of this Part and the procedure under their national law"[239]. References to national law occur in various provisions in the part on international cooperation, including those which govern the transit of a surrendered person through the territory of a state party and those which prescribe the documents, statements and information required for the surrender process in the requested state[240]. The application of national law is however not unconditional. The state party's general obligation to comply is subject to only the procedure under its national law. It cannot therefore rely upon a substantive legal rule to refuse surrender, e.g. a prohibition against the extradition of its nationals. In the case of evidential requirements under national law which apply to a request from the Court, these cannot be more burdensome than those applicable to extradition between the requested state and other states (although this arguably falls short of requiring "most favoured nation" treatment). The state party must, in addition, consult with the Court, upon its request, and advise the Court on such evidential requirements[241].

There is moreover a general obligation on states parties to ensure that there are procedures available under their national law for all the forms of cooperation specified in the international cooperation provisions[242]. The absence of national legislation prescribing a procedure for surrender to the Court is therefore no excuse although the obligation to ensure the availability of procedures is more pertinent in the context of forms of cooperation other than arrest and surrender[243].

234 This rule is contained in sections 7(2) and 21(3) of the Extradition Act.
235 Art 101. There is an obligation on the part of the requested state to endeavour to waive this restriction.
236 Art 58(1) and (5), see discussion *supra.*
237 Art 89(1).
238 As compared with the list of five grounds for refusal contained in Art 87(3) Option 2 of the Preparatory Committee's draft Statute.
239 *ibid.*
240 Arts 89(3)(a) and 91(2)(c).
241 Art 91(4).
242 Art 88.
243 Discussed *infra.*

Second, if the person in question mounts an admissibility challenge before the Court, the requested state may postpone surrender pending a determination on the challenge[244]. The state is not however obliged to do so. A pending challenge by a state, on the other hand, has the effect of suspending investigations[245], and this would presumably include the suspension of the request for cooperation as well. The state may however be required to take steps to prevent the person from absconding in such circumstances[246].

Third, if the person sought is being proceeded against or is serving a sentence in the requested state for a different crime, the requested state "after making its decision to grant the request, shall consult with the Court"[247]. This formulation is hardly a model of clarity. Is it intended to operate as a modification of the obligation to surrender or only as a stipulation of an additional procedural step which the state must take? The context in which it appears seems to point to the former. The provision would seem illogical if it merely imposed an additional procedural obligation to consult with the Court. The fact that the requested state is exercising penal jurisdiction over the person ought, if at all, to qualify the obligation to surrender rather than make it more onerous. Further, because it applies only after the state has decided to grant the request, it probably serves to replace the obligation of taking the usual steps to give effect to the request with one to consult with the Court to find appropriate ways of resolving the matter. The requested state cannot of course enter upon the consultations in bad faith, because that would, it is submitted, disentitle reliance upon this provision anyway[248].

Fourth, there is an entire article dealing with competing requests from the Court and from another state or state party for the surrender/ extradition of the same person and defining the circumstances in which the Court's request must be given priority (and therefore when a competing request may be a ground to refuse surrender to the Court in favour of surrender to the requesting state). The rules, in a nutshell, are as follows:

a. if the requests relate to different offences and the requested state is not under an international obligation to surrender the person to the requesting state, it must surrender the person to the Court. If it is under an international obligation to the

244 Art 89(2).
245 This is, however, regulated by Art 19(7).
246 Art 19(8)(c).
247 Art 89(4).
248 States parties to treaties are bound to perform their obligations in good faith, see Art 26 of the Vienna Convention on the Law of Treaties.

requesting state, then it may determine for itself, based on certain specified criteria, which request to accede to[249];

b. if the requests relate to the same offence, the requested state must notify the Court[250]. If the Court has determined or determines the case to be admissible and —

i. if the requesting state is a party to the Statute, the Court's request must be given priority[251];

ii. if the requesting state is a non-state party, the Court's request must be given priority unless the requested state is under an international obligation (e.g. pursuant to an extradition treaty) to the requesting state to surrender the person[252]. If such an international obligation does exist, then the requesting state may determine for itself, based on certain specified criteria, which request to accede to[253]. Neither request overrides the binding effect of the other. This is a recognition of the principle[254] that a subsequent treaty entered into by the requested state cannot prejudice the existing treaty rights of states which are not a party to that subsequent treaty.

The significance of a determination of admissibility by the Court in the provisions governing competing requests reflects the principle of complementarity. If a state is seeking the extradition of the person for the same offence, then it must *ipso facto* be exercising jurisdiction by investigating or prosecuting the matter. Unless that state is shown to be "unable or unwilling genuinely" to carry out such investigation or prosecution, the case is inadmissible[255] and consequently the Court cannot make a valid request for arrest and surrender.

Fifth, requests for the surrender of persons who must be accorded state or diplomatic immunity by the requested state pursuant to its international law obligations[256] cannot be made unless the Court has first obtained a

249 Art 90(7). This is similar to the regime which exists for simultaneous requests for extradition in section 41 of the Extradition Act.

250 Art 90(1).

251 Art 90(2).

252 Art 90(4)

253 Art 90(6).

254 See Art 30(4) of the Vienna Convention on the Law of Treaties.

255 Art 17(1)(a).

256 The reference to "obligations under international law" would cover obligations under treaties as well as customary international law obligations. The substantive obligations of 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95, are widely considered as reflecting customary international law, see *U.S. Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979*, ICJ Reports 1979, p 7, at paragraphs 38-41. The substantive norms set out in the Convention must therefore be applied by the requested state, whether it is or is not a party to the Convention.

waiver of that immunity by the sending state[257]. A similar condition applies where the requested state is obliged under an international agreement to seek the consent of a sending state for the surrender of the person to the Court[258]. A status of forces agreement is an example of such an agreement. In these circumstances, the request cannot be made until the Court has first obtained the consent of that state.

In both cases referred to in the previous paragraph, if the sending state were a state party to the Statute, the waiver or consent would, it is submitted, be sought by the Court as a request for cooperation under the Statute[259] and the sending state must therefore respond to the request in accordance with its obligations to the Court.

In urgent cases, the Court may request the provisional arrest of a person pending the presentation of a formal request for surrender together with its supporting documents[260]. Some basic information must still be given for this purpose although they may be transmitted to the requested state "by any medium capable of delivering a written record"[261], e.g. a facsimile message. The formal request must however be delivered within a time specified in the Rules of Procedure and Evidence to be adopted by the state parties[262], otherwise the arrested person may be released from custody[263].

(b) Forms of Cooperation other than Arrest and Surrender

The obligation of states parties to comply with requests from the Court for cooperation other than for the arrest and surrender of persons covers 12 categories of assistance to be rendered by their national authorities[264]. These include:

a. the identification of persons and property;

b. the taking of evidence;

c. the service of documents;

257 Art 98(1).
258 Art 98(2).
259 Probably under the residual category of forms of cooperation in Art 93(1)(1).
260 Art 92(1).
261 Art 92(2). By comparison, ordinary requests for arrest and surrender are to be transmitted through diplomatic channels or through any other appropriate channel designated by the state party, see Art 87(1)(a).
262 Pursuant to Art 51.
263 Art 92(3).
264 Art 93(1). The chapeau makes it clear that the list refers to assistance provided by the states parties. There are other provisions governing the obligation of states parties to assist by facilitating the conduct of investigations by the Court directly on their territory in limited circumstances, see Art 99(4), discussed *infra*.

d. facilitating the appearance of witnesses on a voluntary basis before the Court, i.e. witnesses cannot be "surrendered" to the Court to provide testimony;

e. the temporary transfer of persons in custody to assist in investigations or to give testimony provided that both the person and the requested state consent to the transfer. The Court must return the person after the purposes of the transfer have been fulfilled[265];

f. the examination of sites, which includes the exhumation and examination of grave sites[266];

g. searches and seizure;

h. the protection of victims and witnesses and the preservation of evidence;

i. the identification, tracing and freezing of the proceeds and instrumentalities of crimes for the purposes of eventual forfeiture; and

j. "any other type of assistance not prohibited by the law of the requested state"[267].

There is only one specified ground for refusing to comply with such requests, viz. if it concerns the disclosure of information related to national security[268], although the state party invoking this must follow the prescribed procedure for doing so[269]. But as in the case of requests for arrest and surrender, other "grounds for refusal" do implicitly exist in that the state party's obligation to comply is also qualified in various ways.

First, as in the case of arrest and surrender, compliance is subject to the procedures of the requested state's laws[270]. The corresponding obligation on states parties to ensure that procedures are available under their national law for all the forms of cooperation "which are specified under this Part"[271] also applies. It should however be noted that this obligation extends to only those forms of cooperation which are "specified" and probably does not, as a matter of logic, cover the residual unspecified category of "other types of assistance not prohibited by the law of the requested state".

265 Art 93(1)(f) and (7).
266 Prominence is given to such investigative measures in the light of the atrocities in the former Yugoslavia.
267 Art 93(1)(1).
268 Art 93(4).
269 In Art 72, see discussion *supra.*
270 Art 93(1) chapeau.
271 Art 88.

The request must also contain such information as may be required by the national laws of the requested state for its execution but the requested state is under an obligation to advise the Court of the specific requirements of its national laws[272].

The manner in which a request for cooperation is executed is, in addition, subject to the prohibitions under the national laws (and this is not limited to only the procedural laws) of the requested state[273].

Second, where a particular measure of assistance sought is prohibited in the requested state on the basis of "a fundamental legal principle of general application", the state must consult with the Court to resolve the matter[274]. This could involve finding alternative ways of rendering the assistance sought. If the matter still cannot be resolved, the Court must modify the request "as necessary", which probably means such modification as is necessary to get around the prohibition.

The principle relied on in such cases must be "of general application", i.e. it should apply in general to investigations and court proceedings in the requested state and not just to requests for cooperation from the Court. What is far less clear however is the notion of a "fundamental legal principle". A prohibition is usually prescribed by a law, so a fundamental legal principle probably refers to the principle which forms the basis of that law. Some guidance as to its scope can be sought from the *travaux preparatories* of the Statute. The report adopted by the Committee of the Whole of the Diplomatic Conference which contains this text records an understanding that it "includes laws preventing the freezing or seizure of certain types of property"[275]. The fundamental principle which applies in these cases is probably that of the sanctity of specific categories of proprietary rights in the domestic jurisdiction.

Beyond the examples which have been cited, it is submitted that long-standing and well known privileges such as legal professional privilege and public interest immunity would also fall within the scope of this provision. The fundamental legal principles involved would be the confidentiality which must be accorded to certain types of communications to guarantee due process in the first case and, in the other, the protection which must be given in order to safeguard important public interests. Restrictions based on the competence and compellability of witnesses to give evidence in the requested state are probably also covered by this

272 Art 96(2)(e) and (3).
273 Art 99(1).
274 Art 93(3).
275 UN Doc A/CONF.183/C.1/L.11/Add.3 at footnote 1. The footnote continues with an explanation that in such cases, other alternatives such as the seizure of the proceeds of sale or disposal should be relied on. Under Art 93(3), the Court could accordingly amend its request to seek the taking of such alternative measures from the requested state.

provision.

A distinction may, in any event, not always be easy to draw between a "particular measure of assistance" and the manner in which the request for assistance is to be executed. Domestic legal prohibitions apply without qualification to the latter (see discussion *supra*) but apply to the former only if they are fundamental and of general application. It may well depend on how the request for assistance is formulated. A request, for example, to take evidence from the accused's legal counsel and a request to take evidence by questioning the legal counsel may raise the issue of privilege as a prohibition against a particular measure of assistance in the first case and as a prohibition on the manner of rendering the assistance sought in the other.

Third, competing requests for these forms of cooperation from the Court and another state are to be resolved in the same way as competing requests for arrest and surrender[276], except that the requested state must, in the case where it is under an international obligation to accede to the requesting state's request, first endeavour to meet both requests, if necessary by postponing or attaching conditions to one or the other[277].

If the request, however, concerns information, property or persons under the control of a third state or of an international organisation by virtue of an international agreement, the Court must, upon notification, direct its request to that third state or organisation[278]. It should be noted that this provision does not operate as a general qualification to the obligation to cooperate. It applies only in the case where a state party faces competing requests[279].

Fourth, the requested state may postpone executing a request —

a. if its immediate execution would interfere with an ongoing investigation or prosecution of a different case, provided that the Court agrees to such postponement[280]; or

b. where there is a pending challenge to the admissibility of the case (but not apparently where it is a jurisdictional challenge which is mounted), unless the Court orders that the collection of evidence should continue[281] *inter alia* for the purposes of their preservation[282].

276 Under Art 90.
277 Art 93(9)(a).
278 Art 93(9)(b).
279 This is evident from the use of the word "however" at the beginning of the paragraph.
280 Art 94(1).
281 Art 95.
282 Pursuant to Arts 18(6) and 19(8).

Fifth, and finally, as in the case of requests for arrest and surrender, where compliance with requests for other forms of cooperation would impinge upon the requested state's international law obligations with respect to state or diplomatic immunity (e.g. if it is called upon to search diplomatic premises), the Court must first obtain the cooperation of the sending state to waive the immunity in question[283].

(c) Other aspects of international cooperation and judicial assistance

The Court is empowered, but not obliged, to provide assistance to any state (not necessarily a state party) which is conducting an investigation into or prosecuting persons for conduct[284] which constitutes a crime within the Court's jurisdiction[285].

A state party may be obliged to permit the Prosecutor to directly execute a request for forms of cooperation other than arrest and surrender on its territory in limited circumstances[286]. The request must first be capable of being executed without compulsory measures. The scope of this type of request is defined by way of the following two examples:

a. the interview or taking of evidence from a person on a voluntary basis[287]; and

b. the examination "without modification" of a public site or a public place, which means, in most cases, a visual examination of the site.

The direct execution of the request on the state party's territory must, in addition, be necessary for its success. The Prosecutor must also consult with the requested state and abide by reasonable conditions which that state imposes[288]. This is unless the state in question is the state on whose territory the crime was committed and it has been found to be unable or unwilling genuinely to deal with the case so as to render it admissible under Article 17. In such circumstances, the Prosecutor is only required to carry out all "possible consultations" with that state prior to execution on its territory[289].

283 Art 98(1).
284 Note that it does not refer to a crime as such, so a state party may receive assistance from the Court to prosecute persons for multiple murders in circumstances where their conduct could also amount to genocide.
285 Art 93(10).
286 Art 99(4).
287 This could include doing so without the presence of the authorities of the requested state.
288 Art 99(4)(a).
289 Art 99(4)(b).

In the case where a state party fails to comply with a request for cooperation in breach of its obligations under the Statute and in so doing prevents the Court from exercising its functions and powers, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the referral is by the Security Council, to the Council itself[290]. The resolution of the matter is then left to a political rather than judicial process.

The Court may also make requests for cooperation from non-states parties or inter-governmental organisations[291], e.g. the United Nations. Where a non-state party enters into an *ad hoc* arrangement or agreement with the Court for that purpose and subsequently fails to cooperate pursuant to such an arrangement or agreement, the Court may, in a manner somewhat similar to the procedure for non-compliance by states parties[292], inform the Assembly or the Security Council in the case of a Council referral[293].

Enforcement

Sentences of imprisonment are served in a state designated by the Court from a list of states which have indicated their willingness to accept sentenced persons[294] or, in the absence of such a designation, the host state, viz. the Netherlands. A state which is on the list retains however the discretion to refuse acceptance in individual cases[295].

The state of enforcement is bound by the sentence of imprisonment and the Court has the sole discretion to decide on matters pertaining to the variation or reduction of the sentence or the early release of the person[296]. This is correct as a matter of principle. Prisoners sentenced to the same terms of imprisonment should not be treated differently depending on the national penal system of the state of enforcement to which they are sent. The Court must therefore have the final say on when a prisoner is to be released or when his or her sentence is to be commuted.

A procedure is however established which permits the Court to transfer the person to another state of enforcement if circumstances arise in the original state of enforcement which could materially affect the term or extent of the imprisonment[297]. This would, for example, cover the situation where the laws of the state of enforcement give every prisoner the right

290 Art 87(7).
291 Art 87(5) and (6).
292 There is however no requirement that there should be a finding of a breach by the state and that the breach prevents the Court from exercising its functions and powers.
293 Art 87(5).
294 Art 103(a).
295 Art 103(c).
296 Arts 105 and 110(1) and (2).
297 Art 103(2) read with Art 104(1).

to seek pardon or to be granted parole. If the state is minded to grant a pardon or to release the person on parole, it must inform the Court. If the Court does not agree with the early termination of his or her detention, it may at its discretion transfer the person to another state of enforcement.

A limited rule of specialty binds the state of enforcement when it takes custody of a sentenced person in that the state cannot prosecute, punish or extradite the person for conduct which takes place prior to the person's delivery to that state unless the Court's approval is obtained[298].

In the case of fines and forfeiture orders imposed by the Court, all states parties must give effect to them subject to the rights of *bona fide* third parties and the procedures of their national laws[299]. If a state party cannot give effect to a forfeiture order, e.g. because of prohibitions under its national law against the confiscation of the property in question, it must take other measures to recover the value of the property to be forfeited[300]. This can be done by, for example, forfeiting other assets or imposing a monetary penalty.

Assembly of States Parties and Financing

An Assembly of States Parties, to which all states parties are members, is tasked with performing various supervisory and political functions under the Statute. These include the approval of the Court's budget and the consideration of "any question relating to non-cooperation" which has been referred to the Assembly by the Court[301].

The Court will be financed out of assessed contributions made by states parties, based on the scale of assessment used for the regular budget of the United Nations, and also from funds provided by the U.N., especially when expenses are incurred as a result of a referral by the Security Council[302].

Dispute Settlement, Reservations and Amendments

Disputes concerning the judicial functions of the Court will be settled by a decision of the Court. Any other dispute between two or more states parties which cannot be resolved by negotiations will be referred to the

298 Art 108(1).
299 Art 109(1). As for the reference to the procedures of national law, see the discussion on the same subject in relation to international cooperation and judicial assistance *supra*.
300 Art 109(2).
301 Art 112(2). Referrals to the Assembly of cases of non-cooperation by states parties and non-states parties are governed by Art 87(7) and (5) respectively, see discussion *supra*.
302 Arts 115 and 117.

Assembly of States Parties which can either resolve it itself or resort to other means of dispute settlement, including a referral to the International Court of Justice[303]. The Statute is however silent on what happens when a dispute does not concern a judicial function but is also not one between two or more states parties[304].

The phrase "judicial function" should include matters arising directly from proceedings before the Court. The application of the criteria for determining admissibility and rulings on virtually all procedural questions would be judicial functions. What would be non-judicial would be organisational and institutional matters and matters pertaining to relations between states parties, e.g. the election of judges, financial arrangements and probably amendments. The failure by a state to render assistance to the Court is subject to a specific regime governing non-compliance[305], which leaves the ultimate resolution of the matter to the Assembly of States Parties or the Security Council although the Court may, in the case of a state party, make a finding that that state's failure to cooperate is contrary to the provisions of the Statute.

There will of course be some gray areas. A dispute over the making by the judges of Regulations of the Court[306] could arguably concern a "judicial function" depending on whether that term is read widely or narrowly. Another area of uncertainty is the part governing enforcement. Whether a dispute does concern a judicial function should, it is submitted, depend on the nature of the dispute itself rather than the identity of the provision in question. A dispute over whether the Court has properly applied the relevant principles governing the designation of a state of enforcement[307] would probably be regarded as one which concerns a judicial function of the Court. Whether the state of enforcement has complied with agreed conditions for the acceptance of sentenced persons[308] would, on the other hand, probably not be regarded as involving a function of this nature.

No reservations may be made to the Statute[309].

As far as amendments to the Statute are concerned, these can be adopted either by the Assembly of States Parties or by a Review Conference (which, for all practical purposes, is exactly the same as the Assembly[310]).

303 Art 119.

304 Whether this lacuna is a real one may depend on how widely or narrowly a "judicial function" is interpreted, see discussion *infra*.

305 Art 87(5) and (7), see discussion *supra*.

306 Under Art 52.

307 Under Art 103(3).

308 Art 103(1).

309 Art 120.

310 The Review Conference is open to participants in the Assembly of States Parties on the same conditions as in the Assembly, e.g. those which are observers in the Assembly (because they signed the Final Act but are not parties) continue to be observers at the Conference, see Arts 112(1) and 123(1).

A Review Conference must be convened seven years after the entry into force of the Statute and may be convened thereafter with the approval of a majority of the states parties[311].

There are three different regimes governing amendments depending on the provisions of the Statute which are to be amended.

First, there are provisions of an institutional nature. These have been specifically identified in the Statute and include the provisions on the organisation of the judges into divisions, their term of office, the office-holders in the Office of the Prosecutor and the Registry, the removal of office-holders of the Court and the taking of other disciplinary actions against them[312]. Proposals to amend such provisions can be made at any time and the amendments are adopted by the Assembly or a Review Conference by a two-thirds majority of the states parties to the Statute. The amendments then enter into force automatically for all states parties six months after adoption[313].

Second, in the case of other provisions apart from Article 5 (which is the list of crimes within the jurisdiction of the Court), proposals to amend them can only be made seven years after the entry into force of the Statute[314]. As in the case of the institutional provisions, amendments are adopted by a two-thirds majority of the states parties[315]. They enter into force however for all states parties one year after seven-eighths of them have deposited instruments of ratification or acceptance of the amendments[316].

Finally, in the case of amendments to Article 5, which will usually[317] be amendments to add new crimes to the list[318], the amendment regime is the same as in the previous category except for the entry into force provisions. The entry into force of amendments to Article 5 takes place for states parties which have accepted the amendment one year after the

311 Art 123(2). Whether this provision is really necessary is questionable since special sessions of the Assembly itself may be convened at the request of only a third of the states parties, see Art 112(6).

312 The full list of provisions of an institutional nature is contained in Art 122(1).

313 Art 122(2).

314 Art 121(1).

315 Art 121(3).

316 Art 121(4).

317 Although Art 121(5) has been drafted with the addition of crimes in mind, Art 5 could also be amended to delete an existing crime. Such an amendment could pose particular problems in relation to the conditions for the exercise or non-exercise of jurisdiction by the Court over the deleted crime if certain states parties have accepted that amendment but others have not.

318 These could include terrorism and international drug trafficking, both of which have been specifically identified in Resolution E of the Final Act (the text which was adopted by the Conference is found in UN Doc A/CONF.183/C.l/L.76/Add.l4) as crimes which should be considered by a Review Conference with a view to arriving at acceptable definitions and to their inclusion as crimes within the Court's jurisdiction.

deposit of their instruments of ratification or acceptance[319]. This probably means that for the purposes of the exercise of jurisdiction by the Court over the new crime under Article 12(2), the accepting state will be regarded as a state party to the Statute from that time. It also means that the accepting state would be bound by its obligations to render assistance to the Court when the Court is seised of the new crime.

However, if a state party does not accept the amendment, the Court cannot exercise its jurisdiction over the new crime if it is committed by a national of that state party or on its territory[320]. The provision is expressed in terms of the exercise of jurisdiction by the Court under Article 12(2), although it does not include the reference in Article 12(2) to the state of registration of a ship or aircraft. The effect of the amendment provision is that if the new crime is committed on the territory of State A by a national of State B, the Court cannot exercise jurisdiction if State A is a party which has accepted the amendment but State B is a party which has not. If, on the other hand, State B is not a party to the Statute at all, the Court will be able to exercise jurisdiction on the basis of State A's acceptance. The provision operates by way of an exclusion which applies only to states parties.

A proposed technical amendment to include Articles 6, 7 and 8, which deal with the definitions of genocide, crimes against humanity and war crimes, in this regime has been circulated to the signatory states for objections, if any, to be raised by 6 November 1998[321]. If this is accepted, then the foregoing discussion will apply to (presumably) any additional conduct which falls within the scope of the crimes as a result of amendments to Articles 6–8.

Conclusion

Although the text of the Rome Statute could not be adopted by consensus, primarily because of differences over key jurisdictional provisions[322], the fact remains that a broad measure of agreement was probably reached on the vast majority of the other provisions of the Statute, including in particular those dealing with criminal law principles and criminal procedure. One of the major achievements of the Rome Conference has been its ability to bridge the differences which exist in these areas among the diverse legal systems represented at the Conference. This can, for example, be seen in the provisions on the Pre-Trial Chamber and the admission of guilt by the accused at trial.

319 Art 121(5).
320 *ibid.*
321 Depository Notification C.N. 502.1998.TREATIES-3.
322 See *inter alia* the statements made by the United States and China in the plenary session on 17 July 1998, UN Press Release L/ROM/22.

The foregoing discussion however demonstrates that there also exists, on the other hand, an unfortunate lack of clarity in some of the important provisions of the Statute. A certain amount of vagueness and ambiguity probably stems from the fact that the Statute is the result of a process of negotiation, which is a political exercise. It must nevertheless be borne in mind that the Court is not a political entity but a judicial organ endowed with the power to determine the criminal responsibility and liberty of those who come before it. Clarity and certainty are therefore essential in defining how its powers and proceedings affect individuals and states.

The challenge is now before the Preparatory Commission[323] charged with elaborating the detailed arrangements for the operation of the Court and, after its establishment, for the Court itself, in the course of its work, to provide that clarity and certainty. The road out of Rome is as important as those leading to it.

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323 Set up pursuant to Resolution F of the Final Act.

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