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The *International Criminal Court Bill [HL]*

Bill 70 of 2000-2001

"*as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they become simply men once more, and no one has any longer the right to take their lives.*"

Jean-Jacques Rousseau, 1762.

The *Rome Statute of the International Criminal Court* will come into force once 60 states have ratified it. Then, for the first time, a permanent court may exist which is run outside national control, but with the consent of a substantial number of states, to impose criminal responsibility on individuals. It will have jurisdiction over genocide, war crimes and crimes against humanity.

The *International Criminal Court Bill* is designed to bring legislation into line with the obligations which the British Government will take on if it ratifies the Statute. The Bill is necessary to allow the Government to ratify. It provides for cooperation with the Court and creates offences which match those in the Statute.

It applies to England, Wales and Northern Ireland. Some aspects also apply to Scotland.

Paul Bowers

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Summary of main points

- An International Criminal Court (ICC) is being set up. To join, states must ratify the Rome Statute, which gives details of how the ICC will work.

- The ICC will hold individuals to account for genocide, war crimes and crimes against humanity. It will pass prison sentences on the guilty and may give reparations to the victims.

- It will have jurisdiction over cases involving a national of a state party, or if the crimes took place in the territory of a state party. Sometimes it can have wider jurisdiction than this.

- The Prosecutor of the ICC will have the independence to investigate on his own initiative, or if a state party or the UN Security Council ask him to.

- The UN Security Council can block investigations and prosecutions.

- Many people are worried that the ICC will not bring to justice leaders of states which do not join up unless they commit crimes outside their own country.

- Many people are worried that soldiers and political leaders could be vulnerable to politically motivated allegations, for instance in peacekeeping operations or in actions like the Kosovo campaign.

- The ICC will not be able to investigate a case if the relevant state is already doing so.

- The British Government supports the ICC and wants to be among the first 60 states to ratify.

- To ratify there has to be legislation so that the UK can cooperate with the ICC during its investigations.

- To make sure the British courts can always step in before the ICC, the Government has decided to incorporate all the ICC crimes in domestic law in identical language to that used in the Rome Statute.

- This Bill does two things: it allows for the cooperation stipulated in the Rome Statute and it incorporates the ICC crimes.

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I Introduction

The *Rome Statute of the International Criminal Court* was adopted on 17 July 1998. This came after many years during which international lawyers, governments and organisations had struggled to find a framework in which justice could be dispensed against individuals for crimes such as genocide or war crimes, and which would carry the support of a wide range of states.

The end of the Cold War did not bring global peace as some had anticipated. In the 1990s conflicts in Rwanda, the Balkans, Sierra Leone, Sudan, Burma, Liberia, Somalia, and Central Africa gave ample proof of humanity's continuing capacity for harm. The impact of these conflicts on non-combatants, in particular on civilians, violated the whole basis of the international laws of war since at least the Geneva Conventions of 1949. A new consciousness developed of the role of sexual violence in war crimes, evidence was routinely available in some parts of the world of the control of food supplies for coercive purposes, troubling evidence emerged of the willingness of some groups to target small children as victims of mutilation and murder, and the use of civilian displacements known as 'ethnic cleansing' became commonplace. The civil war in Bosnia and the genocide in Rwanda had a particular impact on opinion, and gave rise to international tribunals with mandates to prosecute the guilty.

In the context of these conflicts the UN General Assembly intensified its long-running efforts to establish an international criminal court, and this resulted in a draft treaty text. A Diplomatic Conference was convened in Rome to finalise the text through negotiations between government representatives, and at the end of this the Rome Statute was adopted. 120 states voted in favour, and seven against.[1]

The Statute is an international treaty. States wishing to be bound by its provisions must first sign and then ratify it. When 60 states have ratified it the Statute will come into force. The International Criminal Court (ICC, or the Court) cannot be set up before then. The British Government wishes to be one of the first 60 to ratify, but before it can do so it must pass legislation in this country.

A. Treaties

A treaty is an agreement entered into voluntarily by sovereign states (and sometimes by international organisations) which, amongst other things, commits ('binds') those states to its provisions. There are many ways in which a state may become a party to a treaty, and these are usually set out in the treaty itself. The Rome Statute uses the most common

[1] The vote was unrecorded, but the USA, China and Israel have acknowledged voting against, and Libya and Iraq are widely presumed to have done likewise.

device for a multilateral treaty: states must first sign the treaty, which signifies their support for its purposes, and then they ratify the treaty, which indicates their consent to be bound by its provisions.

States have varying internal procedures for deciding to ratify treaties, and in the UK the treaty-making power falls under the Royal Prerogative. That is to say, the British Government decides whether or not to sign and/or ratify a given treaty and there need not be any parliamentary involvement. However, in practice, there may be parliamentary involvement which has a bearing on ratification. Treaties are brought to Parliament's attention under the Ponsonby Rule, and this may give rise to debate, or there may be legislation which is relevant to the treaty.

1. Ponsonby Rule

In a Written Answer of 1 November 1995 Baroness Chalker outlined the Ponsonby Rule as follows:

> it has been the practice of successive Governments for the past hundred years to lay before Parliament, in the Treaty Series of Command Papers, all treaties entered into by the United Kingdom, but only after their entry into force. Since 1924, it has also been the practice (known as the 'Ponsonby Rule') to lay before Parliament, before entry into force, those treaties which have been signed subject to ratification. The treaty lies on the table in the normal case for a period of 21 sitting days, after which it is ratified and published again in the Treaty Series once it has entered into force. The Ponsonby Rule, which applies as indicated only to treaties which are subject to ratification (or its equivalent), has been understood as allowing for exceptions from its operation in special cases, when other means of consulting or informing Parliament may be employed in its stead.
>
> The above practices are not understood as precluding the Government, in appropriate cases, from proceeding to ratification (or its equivalent) without laying for 21 days or from concluding treaties which enter into force on signature.[2]

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[2] HL Deb 1 November 1995, c159w. Baroness Chalker also said that the practice was described "more fully" in an affidavit sworn by Lionel Darby, 1st Secretary at the Foreign Office, on 23 July 1993, for the purposes of the proceedings in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg*. HL Deb 1 November 1995, c160w. The affidavit is available as Dep 3/2282, 6 November 1995, and the description of the Ponsonby Rule starts at para 10. See also the Memorandum by the FCO on *The Presentation of Treaties to Parliament: the Ponsonby Rule*, which was submitted to the Select Committee on Procedure on 30 November 1998, UP 6 1998/99, 14 January 1999. For a broader discussion of the Rule see R Ware, "Parliament and treaties," in C Carstairs & R Ware (eds) *Parliament and International Relations*, 1991.

In October 2000 the Government accepted certain of the recommendations made by the Procedure Committee in its second report of 1999-2000, *Parliamentary Scrutiny of Treaties*.[3] This had the effect of giving departmental select committees a greater role in the scrutiny of treaties. The Government undertook to provide a copy of any treaty laid before Parliament under the Ponsonby Rule, with an Explanatory Memorandum, to what it regarded as the most appropriate departmental select committee, so that the committee could carry out an inquiry if it so wished. The committee could choose to pass it on to another committee or committees if it thought this appropriate. The normal time for scrutiny by the committee(s) would still be 21 days, although "the Government would aim to respond positively" to requests for an extension. The Procedure Committee also recommended that the Government undertake to accept a recommendation made by the relevant select committee and supported by the Liaison Committee for debate on the floor of the House of a treaty requiring ratification and having major political, military or diplomatic implications.

The Government accepted this, saying

> the Government is happy to undertake normally to provide the opportunity for the debate of any treaty involving major political, military or diplomatic issues, if the relevant select committee and the Liaison Committee so request. It agrees that this would be a useful development of the Ponsonby Rule. The form of the debate will remain a matter for the Government, although it will of course take the views of the Committee concerned and of the Liaison Committee into account. As the Committee notes, there are some circumstances in which treaties are already subject to proceedings in Parliament. The Government sees no need to provide extra opportunities for debate on such treaties, although the Government would welcome any Report from a Committee which could help to inform that debate.[4]

The Ponsonby Rule and associated practice are not in any way a derogation from the rule that the treaty-making power comes under the Royal Prerogative, since Parliament is not being asked to approve the treaties which are laid. It is merely being given an opportunity to discuss them, to interrogate the executive over its exercise of its treaty-making power. Equally there is no promise of a debate on every treaty subject to ratification: it is simply that the Government would not normally resist a request for a debate through the usual channels.[5]

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3 HC 210 1999-2000, 19 July 2000.

4 *The Government's Response to the Procedure Committee's Second Report of Session 1999-2000, Parliamentary Scrutiny of Treaties*, (HC 210), published as Second Special Report of Procedure Committee of 1999-2000, HC 990 1999-2000, 15 November 2000.

5 Ponsonby himself actually gave a clear undertaking to find time if so requested, but this is not normally stated as part of the Ponsonby Rule. See R Ware, "Parliament and treaties," in C Carstairs & R Ware (eds) *Parliament and International Relations*, 1991, p39.

2. Legislation

Before it can ratify a treaty the Government must ensure that domestic legislation is such that it can comply with the obligations which the treaty will place on it. For instance, if a treaty provides that states parties shall grant legal immunity to the officers of a particular international organisation, the Government will have to introduce legislation (usually secondary) conferring such immunity before it can ratify the treaty. Sometimes this is not an issue, since domestic law is already consistent with the obligations which the Government will take on. Otherwise, the Government cannot normally ratify, since it will not be able to meet its international obligations once it has.[6] If it attempted to ratify in any case, the ratification would probably not be regarded as valid by the other states parties. If it became evident only some time later that there was a disparity, the Government of the day would have to make the necessary adjustments to domestic legislation or it might be subject to penalty (if the treaty so provides) or to a withdrawal of the treaty's reciprocities by other states parties.

When legislation is necessary in order that a treaty may be ratified Parliament has a means to block or delay ratification. It does not vote on ratification as such, but if it rejects the bill or amends it so that it no longer does its job of making domestic law compatible with international obligations, then Parliament has made it impossible for the Government to ratify in a simple way. Of course, the Government might find opportunities to finesse the point, especially if the other states parties are sympathetic, but it will normally seek to preserve consistency between the legislation and the treaty. Governments will argue for this reason that there is limited scope for amendment of legislation designed to allow ratification of a treaty. If an inconsistent bill were passed the Government would have to delay ratification, pending amendment of the treaty or the passage of subsequent legislation.

In the case of the Rome Statute the British Government has seen a need to legislate before it can ratify. The Bill therefore includes provisions for various forms of cooperation with the Court, which are called for in the Statute. It also incorporates into domestic law all the offences set out in the Statute. Only cooperation with the Court is necessary for ratification, but there are political grounds for incorporating Statute crimes into domestic law. These are discussed in Part IV of the present Paper below.

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[6] Strictly speaking it can ratify if the treaty has not entered into force, and some states will do this. However, in such cases the government must be confident of securing the necessary legislative changes in time for entry into force. British governments have not taken this path.

II History of war crimes prosecutions

Throughout history warfare has been accompanied by understandings concerning its conduct. These have taken the form of codes, undertakings or norms regarding proper behaviour, and there have also been efforts to address the culpability of those whose conduct is considered unacceptable. Such understandings can be seen in ancient Greece or Rome, in medieval, renaissance or enlightenment Europe and in parts of Asia with well-recorded martial histories. They may have varied between historical periods and in different cultures, and sometimes they may have served the interests of particular groups (certainly they have tended to be honoured in the breach), but they give evidence that warfare, like other aspects of culture, has prompted an instinct to temper and regulate. When states have engaged in armed conflict they have sought to regulate its conduct and attenuate its consequences: generally it has not been a chaotic activity. States have also tended to accept that individuals should be held responsible for violations of the prevailing understandings concerning conduct in war, but have not agreed on enduring structures for the prosecution and punishment of offenders in a manner consistent with the principles of fair trial.

The extent to which the understandings on conduct during wartime were violated by the German and Japanese aggressors during World War II was perhaps responsible in part for the impact which that conflict had on international thinking in the second half of the 20th century, and provided a spur towards the codification of crimes and the establishment of a means of punishment.

A. Early history

Historical precedents can be found for virtually all contemporary concerns regarding the laws of war, whether the rules on starting a war, the use of particular weapons, the treatment of prisoners or the treatment of civilians, and the same goes for the imposition of individual criminal responsibility for violations of the laws of war.

According to Bassiouni there is evidence of a war crimes tribunal holding individuals to account in Greece in 405BC, and he cites other examples from Europe between the 13th and 17th centuries,[7] while others refer to examples from ancient China, India and Japan.[8] Most of these appear to have been forms of 'victor's justice,' but this was not always the case. In 1689 James II relieved one of his commanders of his duties as a result of the

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[7] MC Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999, p517. Professor Bassiouni is a distinguished international lawyer, and was Chair of the Drafting Committee for the Rome Conference which adopted the statute of the International Criminal Court in 1998.

[8] A Bos, "The International Criminal Court: a perspective," in R Lee (ed), *The International Criminal Court: the making of the Rome Statute*, 1999, p465; Y Beigbeder, *Judging War Criminals*, 1999, pp4-5.

brutality of his siege of Londonderry. In 1474 a panel of 28 judges of the Holy Roman Empire stripped Peter von Hagenbach of his knighthood and sentenced him to death after finding him guilty of presiding over murder, rape and other offences committed by his men against the citizens of Breisach in the Upper Rhine, in the course of a military occupation. Von Hagenbach's defence that he was following orders from his superior, Duke Charles of Burgundy, was rejected.

Nevertheless, these are isolated instances of single political structures punishing their own soldiers for excess in victory or punishing their enemies for excess before defeat. They do not show a general willingness by the international community to establish clear, enduring rules subject to universal jurisdiction.

B. The emerging modern order

In the late 19th and early 20th centuries, as warfare became industrialised, the international order among states also was becoming recognisably modern, with multilateral treaties open to all states being used to develop regulated systems of behaviour. The laws of war were undergoing a level of codification in multilateral treaties on matters such as weaponry, the treatment of sick and wounded, the treatment of civilians, the position of neutral states and the treatment of property. However, the question of individual criminal responsibility for breaches of acceptable behaviour in war was not a subject of international agreement. Some states did begin to make moves towards prosecuting war crimes, but these were still based on national jurisdiction.

During the American Civil War in the 1860s the Union adopted a Code of Martial Law, known as the Lieber Code. This included provisions that captured prisoners-of-war would be held responsible for their previous actions and that if they had committed crimes "against the captors' army or people" they would be answerable for them if they had not been punished by their own authorities. On this basis the Union tried and condemned to death a Confederate Major, Henry Wirz, for the deaths of thousands of Union soldiers held as prisoners-of-war at Andersonville. The USA also established war crimes tribunals after the Spanish-American War and the occupation of the Philippines, and the British set up tribunals during the Boer War to prosecute prisoners-of-war for crimes which they had committed prior to capture.[9]

These principles were adopted in 1880 by the Institute of International Law in its *Oxford Manual on the Laws of War*, which stated that

> in case the preceding rules are violated, the perpetrator shall, after a due process of law, be punished by the belligerent in whose power he is.[10]

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9 MC Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999 pp518-9.

10 *Oxford Manual on the Laws and Customs of War on Land*, Institute of International Law, 1880, Art 84

In 1872 Gustave Moynier, the President of the International Committee for the Relief of the Wounded (later to become the Red Cross), argued for the establishment of an international criminal court to deal with violations of the *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864*, the treaty under which his Committee was set up.[11] Nothing came of his suggestion in the short term, but after World War I there was a further development.

C. Treaty of Versailles

Part VII of the *Treaty of Versailles, 1919*, included provisions for the prosecution of Germans accused of war crimes. It was prepared by the Commission on the Responsibility of the Authors of War and Enforcement of Penalties for Violations of the Laws and Customs of War, a group of 15 international legal figures from the Allied states and chaired by the US Secretary of State Robert Lansing. The Commission produced a Report which named over 850 suspected war criminals and elaborated a list of 32 activities which constituted war crimes. The Treaty included a somewhat diluted version of the recommendations of the Commission, and there was opposition from within the Commission to some of its proposals (the Americans and Japanese presented memoranda of reservations to the Report). Even the provisions which were included did not result in extensive prosecutions.

In Article 227 the Allies arraigned Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties" in disregarding the neutrality of Belgium, and authorised a "special tribunal" to try him, consisting of five judges, one each appointed by the USA, the UK, France, Italy and Japan. The Article continued,

> in its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.

There was an apparent concern here with high principles of international order: the Kaiser had breached the fundamental rules of reciprocity which underpin the relations between states in treaties, and there was a desire not only to try and punish him for it, but also to demonstrate a level of integrity in the manner in which he was tried. The Article stated that

> a special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence.

Nonetheless, it could barely be concealed that this was a high-mindedness adopted from a position of strength by a group of states which had just fought the most intense and costly

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[11] A Roberts & R Guelff (eds), *Documents on the Laws of War*, 3rd ed, 2000, p667.

war then known against the Kaiser's regime. The movement away from purely national jurisdiction over war crimes had begun, but only by the smallest degree.

The Kaiser was never actually put on trial. He took refuge in Holland, where the authorities refused to extradite him on the basis that the crimes for which he was wanted were political offences, and as such not normally extraditable. As for other German war criminals, the Treaty again established individual responsibility, but left justice in the hands of national military tribunals.

Article 228 stated that

> the German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.

This applied notwithstanding any prosecutions taking place under German jurisdiction, and the German Government was to hand over suspected war criminals to the Allied and Associated Powers. In fact, no prosecutions took place before such tribunals: doubts had arisen as to whether prisoners-of-war could be tried legally after the end of a conflict, and German prisoners were returned to Germany, while Germany did not extradite its own nationals.

The list of suspects was presented to the Germans for extradition, which was refused, but the Allies agreed to Germany trying the accused in its own court, the specially convened Criminal Senate of the Imperial Court of Justice in Leipzig. The mechanism for this was that the Allies would present to the German Prosecutor General the evidence against an accused, and he would then decide either to proceed immediately or to order a preliminary judicial hearing if he did not feel that the evidence warranted a trial. The preliminary hearing would then make the final decision whether or not to proceed. The number of cases which the Allies brought under this procedure was reduced to 45, of which Germany in fact tried only 12. Six of these were acquitted and six convicted, in trials which took place between May and July 1921. The Leipzig trials were unpopular in Germany, where public opinion was against the prosecution of Germany's own soldiers, and the press brought pressure against the court. The Allies decided to abandon the process, and it was left to Belgium and France to hold a few subsequent trials *in absentia*.

D. League of Nations

The Covenant of the League of Nations included provision for the establishment of a Permanent Court of International Justice (PCIJ), but this was akin to the International Court of Justice later established with the United Nations, designed to consider disputes between states: it was not a criminal court. However, there were proposals from within the League to develop an international criminal court as well. In 1920 a League committee circulated a draft paper on such a court to various interested bodies for

consultation. In response the Association of Penal Law, the International Law Association and the Inter-Parliamentary Union prepared a draft International Penal Code.

By this time there was a consensus on the three broad categories of international crimes: offences against international morality (now known as crimes against humanity), offences against the sanctity of treaties (crimes against peace, or the crime of aggression), and acts contrary to the rules and customs of war (war crimes). However, there was no consensus on the details of these offences, and the court never came into being. A *Convention on the Establishment of the International Criminal Court* was signed by a handful of states in 1937, but did not come into force owing to the lack of ratifications. The enthusiasm for a criminal court among international lawyers was not shared by most governments, which tended to assume that the advent of the League would do away with the dangers of war and with the need to bring war criminals to justice. The efforts which started after World War I had run aground and it would take a second catastrophic war to restart them.

E. Nuremberg and Tokyo

The victorious Allies established special military tribunals after World War II to try major German and Japanese war criminals.

In one of the Moscow Declarations of 1943, the Allies agreed that those responsible for crimes in the course of the war should be prosecuted and punished. On 8 August 1945 the Allies concluded the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, also known as the London Charter, and this established an international military tribunal for the trial of war criminals of the European Axis powers. The tribunal began its hearings in Nuremberg on 20 November 1945 and delivered its judgements on 30 September and 1 October 1946. Twenty-two Nazis stood trial, of whom twelve were sentenced to death, seven to prison sentences of between ten years and life, and three were acquitted.[12]

The tribunal at Tokyo was established under a Special Proclamation by General MacArthur in 1946, but it was structured along similar lines to Nuremberg. It began its hearings on 3 May 1946 and delivered judgement on 4-12 November 1948. There were twenty-eight defendants, two of whom died during the trial, one was found mentally incompetent, seven were sentenced to death and eighteen received prison sentences, most for life.

The Charter and judgement of the Nuremberg Tribunal established a number of significant legal principles. Many of these were regarded as part of customary

[12] Two others were indicted but never stood trial, one on grounds of ill health, the other having committed suicide before the trial. Bormann was also dead but regarded as missing at the time of the trial, while Goering committed suicide before being executed: these two are included in the 12 death sentences.

international law already, but the Charter and judgement moved towards the written codification of this law and served as a precedent for future cases.

Perhaps the most basic legal principle underpinning Nuremberg was that individuals could be held responsible for war crimes. This included the idea that individuals could not make the defence of 'superior orders,' that is, to argue that they were simply obeying their orders, with the corollary that only the most senior commanders could be culpable. It also included the ideas that heads of state and other officials could not be exempt from prosecution for such crimes and that these crimes were established at the international level, regardless of whether or not the relevant national legal systems recognised them. It also made clear that conspiracy or incitement to commit the crimes was itself a criminal act.

Article 6 of the Charter of the Nuremberg Tribunal gave the definition of the crimes over which the Tribunal would have jurisdiction:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes:
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
>
> (c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Nuremberg and Tokyo dealt only with the most senior suspects. The great majority of those tried for war crimes were tried in lower level tribunals which each of the Allies established in their own zones of occupation. The various tribunals achieved differing levels of fairness. For instance, the proceedings at Nuremberg were generally perceived as reasonably fair, while those at Tokyo attracted some criticism. Thousands were convicted and hundreds executed by the Western powers in national military courts established across Europe and Asia, and some of these gave rise to concerns over fairness of trial, while the Soviets preferred to use summary proceedings to execute vast numbers of suspected war criminals and also prisoners-of-war, and some argued that this constituted a breach of international law in itself.[13]

F. Further codification

In the years following the Nuremberg and Tokyo tribunals efforts were made to codify further the actions which would be regarded as offences in war. Hitherto the main basis for the crimes had been customary international law, plus the Hague Conventions of 1907 and the Geneva Conventions of 1929.[14] There were a great many other treaties concerning the conduct of war, but not all of these would have been directly applicable to individuals. After the Charter and judgements arising from Nuremberg the most important texts to be adopted in this regard were the Genocide Convention of 1948 and the Geneva Conventions of 1949.

1. Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948. International legal action against genocide grew out of the work of Dr Raphael Lemkin, who coined the term in 1944 and pressed for its recognition as a specific crime. This recognition was reflected in the Nuremberg Charter, and the General Assembly declared genocide a crime under international law in its Resolution 96 (I) of 11 December 1946. The Convention is concerned with setting out provisions for the punishment of the crime.

Article I of the Convention confirms that genocide, whether committed in time of peace or of war, is a crime under international law. States Parties undertake to prevent and to punish it.

Article II defines genocide. It reads as follows:

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13 See MC Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999,pp531-4.

14 See especially *Fourth Hague Convention Respecting the Laws and Customs of War on Land 1907*, and *Geneva Conventions for the Relief of Wounded and Sick in Armies in the Field*, and *Relative to Prisoners of War 1929*.

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Article III provides that the following acts shall be punishable

> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

Article IV provides that anyone committing any of the acts listed in Article III shall be punished, "whether they are constitutionally responsible rulers, public officials or private individuals."

Article VI provides for trial

> by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The definition of genocide can be read in a restrictive way, and there are cases of notorious mass killings which might not be regarded as falling within the definition. The list of groups the destruction of which constitutes genocide does not include political groups, so that the actions of many dictatorships in the second half of the 20th century would be excluded, while the "intent to destroy" a group, "in whole or in part," and "as such" may be difficult to prove. The Holocaust was of course the definitive example of genocide in modern times, and the killings in Rwanda in 1994 also generally have been regarded as such.[15]

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[15] The Statute of the International Tribunal for Rwanda, annexed to Security Council Resolution 955, allows for prosecution of persons responsible for genocide in Rwanda, implying a recognition that genocide did take place. An interesting, if polemical, discussion of examples of mass killings which might or might not be considered to constitute genocide is given in A Destexhe, *Rwanda and Genocide in the Twentieth Century*, 1995.

2. Geneva Conventions

The four Geneva Conventions adopted in 1949 set out rules for the protection of various categories of non-combatants in armed conflicts. The First Convention covers wounded and sick in armed forces in the field, the Second covers wounded, sick and ship-wrecked in armed forces at sea, the Third covers prisoners-of-war, and the Fourth covers civilians. The Conventions share a number of common articles which are regarded as declaratory of customary international law. Violations defined in the Conventions as 'grave breaches' constitute war crimes, one of the main categories of offence already mentioned, and they are subject to universal jurisdiction, meaning that any state may try any suspect regardless of their nationality and of where the alleged offence took place. Grave breaches include wilful killing, torture, inhuman treatment, wilfully causing great suffering or serious injury, biological experiments, extensive wanton destruction or appropriation of property not justified by military necessity, compelling a prisoner-of-war or other protected person to serve in the forces of a hostile power, deprivation of the right to fair trial, and, in relation to civilians, unlawful deportation, transfer or confinement and taking of hostages.[16]

G. International tribunals for Yugoslavia and Rwanda

As the conflicts in former Yugoslavia developed and it became clear that violations of the laws of war were taking place, a need was perceived for a means by which the perpetrators could be brought to justice other than through national courts. There was little confidence that the legal systems of states involved in the conflicts, and led by nationalistic and in some cases authoritarian regimes, could provide justice. The International Criminal Court was still in its long process of gestation (see below) and could not be expected to fulfil the role retrospectively if and when it was eventually set up. A solution was found in the form of an ad hoc international tribunal broadly inspired by the precedent of the tribunals at Nuremberg and Tokyo. In order to establish a tribunal for Yugoslavia rapidly and with authority which did not depend on the consent of all the states potentially concerned, it was decided to act by way of a resolution of the UN Security Council.

The International Criminal Tribunal for former Yugoslavia was established by Security Council Resolution 827 of 25 May 1993, on the basis of proposals contained in a report of the Secretary-General.[17] The Resolution adopted the Statute of the Tribunal also contained

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[16] First Geneva Convention, Articles 49 and 50; Second Geneva Convention, Articles 50 and 51; Third Geneva Convention, Articles 129 and 130; Fourth Geneva Convention, Articles 146 and 147. The First and Second Conventions set out the same grave breaches, the Third and Fourth repeat these with additions.

[17] In Resolution 808 of 22 February 1993 the Security Council had decided that such a tribunal should be established and had requested the Secretary-General to submit proposals on the details.

in that report.[18] The full designation is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. It sits at the Hague.

The Tribunal initially had two trial chambers and 11 judges, who were elected by the General Assembly from a list of candidates established by the Security Council from nominations received. Security Council Resolution 1166 of 13 May 1998 decided to establish a third trial chamber and to increase the number of judges to 14. The judges sit for renewable four-year terms.

The Prosecutor's office is an independent organ of the Tribunal. Article 18(1) of the Statute covers the process whereby the Prosecutor is to initiate investigations and decide whether or not to proceed in each case. It reads:

> the Prosecutor shall initiate investigations *ex officio*, or on the basis of information obtained from any source, particularly from Governments or United Nations organs, intergovernmental or non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is a sufficient basis to proceed.

The Prosecutor is appointed by the Security Council on the nomination of the Secretary-General and also serves a renewable four-year term. The initial incumbent was Justice Richard Goldstone of South Africa. Justice Louise Arbour from Canada took over the post in October 1996 and Carla del Ponte of Switzerland took over in September 1999.

In October 2000 the Tribunal had 1200 staff from 75 countries. Its budget has climbed steadily each year, and is $96,443,900 for 2001.[19]

The Tribunal is not confined to conflicts between states, but merely to violations committed "in the territory of the former Yugoslavia" between 1991 and a date to be set by the Security Council. This was intended to avoid disputes about the status of the combatants in the Bosnia conflict, and also means that the Tribunal may have jurisdiction over crimes which may have been committed during more recent developments such as the actions of the Yugoslav authorities in Kosovo and NATO's actions against them.

The Tribunal is responsible for prosecuting war crimes (grave breaches of the Geneva Conventions and of the laws or customs of war), genocide and crimes against humanity. It is not responsible for prosecuting crimes against peace, that is, planning, preparation and initiation of war. This means that defendants can be brought before the Tribunal on charges of genocide, or of ordering or condoning grave breaches of the Geneva Conventions, but not of initiating the conflict in the first place. In the first annual report of the Tribunal the

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18 S/25704, 3 May 1993.

19 *ICTY Key Figures*, International Criminal Tribunal for Former Yugoslavia, 15 March 2001, from http://www.un.org/icty/glance.htm.

President commented that "the underlying reason is probably that the Security Council preferred to reserve to itself competence in the field of aggression and similar crimes against peace."[20]

The Tribunal takes primacy over national jurisdiction, so that suspects should normally be handed over to the Tribunal, rather than being tried in national courts.

As at 15 March 2001 the Tribunal had publicly indicted ninety-eight individuals. Four people had been convicted and were serving their sentences, four were awaiting sentencing, twelve others had been convicted but were appealing, two had been acquitted, and the trials of seven others were ongoing. Nine accused had died (three in custody at the UN detention centre) and charges against eighteen had been dropped.[21]

On 8 November 1994 UN Security Council Resolution 955 established an international criminal tribunal for Rwanda. This is based in Arusha, Tanzania, and it shares the Prosecutor and some other officers of the tribunal for Yugoslavia. Its jurisdiction is limited to offences which took place in 1994. The Tribunal has arrested over forty suspects and convicted many, including the former Prime Minister Jean Kambanda, of genocide and crimes against humanity.[22]

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[20] *Annual Report of the International Tribunal…*, A/49/342, 29 August 1994, p13.

[21] *ICTY Key Figures*, International Criminal Tribunal for the Former Yugoslavia, 15 March 2001, from http://www.un.org/icty/glance/keyfig-e.htm. The ICTY website contains many useful documents, including the Statute of the Tribunal, the detailed rules of procedure and codes of ethics, and transcripts of judgements.

[22] Its website is http://www.ictr.org, although it is somewhat less informative than its Yugoslav counterpart.

III The International Criminal Court[23]

A. History

In 1948 the UN General Assembly adopted a resolution inviting the International Law Commission (ILC) to examine the feasibility of establishing a permanent international criminal court, which might have the advantage of not being seen as the tool of a particular group of states. A special committee was established in 1950 and it drew up a draft statute the next year, but there was opposition from the Soviet bloc. While the definitions of war crimes, genocide and crimes against humanity were reasonably settled, the definition of crimes against peace became mired in dispute. The attempt was deferred indefinitely in 1957 and the obduracies of the Cold War prevented significant progress for many years.

In 1989 Trinidad and Tobago gained backing in the General Assembly for its call to revive serious efforts to create an international criminal court. This was a result of its concerns over the international drug trade, though drug crimes were squeezed out of the purview of the court as a result of opposition led by the USA. In 1990 the General Assembly invited the ILC to return to the possibility of establishing a court, and in 1992 and 1993 requested that it draw up a draft statute. The ILC worked on this during its 1993 and 1994 sessions and completed a draft statute in 1994, which was referred to the General Assembly and considered in an *ad hoc* committee.[24] In December 1995 the General Assembly set up a Preparatory Committee to redraft the statute, and this held frequent meetings.[25]

The final session of the Preparatory Committee was held in March 1998 and a Diplomatic Conference was arranged to take place in Rome for five weeks in June-July, with a view to concluding a treaty to establish the Court. This would include a final version of the statute and would cause the Court to be established at some point after the entry into force of the treaty.

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[23] References to Articles are to articles of the *Rome Statute of the International Criminal Court*, which establishes the Court, and is itself referred to here as 'the Statute.' The International Criminal Court is referred to as 'the Court' or, where clarification might be needed, 'the ICC.'

[24] *Report of the International Law Commission on the work of its forty-sixth session*, General Assembly Official Records, Forty-Ninth Session, Supplement No 10, A/49/10, p19. Also available as Dep 3325/3. The draft statute, with commentary, is reproduced on pp43-194.

[25] Information on the work of the Preparatory Committee is given in the *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, General Assembly Official Records, Fifty-first Session, Supplement No 22A, A/51/22. Also available as Dep 5682/3.

B. The Rome Statute[26]

At the Diplomatic Conference in Rome states bargained hard to protect their national interests. To some observers this resulted in a treaty which was less incisive than it might have been. At the same time, many commentators stressed that the conclusion of a treaty, and the anticipated establishment of a court, provided a moral standard and represented a considerable achievement.[27]

The *Rome Statute of the International Criminal Court* was adopted on 17 July 1998.[28] It enters into force "on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification" or other agreement to be bound, and after that time the Court will be established.[29] The seat of the Court will be at the Hague, although it may sit, and will exercise its powers, in any state party or by agreement in any other state.

Article 1 of the Rome Statute is as follows:

> An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jursidiction and functioning of the Court shall be governed by the provisions of this Statute.

The UN Secretary-General, Kofi Annan, told the delegates

> no doubt, many of us would have liked a Court vested with even more far-reaching powers, but that should not lead us to minimise the breakthrough you have achieved. The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law. It is an achievement which, only a few years ago, nobody would have thought possible.[30]

The Head of the Delegation of the International Committee of the Red Cross, Yves Sandoz, said at the closing of the Conference:

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26 The summaries of Articles in the Statute which follow are not to be taken as authoritative or exhaustive accounts: they are a guide only. Members wishing to examine points of technical detail are referred to the Statute itself, and comments on interpretation of such points are available from the Library on request.

27 Information on the negotiation process is given in R Lee (ed) *The International Criminal Court: the making of the Rome Statute*, 1999, which is a collection of articles by those responsible for negotiating the treaty.

28 The Rome Statute is available as Cm 4555, 23 December 1999.

29 Article126.

30 UN Press Release SG/SM/6643, 20 July 1998.

> the statute that has just been adopted offers States an extraordinary opportunity, at the dawn of the twenty-first century, to unite in defending fundamental values and to give true meaning to the concept of 'international community.' I hope they will take it.[31]

The ICRC has long played an important role in developing international humanitarian law, and it was under its auspices that the Geneva Conventions were drawn up. Mr Sandoz welcomed the Court as a "tale of success" for those who had worked hard for it over many years. However, he drew attention to a number of concerns. These included the failure to specify prohibitions on weapons of mass destruction and landmines, the lack of specific provisions on the use of famine, indiscriminate attacks and prohibited weapons in non-international conflicts, the difficulty in bringing to justice representatives of non-states parties, and the presence of Article 124, the opt-out, which he described "unequivocally" as "a hollow stone in the construction of the Court."

The Foreign Secretary told the House of Commons:

> it has been a paradox of our century that those who murder one person are more likely to be brought to justice than those who plot genocide against millions. The International Criminal Court will put on notice the Pol Pots and Saddam Husseins of the future that they may be held to account personally for their crimes against humanity. It will also offer justice to the victims who have no means at present of bringing their suffering before any court.[32]

Opposition parties also welcomed the Court. For the Conservatives Cheryl Gillan described it as "a considerable step in the right direction"[33] and for the Liberal-Democrats Menzies Campbell called it a "real achievement."[34]

Amnesty International gave the Court a muted welcome. Its press release said

> while recognising that the court would be an historic step forward for international justice, the organisation said that the statute still requires radical surgery to ensure that the court will be just, relevant and effective.

Its Secretary-General Pierre Sane drew attention to restrictions on cases involving non-states parties. He complained that "this court requires the permission of criminals to face trial" and that

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31 *Statement on the establishment of an International Criminal Court*, Y Sandoz, Head of Delegation of the International Committee of the Red Cross, 18 July 1998 LG,1998-063-ENG

32 HC Deb 20 July 1998, c803.

33 HC Deb 20 July 1998, c805.

34 HC Deb 20 July 1998, c807.

> paradoxically, we face a future court that will need the permission of President Milosevic to commence investigations into war crimes committed by his troops in Kosovo.[35]

Human Rights Watch said that the Court

> represents one of the most important advances in human rights protection since the adoption of the 1948 Universal Declaration of Human Rights and the most significant step for international justice since the Nuremberg Tribunal.[36]

By 31 December 2000 139 states had signed the Statute and 27 had ratified. This date was the last on which signature could be made: thereafter states would join through a process of accession, which does not entail subsequent ratification. At 12 February 2001 there had been one further ratification and one accession.[37]

1. Statute crimes

Part 2 of the Statute covers the Court's jurisdiction, and Articles 5 to 8 set out the crimes with which the Court will be concerned.

Under Article 5 the Court will have jurisdiction over four general categories of crime: genocide, crimes against humanity, war crimes and the crime of aggression. The first three of these are defined in subsequent articles. The crime of aggression (starting a war) is included in the general headings, but jurisdiction over it is deferred under Article 5 (2) until such time as a definition can be agreed: such a definition has been a moot point in international law for many years and is unlikely to be resolved soon.[38]

Article 5 (1) tells us that the Court's jurisdiction "shall be limited to the most serious crimes of concern to the international community as a whole."

Article 6 defines genocide in terms identical to those used in the Genocide Convention (see Part II, F [1] of the present Paper, above).

Article 7 defines crimes against humanity. These are any of a list of acts "when committed as part of a widespread or systematic attack directed against any civilian

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35 *International Criminal Court - 'crippled at birth?'*, IOR 40/020/1998, 17 July 1998.

36 *Clinton signature on war crimes court praised*, http://www.hrw.org/campaigns/icc/index.htm.

37 Those states which have ratified include Austria, Belgium, Canada, Finland, France, Germany, Italy, Luxembourg, New Zealand, Norway and Spain. See http://www.un.org/law/icc/statute/status.htm for updated details of ratifications.

38 There are also political reasons for the deferral, since the Security Council is likely to be protective over its primary responsibility in relation to peace and security.

population, with knowledge of the attack."[39] The list includes murder, extermination, enslavement, forcible transfer of the population, imprisonment contrary to international law, torture, rape and other forms of sexual violence including forced pregnancy and forced sterilisation, sexual slavery and forced prostitution, persecution of a group on grounds which are slightly wider than for genocide,[40] enforced disappearance, apartheid, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[41]

Article 8 defines war crimes. In the context of an international armed conflict these include grave breaches of the Geneva Conventions (see Part II, F [2] above), and other "serious violations of the laws and customs applicable in international armed conflict."[42] The latter include attacks on civilians and civilian objects, attacks on those engaged in peacekeeping or humanitarian assistance, attacks which will cause incidental death or injury to civilians, damage to civilian objects or severe and lasting damage to the natural environment when this "would be clearly excessive in relation to the concrete and direct overall military advantage anticipated,"[43] killing or wounding those who have surrendered, declaring that no quarter will be given, making improper use of the emblems of the UN or the Red Cross leading to death or serious injury, the transfer by an occupying power of parts of its civilian population into occupied territory or the deportation of the population of the occupied territory, attacks on certain buildings (such as those dedicated to religion or education), or on historic monuments and hospitals, subjecting persons to medical or scientific experiments which cause death or seriously endanger health and are not justified by the medical condition of the patient and are not carried out in his/her interests, treacherously killing or wounding members of the hostile nation or army, destroying or seizing enemy property unless imperatively demanded by the necessities of war, pillage, the use of certain excessively or indiscriminately injurious weapons, committing outrages on personal dignity, rape, sexual slavery and other forms of sexual violence, the use of civilians as 'human shields,' attacking personnel, buildings, materials and transport of the Red Cross, using starvation as a method of warfare, and conscripting or enlisting children under the age of 15.[44]

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39 Article 7 (1).

40 They include cultural, political and gender grounds, in addition to national, racial, ethnic and religious. Gender orientation and disability are not included except potentially under "other grounds that are universally recognised as impermissible under international law." Article 7 (1)(h) and see Article 7 (3).

41 Article 7 (1)(k).

42 Article 8 (2)(b).

43 Article 8 (2)(b)(iv).

44 See Article 8 (2)(b) for the precise definitions of these crimes. It is noteworthy that the use of anti-personnel mines is not addressed directly in the detailed definitions (although it might be covered by provisions on excessively injurious weapons and due regard to safety of civilians) and neither is the use of nuclear weapons, although Article 8 (2)(b)(xx) is a compromise clause which is intended to allow the inclusion of nuclear weapons at some point in the future, in the event of a comprehensive prohibition on them.

In the context of an armed conflict not of an international character war crimes cover certain breaches of the Geneva Conventions and other serious violations. The breaches of the Geneva Conventions are violations of their common Article 3, being a list of prohibited actions against persons taking no part in hostilities (civilians, those who have surrendered and those who are *hors de combat* as a result of wounding, detention or any other cause). The list covers violence to life and person, including murder and torture, outrages on personal dignity, hostage taking, and the passage of sentences and carrying out of executions without fair trial.[45] The other serious violations contrary to international law include many of the activities listed for an international armed conflict, although the list is shorter. It includes directing attacks against civilians not taking part in hostilities, attacking the Red Cross, peacekeepers or those engaged in humanitarian assistance, attacking certain buildings (such as those dedicated to religion or education), historic monuments or hospitals, pillage, rape, sexual slavery and other sexual violence, conscripting or enlisting children under the age of 15, ordering the displacement of the civilian population unless for their own security or for imperative military reason, treacherous killing or wounding of combatant adversaries, declaring that no quarter will be given, subjecting persons to medical or scientific experiments which cause death or seriously endanger health and are not justified by the medical condition of the patient and are not carried out in his/her interests, and destroying or seizing property of an adversary unless imperatively demanded by the necessities of the conflict.[46]

These apply to conflicts not of an international character, a concept which needs definition. It is defined in Article 8 (2)(f) as follows:

> Paragraph 2 (e) [other serious violations] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.

Article 8 (3) holds that these provisions shall not affect the responsibility of governments to maintain law and order and to defend the unity and territorial integrity of the state.

One effect of these articles is virtually to exempt government actions against terrorism and the actions of terrorist groups themselves from the scope of war crimes.[47] Jurisdiction over terrorism, and also drug crime, was deferred pending consideration at the Review

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45 Article 8(2)(c).

46 See Article 8 (e) for the precise definitions of these crimes.

47 Terrorist activity would not normally be sufficiently widespread to satisfy the conditions of crimes against humanity, although it is just conceivable that it could still fall under genocide.

Conference "with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."[48]

These definitions of Statute crimes are based on existing international law, and even when the Statute does not cite other instruments, such as the Geneva Conventions, its language stays close to them. The Preparatory Commission (see Part III, B [12] below) has produced a draft Elements of Crimes document, which gives greater detail on the Statute crimes.[49]

2. Other questions of jurisdiction

a. temporal

Under Article 11 the Court has jurisdiction only over crimes committed after the Statute has entered into force. When a state becomes party to the Statute after this point jurisdiction is limited to crimes committed after the entry into force for that state (although under Article 12 it could accept jurisdiction in particular cases occurring earlier). Jurisdiction is also limited to cases in which the conduct in question constitutes a crime within the jurisdiction of the Court at the time it takes place.[50] So, for instance, a new crime which might be added to the Court's jurisdiction at some later date could not be prosecuted retrospectively from the date of entry into force.

b. states parties

Under Article 12 states parties accept the Court's jurisdiction over the Statute crimes, as listed in Article 5. The Court may hear a case if either the state on whose territory the crime occurred or the state of which the accused is a national is a party to the Statute, or if the case arises from a referral by the UN Security Council (see Part III, B[3] below). A non-state party may accept the jurisdiction of the Court in a particular case.

c. heads of state

Under Article 27 there is no immunity from the jurisdiction of the Court on the grounds of official capacity: this means that Heads of State or Government, and other officials, are liable to prosecution, and this is notwithstanding any other immunity or special rules which they may enjoy under national or international law. The article makes clear in particular that official capacity

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48 *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/10, 17 July 1998, Resolution E.

49 Available at http://www.un.org/law/icc/statute/elements/elemfra.htm.

50 Article 22 (1).

> shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[51]

Therefore a state party to the Statute implicitly accepts that any immunities enjoyed by its representatives are waived in relation to the Court. However, the representatives of a non-state party will still enjoy immunities in other states. Under Article 98 (1)

> the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

This means that the Court can oblige a state to surrender representatives of a non-state party who enjoy immunities only if the non-state party agrees to waive those immunities.

d. criminal responsibility

Article 25 defines criminal responsibility and liability to prosecution. This extends to one who commits a crime, whether individually or jointly, orders, induces or solicits the commission of a crime which is committed or attempted, aids, abets or assists the (attempted) commission of a crime for that purpose (ie not accidentally), contributes in any way to the (attempted) commission of a crime by a group of persons acting with common purpose and who does so with criminal intent or knowledge of the same on the part of the group, directly and publicly incites others to commit genocide, or attempts to commit a crime by taking action which "commences its execution by means of a substantial step" but does not lead to the crime actually taking place when this is a result of circumstances beyond that person's control. Abandoning the attempt to commit a crime or preventing its completion remove liability for prosecution for previous involvement in the attempt.

Under Article 26 the Court has no jurisdiction over any person who was under 18 at the time the alleged offence was committed.

e. command responsibility and superior orders

Military commanders are not exempt from prosecution merely on the grounds that they did not personally commit specific crimes. If they ordered criminal courses of action they would be liable in any case under Article 25 (b), but even if they did not, crimes of which they knew or should have known and which they did not take reasonable steps to prevent

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[51] Article 27 (1).

or punish, when committed by forces under their control, will amount to culpable behaviour on their part.

This is set out in Article 28, which also deals with other relationships of command. It provides that, in addition to other grounds of criminal responsibility,

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 33 deals with the defence of superior orders. It provides that

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and

> (c) The order was not manifestly unlawful.
>
> 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

As with many of the provisions of the Statute, there are precedents for Articles 28 and 33 in the Charter of the Nuremberg tribunal and the statutes of ICTY and ICTR. [52]

Article 6 of the Charter of the Nuremberg Tribunal includes the provision that

> leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

This is not analogous to Article 28 of the Rome Statute but does have relevance to issues of command and control.

Article 8 of the Charter of the Nuremberg Tribunal reads:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7 of the Statute of the International Criminal Tribunal for former Yugoslavia is devoted to 'individual criminal responsibility,' and it asserts the culpability of those involved in planning relevant crimes, the inadmissibility of a defence of official capacity, the culpability of commanders for acts carried out by their subordinates if they know or have reason to know of those acts and do not take measures to prevent or punish them, and the inadmissibility of the defence of superior orders.

The Article reads in full:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
>
> 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
>
> 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal

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[52] In December 1946 the UN General Assembly affirmed as principles of international law the principles recognised in the Nuremberg Charter and judgement. A Res 95 (1), adopted unanimously.

> responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
>
> 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

The Statute of the International Criminal Tribunal for Rwanda repeats these provisions in its Article 6 in virtually identical terms.

The Rome Statute is far more detailed than these earlier documents. The various elements of individual criminal responsibility are all repeated, but in separate articles, and they are given much closer definition.

The definition of the responsibility of commanders, given in Article 28 of the Rome Statute, differs from these previous texts. In particular it includes the negligence provision that a commander is culpable if s/he knew "or should have known" that forces under his/her command were committing or about to commit Statute crimes. This differs from the "had reason to know" of the ICTY Statute, and from the "consciously disregarded information" which the Rome Statute applies to non-military superiors under Article 28 (b)(i). However, it is not completely novel, and almost identical wording has been included in the British *Manual of Military Law* since 1958.[53]

As to the disallowance of the defence of superior orders in Article 33, this might seem permissive compared to the precedents. However, the other international tribunals all dealt with situations in which a great many manifestly unlawful orders had been given. It is possible that the drafters of the Rome Statute were prompted by the wider jurisdiction of the ICC, and the likelihood that its deliberations will turn not only on personal responsibility when a crime has clearly occurred, but also on the very legality or illegality of the behaviour in question, to allow for the situation in which a subordinate is given an order which appears to call for a course of action normal in wartime but which for reasons unknown to the subordinate will actually lead to an offence. For instance, there might be an order to attack a target from distance, and this is followed in the belief that the target in question is a military target, but the commanders have failed to take sufficient precautions to determine its use and it is in fact, unknown to the troops who fire the missiles, a civilian target.

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[53] "The commander is also responsible, if he has actual knowledge or should have knowledge, through reports received by him or through other means …," *Manual of Military Law*, War Office, 1958, Part III, The Law of War on Land, p178.

3. Initiating investigations

At the Diplomatic Conference there was pressure from the USA, France, Russia and China for the Court to remain under the control of the Security Council, so that the Prosecutor would have to seek the authority of the UN Security Council through a Resolution before proceeding to investigate. This would have given the four states mentioned, plus the UK, a veto: in their view this would be necessary to protect them from politically motivated prosecutions. Campaigners argued that the Prosecutor should have as much independence from national governments as possible, and this view was supported by most European states, Canada and some African states.[54] In the final text adopted at Rome the Prosecutor was given a greater level of independence than was sought by the USA and its supporters among the permanent membership of the Security Council.

The Prosecutor may initiate investigations on his/her own initiative under Article 15, or at the request of a state party under Article 14, or of the UN Security Council under Article 13 (b). The Statute says that a "situation in which one or more of such crimes appears to have been committed" may be referred. According to Yee, leader of the Singapore delegation at Rome, 'situation' was chosen in preference to 'case' or 'matter,' with the intention that general situations would be referred and the Prosecutor would exercise discretion as to what cases might arise.[55] In practice this distinction may prove rather fine. In the case of investigations launched on the Prosecutor's own initiative s/he must request authorisation from the Pre-Trial Chamber on the basis of the available evidence.[56] In the case of an investigation following a referral by the Security Council it is not necessary that either the state where the crime occurred or the state of which the accused is a national should be parties to the Statute.[57] The Prosecutor may decide not to proceed with an investigation, should s/he feel that there is insufficient basis for a prosecution, or that such would be contrary to the interests of justice under Article 53.

Under Article 16 the Security Council has a right to request that no investigation or prosecution be commenced or proceeded with for a period of 12 months. It does this by means of a resolution under Chapter VII of the UN Charter, and the request is renewable in the same way. This gives the members of the Security Council a theoretical chance to block prosecutions of their nationals, if they can gain support for a resolution from the other members.

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[54] These formed a group known as the Like-Minded States, and tended to argue in favour of a strong and independent court.

[55] L Yee, "The International Criminal Court and the Security Council: Articles 13 (b) and 16," in R Lee (ed), *The International Criminal Court: the making of the Rome Statute*, 1999, pp147-8.

[56] Article 15.

[57] Article 12 (2).

4. Structure of the Court

Part 4 of the Statute deals with the strucure and functioning of the Court. It has a Presidency, three divisions (the Appeals Division, Trial Division and Pre-Trial Division), a Prosecutor and a Registry. These are known as the organs of the Court.

a. judges

There are to be 18 judges,[58] and these will elect from among themselves a President and two Vice-Presidents with largely administrative functions.[59]

The election of the judges is detailed in Article 36. The judges

> shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.[60]

The candidates for election as judges must have either

> established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings,

or

> established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.[61]

Candidates are nominated by states parties. They must be nationals of states parties, but not necessarily of the state which nominates them. Each state may put forward one nominee for any given election. The candidates will be divided into two lists, those with qualifications based on established competence in criminal law, and those with qualifications based on established competence in international law. The judges will be elected by secret ballot of the Assembly of States Parties, which will elect at least nine judges from the former list and at least five from the latter. No two judges may be nationals of the same state. After these considerations are taken into account, those elected will be those securing the highest number of votes and a two-thirds majority of

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58 Article 36.
59 Article 38.
60 Article 36 (3)(a).
61 Article 36 (3)(b).

the states parties present and voting. If an insufficient number of judges is elected, further ballots will be held under the same rules until all vacancies are filled.

The states parties must take into account the need to maintain representation of the principal legal systems of the world, equitable geographical representation and a fair representation of male and female judges. They must also take into account the need to find judges with expertise in particular areas, such as violence against women or children.

The judges will normally serve a term of nine years and will not be eligible for reelection. However, at the first election, lots will be drawn to divide the judges into three equal groups: those who will serve a three year term and enjoy the right of reelection for a full term, those who will serve a six year term and those who will serve a nine year term.

The organisation into Divisions is set out in Article 39. The Appeals Division consists of the President and four other judges, while the Trial Division and the Pre-Trial Division each consist of not less than six judges. This arrangement is worked out by the Court itself, taking into account relevant experience and the need to maintain an appropriate combination of expertise in criminal and international law.[62]

The judicial functions are to be carried out by Chambers made up of judges from the relevant Division. The Appeals Chamber comprises all the judges of the Appeals Division, the functions of the Trial Chamber will be carried out by three judges of the Trial Division, and the functions of the Pre-Trial Chamber will be carried out by three, or in some circumstances one, judges of the Pre-Trial Division.[63]

b. prosecutor

Article 42 deals with the Office of the Prosecutor. This acts independently as a distinct organ of the Court. The Prosecutor is responsible for receiving referrals, collecting information, investigating and prosecuting cases. The Prosecutor will be assisted by one or more Deputy Prosecutors (of different nationalities) each of whom will exercise the functions of the Prosecutor. The Prosecutor and Deputy Prosecutors

> shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. [64]

The Prosecutor will be elected by secret ballot by an absolute majority of the Assembly of States Parties, and the Deputies will be elected in the same way from a list provided by

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[62] The word "appropriate" carries weight here, since the Trial and Pre-Trial Divisions are to consist "predominantly of judges with criminal trial experience." Article 39 (1).

[63] Article 57 (2) gives further detail on the exercise of Pre-Trial functions by a single judge.

[64] Article 42 (3).

the Prosecutor. The Prosecutor and the Deputies will serve non-renewable nine year terms.

c. staff and administration

Article 43 sets out the terms for the Registry, which handles the non-judicial administration of the Court and is headed by the Registrar.

Under Article 44 the Prosecutor and the Registrar may appoint their own staff as required. The staff regulations, including pay, are proposed by the Registrar with the agreement of the President and Prosecutor, and these must be approved by the Assembly of States Parties.

Under Article 49 the salaries of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar are decided by the Assembly of States Parties.

d. removal of officers

Article 46 provides for the removal of these senior officers, the judges, the Prosecutor, Deputy Prosecutors, the Registrar and the Deputy Registrar, on grounds of serious misconduct, a serious breach of duties or inability to exercise their functions. In the case of a judge there must first be a recommendation by a two-thirds majority of the other judges and this must then be endorsed in a secret ballot by a two-thirds majority of the states parties. In the case of the Prosecutor there must be an absolute majority of states parties and in the case of the Deputy Prosecutor there must be a recommendation by the Prosecutor endorsed by an absolute majority of the states parties. The Registrar and Deputy Registrar are removed by an absolute majority of the judges.

5. Investigations and prosecutions

a. pre-trial

Part 5 of the Statute, Articles 53 to 61, deals with investigation and prosecution.

Once a situation has been referred to the Prosecutor s/he must determine whether or not to proceed with investigation and, thereafter, with prosecution. These decisions will be taken on the basis of admissibility and jurisdiction, a reasonable *prima facie* case and a consideration as to whether the investigation or prosecution would serve the interests of justice. If the Prosecutor decides not to proceed, those who referred the situation (a state party or the Security Council) may request a review of the decision by the Pre-Trial Chamber. If a case is rejected on the ground that it would not serve the interests of justice to proceed, then the Pre-Trial Chamber may review the decision on its own initiative.

Both The Prosecutor and the Pre-Trial Chamber must decide that there is a "reasonable basis to proceed" before the investigation may begin.[65] If the Prosecutor decides to press charges, the Pre-Trial Chamber will hold a hearing at which the Prosecutor must support each charge with evidence. The Pre-Trial Chamber then decides whether there is "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[66] The accused has the right to object to the charges, to challenge evidence cited by the Prosecutor and to present evidence at this hearing.

The Pre-Trial Chamber has various other functions during the investigatory phase, outlined in Articles 56 to 60. These include issuing warrants and summonses,[67] and authorising the Prosecutor to take "specific investigative steps" in the territory of a state party "without having secured the cooperation of that State under Part 9" if the state in question

> is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.[68]

Under Article 59 a state party which receives a request from the Court for arrest must take steps to comply immediately.

b. trial

Part 6 of the Statute, Articles 62 to 76, deals with the Trial. These articles set out the functions of the Trial Chamber and set terms for fairness, including presumption of innocence,[69] burden of proof,[70] rights of the accused (including a right to silence, and also the right to legal assistance free of charge if they lack the means to pay),[71] protection of victims and witnesses,[72] and rules of evidence.[73] The decision (verdict) is reached by the judges of the Trial Chamber who will attempt to reach a unanimous decision but may deliver a majority decision if this fails.

The trial will normally take place in public. The Trial Chamber may decide to work *in camera* to protect witnesses or the accused (especially in cases involving sexual violence

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65 Article 15.
66 Article 61 (7).
67 Article 58.
68 Article 57 (3)(d).
69 Article 66.
70 Article 66.
71 Article 67. The right to silence is "to remain silent, without such silence being a consideration in the determination of guilt or innocence." Article 67 (1)(g).
72 Article 68.
73 Article 69.

or involving children), or to protect confidential or sensitive information given in evidence.[74]

Part 8, Articles 81 to 85, covers the appeals procedure.

c. reparations

Article 75 allows for reparations to be made to victims. The Court will decide, on request or on its own initiative, whether any form of reparation should be made to the victims of a crime, and it may order the convicted person to make these, or it may award payment from a Trust Fund. Under Article 79 this Trust Fund is to be established by the Assembly of States Parties for the benefit of victims and their families, and this may include the deposit of fines or forfeitures ordered by the Court. The Assembly of States Parties will establish the criteria for the Fund's management.

d. penalties

Part 7 of the Statute, Articles 77 to 80, covers penalties.

Under Article 77 (1) the Court may impose either of the following sentences:

> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

Under Article 77 (2) it may order in addition to a prison sentence

> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
>
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

In determining sentence the Court will take into account factors such as the gravity of the crime and the personal circumstances of the convicted person, and it will deduct time previously spent in detention on its order.

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[74] Article 64 (7) with reference to Article 68 (2).

6. Cooperation with the Court

Part 9, Articles 86 to 102, cover international cooperation with the Court. Under Article 86

> States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

States parties are obliged under Article 88 to ensure that there are procedures available under their national law for all the forms of cooperation specified in Part 9.

There are various forms which this cooperation may take, and the general provisions relating to it are given in Article 87. This includes that when a state fails to comply with a request for cooperation the Court may refer the matter to the Assembly of States Parties or, in relation to situations which it has referred, to the Security Council.

Article 89 sets out terms for the surrender of persons to the Court. Article 89 (1) provides that

> the Court may transmit a request for the arrest and surrender of a person … to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Articles 90, 91 and 92 give further detail on questions relating to surrender of persons, and have implications for extradition law. In particular, Article 90 concerns the situation where a state is requested to surrender a person to the Court and also receives a request from another state for extradition of the same person.

If the two requests concern the same conduct and the state requesting extradition ('the requesting state') is a state party, then there are two options. If the Court has determined admissibility and has taken into account in the process the investigation in the requesting state which gives rise to its request for extradition, then the state receiving the request ('the requested state') gives priority to the Court. If the Court decides that the case is inadmissible, the requested state may of course proceed with extradition to the requesting state.

If the two requests concern the same conduct and the requesting state is not a state party, then two other options arise. If the requested state is not under an international obligation to extradite to the requesting state (for instance, a bilateral treaty), then the requested state gives priority to the Court. If there is an international obligation, then the requested state chooses to which request to accede. It takes into account the dates of the two requests, the possibility of subsequent surrender between the Court and the requesting state, and

> the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought.[75]

If the two requests concern different conduct, then the request of the Court takes precedence, unless the requested state is under an international obligation to extradite to the requesting state. In the latter case, it is for the requested state to decide to which request to accede, on the basis of various considerations including those mentioned above (date, subsequent surrender, interests of the requesting state) and the relative gravity of the two alleged crimes.

Article 93 covers other forms of cooperation which states parties must provide to the Court. These include identification and whereabouts of persons and things, taking evidence, questioning of any person being investigated or prosecuted, providing documents, facilitating voluntary appearances by witnesses or experts before the Court, the temporary transfer of persons in custody for identification or testimony, examination of sites including exhumations, searches and seizures, protection of victims and witnesses and preservation of evidence, identification, tracing and freezing or seizure of proceeds, property or assets for the purpose of eventual forfeiture, and any other form of cooperation not prohibited by the law of the state in question. States may deny a request for assistance only on grounds of national security.

Under Article 93 (4) a state party may refuse a request for assistance from the Court if the request "concerns the production of any documents or disclosure of evidence which relates to its national security." Article 72 allows for a state to intervene at any stage in proceedings if it feels that information is being or is likely to be disclosed which is likely to prejudice its national security interests. Article 72 also sets out the procedures to follow in either of these cases (refusal of request for assistance or intervention at any stage). First the state must seek to take all reasonable measures in cooperation with the Court to resolve the matter through means such as modification of the request for evidence, providing the information in a different or summary form, or use of *in camera* proceedings. If the state is still not satisfied, it may notify the Court of this, giving reasons if this is possible without itself prejudicing national security.

If the Court still thinks the evidence is necessary and relevant for the determination of guilt or innocence, it may take further steps. If the refusal was made under Article 93 (4) (refusal of request for assistance) and the Court determines that the requested state is thereby not acting in accordance with its obligations under the Statute, it may refer the matter to the Assembly of States Parties or, for a situation referred by it, to the Security Council, and the Court may draw inference as to the facts. In other circumstances

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[75] Article 90 (6)(b).

(intervention at any stage) the Court may order disclosure or draw inference as to the facts.

Under Article 93 (10)(a) the Court may also provide assistance to a state investigating a statute crime or any other crime which is serious under that state's laws. However, in doing so, the Court may hand over documents or other evidence provided by a state only with that state's consent.

Article 100 covers the costs of requests for assistance. The Court bears the travel costs for its own officers, for witnesses and experts and for persons transferred under custody, those of translation and of the preparation of any expert opinion or report and, following consultations, any extraordinary costs. The requested state bears the remaining costs, which are likely to be those associated with its own furnishing of information, police and legal activities, administrative activities and so on.

7. Enforcement of sentences

Part 10, Articles 103 to 111 cover the enforcement of sentences.

Under Article 103 those states which are willing to accept persons sentenced by the Court will notify the Court of this and a list will be drawn up. From that list the Court will designate a state in which a sentenced person will be held ('the state of enforcement'), and this will be in accordance with a number of principles. These include that states should share the responsibility for enforcing sentences, the application of "widely accepted international treaty standards governing the treatment of prisoners,"[76] and the views and nationality of the sentenced person. When states notify the Court of their willingness to accept prisoners they may attach conditions, and when they are designated in particular cases they have the right of refusal. If no suitable state can be found the sentence will be served in the host state (the Netherlands) and the costs will be borne by the Court.

The sentence remains under the control of the Court: it retains sole rights to decide on appeal and revision of sentence and to consider reduction of sentence before expiry (parole).[77] Under Article 110, when a prisoner has served two thirds of a sentence, or 25 years in the case of life imprisonment, the Court will review the sentence. No review will be conducted sooner than this. The Court may reduce the sentence if it finds one of the following conditions to apply:

> (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

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[76] Article 103 (3)(b).
[77] Articles 105 and 110.

> (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
>
> (c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.[78]

Under Article 106 the enforcement of the sentence will be subject to supervision by the Court and consistent with international standards for treatment of prisoners. At the same time, the conditions of imprisonment will be governed by the normal laws of the state of enforcement and should be no more or less favourable than for other similar offences in that state.

Article 109 deals with fines and forfeitures. States are obliged to give effect to fines and forfeitures ordered by the Court under Article 77, without prejudice to the rights of *bona fide* third parties and in accordance with their national law.

8. Assembly of States Parties

Part 11 (Article 112) establishes the Assembly of States Parties, and Part 12, Articles 113 to 118, covers financing.

The Assembly of States Parties comprises all states parties to the Statute, and each state party has one representative in the Assembly. States which have signed the Statute and not ratified may be observers in the Assembly. The President of the Court, the Prosecutor and the Registrar may participate in meetings of the Assembly. It will meet at the Hague or at the UN in New York at least once a year. States parties have one vote each, although they are supposed to make efforts to reach decisions by consensus. If not, decisions on matters of substance are approved by a two-thirds majority of those present and voting, with a quorum of an absolute majority of states parties. Decisions on procedural matters are taken by a simple majority of states parties present and voting.

The Assembly has a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for terms of three years.[79] The Bureau must have a "representative character" taking account of "equitable geographical distribution" and "adequate representation of the principal legal systems of the world."[80] The functions of the Bureau are not described in detail: under Article 112 (6) it convenes special sessions

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78 Article 110 (4).
79 Article 112 (3)(a).
80 Article 112 (3)(b).

of the Assembly, and under Article 112 (3)(c) it "shall assist the Assembly in the discharge of its responsibilities." There is also a reference, under the functions of the Assembly, to its consideration of "the reports and activities" of the Bureau.[81]

The functions of the Assembly of States Parties are assigned in the course of the Statute, but they are summarised in Article 112 (2). They include management oversight and to "consider and decide the budget for the Court."[82] The Assembly may also establish any subsidiary bodies which it considers necessary, including an "independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy."[83]

9. Budget

The budget is to be decided by the Assembly of States Parties, as noted above, and under Article 115 it will be provided by assessed contributions from states parties and funds provided by the UN (particularly in relation to expenses incurred on cases arising from referrals by the Security Council). The assessed contributions are based on "an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based."[84] Article 116 allows that the Court may receive additional voluntary contributions from governments, international organisations, individuals, corporations and other entities.

The Assembly of States Parties will adopt Financial Regulations and Rules, which, with the Statute, will govern the financial affairs of the Court, the Assembly, the Bureau and subsidiary bodies.[85]

Article 118 provides for an annual independent audit of the Court's finances.

10. No reservations

It is common for states to make various types of statements on signature or ratification of a treaty, including reservations to it. A reservation is a statement which seeks to exclude or modify the effect of parts of the treaty on that state. Under Article 120 states may not make reservations to the Statute, and they are limited therefore to declarations and interpretative declarations (although it remains open whether any of these might

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81 Article 112 (2)(c).
82 Article 112 (2)(d).
83 Article 112 (4).
84 Article 117. The scale of assessments is in general based on ability to pay, and is subject to maximum and minimum levels. Factors such as permanent membership of the Security Council also influence the calculation, with permanent members generally expected to pay a higher proportion than might otherwise be the case.
85 Article 113.

constitute reservations under a different name).[86] The declarations which have been made so far mostly concern technical matters such as the language in which requests to that state should be framed, but those of Israel and New Zealand are more political. Israel "signs the Statute while rejecting any attempt to interpret provisions thereof in a politically motivated manner against Israel and its citizens,"[87] while New Zealand makes various points relevant to the use of nuclear weapons, to the effect that it would be inconsistent with international humanitarian law to limit the scope of Article 8 (war crimes) to conventional weapons only. This was a response to the position adopted by France.

France made a number of interpretative declarations on ratification. The first of these reiterates France's right to self-defence in conformity with Article 51 of the UN Charter. The second declares that the provisions of Article 8

> relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute.

Others exempt terrorism and other 'ordinary crimes' from the definition of armed conflict for Articles 8 (2)(b) and (c), elaborate the French interpretation of terms such as 'military advantage' and 'military objective,' and exempt collateral damage from the provisions of certain articles. France also made a declaration under Article 124 (see Part III, C[2] of the present Paper, below)

> that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [war crimes] when a crime is alleged to have been committed by its nationals or on its territory.

The British Government has made clear that it has no intention of making a declaration under Article 124.[88] However, it expects to make a "small number of interpretative statements" on ratification, the purpose of which would be "to express our understanding of certain provisions under Article 8 of the Rome Statute."[89]

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86 Under Article 2.1 (d) of the *Vienna Convention on the Law of Treaties 1969* a reservation is a statement "however phrased *or named* [emphasis added]," made by a state at signature, ratification or later agreement to be bound, which purports to "modify the legal effect of certain provisions of a treaty in their application to that State." It is sometimes possible to make reservations at a later stage as well.

87 All references to declarations are to the list given at the foot of the table of Ratification Status on the ICC website. See http://www.un.org/law/icc/statute/status.htm.

88 HL Deb 8 March 2001, c363.

89 HL Deb 8 February 2001, c1272.

11. Amendment

The substance of the Statute remains fixed for a period of seven years from its entry into force. After seven years states parties may propose substantive amendments, and the terms for this are set out in Article 121. If the Assembly of States Parties agrees to take up the matter it can convene a Review Conference or deal with the proposal directly. In either case an amendment not adopted by consensus must achieve a two-thirds majority of states parties to be adopted. Amendments are themselves subject to signature and ratification. For amendments to the key Articles 5, 6, 7 and 8, the amendments will come into force for those states parties acccepting them one year after the deposit of their instrument of ratification or acceptance. For other states parties the Court will not have jurisdiction over crimes covered by the amendment when committed by that state's nationals or on its territory. Other amendments enter into force for all states parties one year after the deposit of instruments of ratification or acceptance by seven-eighths of them.

Amendments on matters of an institutional nature may be proposed at any time and will be decided by a two-thirds majority of states parties at the Assembly of States Parties or a Review Conference. They will enter into force for all states parties six months later.

Whether or not the Assembly of States Parties calls for it, there will be a Review Conference seven years after the Statute enters into force, under Article 123. This may consider the list of crimes in Article 5, although it is not limited to this purpose.

12. The Preparatory Commission

At the Diplomatic Conference a Preparatory Commission was authorised with the following mandate:

> The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:
> (a) Rules of Procedure and Evidence;
> (b) Elements of crimes;
> (c) A relationship agreement between the Court and the United Nations;
> (d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;
> (e) Financial regulations and rules;
> (f) An agreement on the privileges and immunities of the Court;
> (g) A budget for the first financial year;
> (h) The rules of procedure of the Assembly of States Parties.[90]

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[90] *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/10, 17 July 1998, Resolution F.

The draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes are now complete and give much important detail on the way in which the Court will work and the nature of the Statute crimes.[91]

C. Issues pertaining to the Statute

The Statute was the result of political bargaining. During the discussions leading to its adoption a number of states were concerned that the Court might achieve unanticipated results. The final text agreed represents a compromise between the desires to prosecute individual criminals at the international level and to preserve state sovereignty.

1. A court for the consensual

There was a widespread concern that those states most likely to practise Statute crimes would simply not become party to the treaty, as this would limit prosecutions of their nationals to crimes committed abroad and would make apprehension of suspects considerably harder.

Under Article 12 the Court will have jurisdiction only in cases where the accused's state of nationality or the state in which the crime took place is party to the treaty, unless one of those states, though not party, gives its consent to prosecution in a particular case, or unless the UN Security Council has referred the situation. The Court will have jurisdiction only over those crimes committed after the entry into force of the Statute, and in relation to states which become party after that point, only in relation to crimes committed after they have become party, unless they make a declaration accepting jurisdiction in the case of a specific crime which occurred earlier.[92] This may limit the effectiveness of the Court, since those countries with the worst human rights records are precisely those which are least likely to become parties to the treaty. Realistically, there would be immense difficulties in trying to impose the Court on non-states parties. Supporters of the compromise argue that the Statute may at least make it harder for international criminals to travel in freedom.

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[91] They are available at http://www.un.org/law/icc/index.html.

[92] The Statute is inexplicit on the point, but it is to be assumed that a non-state party's capacity to accept retrospective jurisdiction relates only to the period during which the treaty was in force (ie the Court existed) but not for that state (ie it was a non-state party). It would be inconsistent with the spirit of the Statute and the drafting process if non-states parties could accept jurisdiction over crimes occurring before the treaty was in force at all.

2. Malicious prosecution

The question of the protection of innocent persons was of great concern. The USA, France and the UK were occupied by the prospect of malicious, spurious or politically motivated prosecutions against their own service personnel or political leaders. This was connected in particular with crimes against humanity and war crimes. Many features of the Statute could be seen as efforts to assuage the fear that legitimate military action might be followed by spurious referrals and prosecutions against the troops, commanders and leaders of the states concerned.

a. procedural safeguards

At the most basic level the Prosecutor's investigatory role and the role of the Pre-Trial Chamber can be seen in this light. States parties retain control of the Prosecutor and judges to the extent that they elect them and may dismiss them in line with the provisions of Part 4 of the Statute. Non-states parties may not refer situations to the Prosecutor.[93] There are detailed provisions as to fair trial and the accused has rights of appeal and challenge at various points in the process. In particular the accused may request that the Appeals Chamber disqualify the Prosecutor or Deputy Prosecutor on the grounds of lack of impartiality, for instance because of previous involvement in the case or a related case involving the same accused at the national level.[94]

b. complementarity principle

The Statute also includes what has become known as the 'complementarity principle' as a way of ensuring that states retain primary responsibility for investigating and prosecuting complaints.

Briefly, the Court is supposed to be complementary to national jurisdiction, not superior to it. A case is not admissible if it is being investigated or prosecuted by a state, or if a state has investigated it and decided not to prosecute, or if the accused has already been tried for the same offence. This is set out in Article 17, which is qualified by good faith provisions: if a state is unwilling or unable to see an investigation or prosecution through, or if it has undertaken a prosecution in bad faith simply to shield a wanted person from action at the Court, then the case will still be admissible before the Court. The Court determines admissibility itself, on the basis of certain considerations outlined in Article 17.

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93 They would presumably be in a position to send information, the value of which would be for the Prosecutor to decide.

94 Article 42 (8)(a).

Article 17 (1) sets out circumstances in which a case is inadmissible at the Court, and is the basis of the complementarity principle. A case is inadmissible if it is in the process of being investigated or prosecuted by a state, unless that state is unwilling or unable genuinely to carry out the investigation or prosecution. A case is inadmissible also if it has been investigated already by a state and the state has decided not to prosecute, unless the decision resulted from unwillingness or inability genuinely to prosecute. And, with a cross-reference to Article 20 (3), a case is inadmissible if the person concerned has already been tried in a national court for the conduct in question, unless the trial was designed to shield the person from process at the ICC, or if the national procedings

> 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, was inconsistent with an intent to bring the person concerned to justice.[95]

'Unwilling' and 'unable' need definition, and Articles 17 (2) and (3) set out in general terms how the Court will proceed in determining whether these conditions apply. The tests for unwillingness are broadly similar to those quoted above from Article 20 for a case which has already been tried, with the addition of "unjustified delay … inconsistent with an intent to bring the person concerned to justice."[96] The test for inability is a "total or substantial collapse or unavailability" of the national justice system which prevents the state from obtaining the accused or the necessary evidence or testimony, or otherwise carrying out its proceedings.[97]

It falls to the ICC itself to decide these questions of admissibility, and this is set out in Article 19.[98] The Court "may, on its own motion, determine the admissibility of a case in accordance with article 17."[99]

There are procedures for challenging admissibility. According to Article 19 (2) challenges to admissibility may be made by an accused, by one for whom an arrest warrant has been issued, by a state which has jurisdiction over a case (on the grounds that it is investigating or prosecuting or has already investigated and prosecuted), or by a state which must have accepted the Court's jurisdiction for the case to proceed (the one where the conduct occurred or the one of which the accused is a national). The Prosecutor may also seek a ruling from the Court as to admissibility.[100]

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95 Article 20 (3)(b).
96 Article 17 (2)(b).
97 Article 17 (3).
98 The same goes for the related area of 'jurisdiction,' set out in Articles 5 to 12. Challenges to jurisdiction and admissibility are dealt with together in Article 19.
99 Article 19 (1).
100 Article 19 (3).

Under Article 19 (4)

> the admissibility of a case … may be challenged only once by any person or State referred to in paragraph 2.

The sole challenge may take place before or at the commencement of the trial, although the Court may grant exceptional leave for additional challenges or a later challenge. Challenges at the commencement of the trial, or thereafter, may be based only on Article 17 (1)(c) (that the accused has already been tried for this conduct). Challenges are referred to the Pre-Trial Chamber if made before the confirmation of charges, and to the Trial Chamber after confirmation.

Decisions as to admissibility may be appealed to the Appeals Chamber in accordance with Article 82. This allows that "either party may appeal … a decision with respect to … admissibility." If the Court finds a case inadmissible the Prosecutor may request a review of the decision if s/he is satisfied that new facts have appeared which negate the previous finding of inadmissibility.

The British Government has made clear repeatedly that it regards complementarity as sufficient protection. In his statement to the House after the conclusion of the Diplomatic Conference in Rome Mr Cook said

> we … are satisfied that the safeguards that are built in to the International Criminal Court will protect our service men against malicious or politically motivated prosecution.
>
> In particular, it is a clearly established principle that the court will be able to prosecute only when there is no remedy in national law. We are confident that we can demonstrate that there is a remedy in British justice … for accusations that are made against our service men in good faith. The screening of cases by the pre-trial chamber of the International Criminal Court will provide a safeguard against accusations that are brought in bad faith.[101]

So, what if a British soldier, say, were accused of a Statute crime?

There are two ways in which this person could be tried domestically, as well as the possibility of trial in a third country. Under Clause 73 of the *International Criminal Court Bill* (see Part IV below), in which the Government incorporates Statute crimes into British law in order to allow the complementarity principle to work, offences under the Bill may not be dealt with by the service courts (courts-martial etc) if committed in the UK.[102] So if a British serviceman committed genocide, war crimes or crimes against

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[101] HC Deb 20 July 1998, c804.

[102] The meanings of 'national court' and 'service court' are given in Clause 74, while the persons subject to service courts are defined in Clause 67 (see also Explanatory Notes, para 107).

humanity in the UK, the trial would be held in a civilian court. This is in line with the existing practice of exempting certain serious crimes from service jurisdiction. However, according to the Explanatory Notes "this does not affect the jurisdiction of Service courts to deal with offences committed overseas." So Statute crimes may be tried in service courts if committed by British service personnel abroad.[103]

If a situation involving a Statute crime allegedly committed by a British serviceman were taken up by the Prosecutor, the ICC would first have to decide whether any process were taking place in the UK or in a British service court overseas or in the national courts of some third country which complied with the tests of willingness and ability. This would include determinations as to whether the investigatory and trial processes were considered independent, impartial and compliant with norms of due process, and whether they were conducted in a manner consistent with the intent to bring the person to justice. If the answer to both these matters were negative, the ICC would be in a position to regard the case as admissible before it. After this, the UK would be allowed to challenge the ruling once before or at commencement of the ICC trial. The challenge would be heard by judges of the ICC, and the UK would have the right of appeal against their decision. The appeal would also be heard by judges of the ICC.[104]

One question which has perhaps not been addressed concerns the necessity of the safeguard in the complementarity principle. The procedures of the Court are supposed to filter out allegations made in bad faith, but if that were something in which states felt wholly confident there would be little reason for a complementarity safeguard. If part of the reason for the safeguard is the fear that the Court may take on a hostile character (and this itself implies failures, including within the Assembly of States Parties), then it is effective insofar as it allows a first form of justice at the national level. However, if the Court were to function in such a dubious way as to make this necessary, it might be open to question whether the Court would then accept that the British investigation and/or prosecution were adequate and hence prevented it from having jurisdiction itself. It seems unlikely that a Court under the control of the Assembly of States Parties will be staffed by mavericks, and if it does function in a fair and efficient way, the protection is less necessary.[105]

However, there is no safeguard against allegations being made. Even if the Prosecutor is assiduous in the investigative phase in determining that there really is a strong case with which to proceed, and if the Pre-Trial Chamber is likewise demanding before it confirms

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[103] In the past those accused of serious crimes abroad have sometimes been handed over to civilian courts in the host country, and this might remain an option.

[104] A description of the British service courts system is given in Library Research Paper 00/12, 4 February 2000, *The Armed Forces Discipline Bill*. See also *Special Report from the Select Committee on the Armed Forces Bill*, HC 154 2000-01, 13 March 2001.

[105] Benjamin Ferencz, one of the Nuremberg prosecutors, has made the case that the Court is most unlikely to behave in a disreputable way, and indeed the tribunals for former Yugoslavia and Rwanda have gained respect on this issue. B Ferencz, "Make Law, Not War," *The World Today*, June 1998.

charges, there is still the possibility (if allegations are made) that British nationals will be subject to investigation and the British police and other authorities will be subject to requests for cooperation. Indeed, more investigation rather than less might be considered desirable in the interests of justice. This leaves open the possibility, even if the Court works fairly and is not itself the instrument of hostile opinion, that a state which has been the target of legitimate military action might see propaganda value in bringing a situation to the attention of the Court. It might also make an impact, say on police time or on administrative costs, if it were to make persistent allegations against British nationals. As noted above, it could refer a situation only if it were itself a state party, but if not it might seek to prompt interest in the Prosecutor's office by submitting information.

c. opt-out: article 124

France sought a different solution to the problem of politically motivated prosecution. It secured the inclusion of an opt-out, known in the Statute as a "transitional provision". Under Article 124 a state may make a declaration when it becomes party to the Statute that it does not accept the jurisdiction of the Court with respect to the crimes listed in Article 8 (war crimes) when allegedly committed by its nationals or on its territory, and this will last for seven years from entry into force for that state, unless the state withdraws the declaration sooner. The provisions of Article 124 are to be reviewed at the first Review Conference, which itself will come seven years after the Statute enters into force. France made a declaration under Article 124, which, together with its other interpretative declarations, was its way of seeking protection from those acting in bad faith.

3. The US position

At the Diplomatic Conference in Rome the USA was unable to secure its objectives within the treaty text and so refused to sign. Supporters of the Court worried that without US participation the Court's credibility might be compromised. On the final day for signature, and less than three weeks before the end of President Clinton's term in office, the USA did sign the treaty. This was seen as a move by the outgoing President to make a symbolic statement of support for the principle of the Court, although he acknowledged that it had "significant flaws."[106] The signature does not commit the USA to ratify, although it is usual for states which have signed a treaty to work towards eventual ratification.

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[106] *Financial Times*, 2 January 2001.

The US objections to the Statute fall mainly into two areas.

On the one hand there are concerns that it might contradict the US Constitution to surrender Americans to the jurisdiction of the Court, on the grounds that it might be regarded as a foreign court and that it would not incorporate the same rights to fair trial as would be enjoyed in the USA.[107] A number of other states are confronting constitutional difficulties. For instance, Spain is one of many Hispanic states which have constitutional impediments to life imprisonment. This would make it impossible for it to enforce life sentences handed down by the Court. In making a voluntary declaration under Article 103 that it is willing to enforce prison sentences of the Court, Spain added the condition (allowed for in that Article) that the duration of the sentence should not exceed the maximum stipulated for any crime under Spanish law.[108]

On the other hand, and more importantly, there is great concern over the possibility of politically motivated prosecutions, to which the USA regards itself as being particularly vulnerable.

The chief US negotiator at the Diplomatic Conference, David Scheffer, has made the point that under Article 12 (2)(a) US citizens could be prosecuted at the Court even if the USA were not to become a party, if they were accused of crimes in the territory of a state party. He said this "could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations."[109]

The USA indicated at first that it might work to undermine the Court. Later, in the 1999 and 2000 meetings of the Preparatory Commission, US representatives lobbied for substantial revision of the treaty, perhaps by means of a Protocol. The aim was to secure a guarantee that no US citizen would be investigated or tried by the Court. The means of achieving this was to have been a provision that a national of a non-state party could not be surrendered to the Court without the consent of that state. So far US negotiators have not been able to find ways of achieving their aim which are acceptable to other states, and compromise seems unlikely for the time being.

Even after Mr Clinton's late move to sign, it is clear that the USA will not be an active participant in the running of the Court until its concerns have been met. President Bush is unlikely to seek to ratify the treaty in its current form, but if he did move to ratify at some later date he would have to gain Senate approval. There is opposition to the Court within the Senate, and this includes an absolute rejection on the part of the Chairman of the Senate Foreign Relations Committee, Jesse Helms. Secretary of State Colin Powell said

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[107] This would include the absence of trial by jury.

[108] See *National Constitutions and the ICC Statute: some issues of compatibility*, Human Rights Watch, June 2000, http://www.hrw.org/campaigns/icc/prep5/compatibility.htm, for further discussion of these issues.

[109] Comments made to Congress and cited in speech by Senator Jesse Helms, *Towards a Compassionate Conservative Foreign Policy*, American Enterprise Institute, 11 January 2001.

at the UN, "President Clinton signed the treaty, but we have no plans to send it forward to our Senate for ratification."[110]

Under-Secretary of State John Bolton made out three points in arguing against the Court in a prepared statement to the House International Relations Committee in July 2000. He rejected the idea that the Court would have any deterrent effect, because

> all available historical evidence demonstrates that the Court and the Prosecutor will not achieve their central goal -- the deterrence of heinous crimes -- because they do not (and should not) have sufficient authority in the real world. Beneath the optimistic rhetoric of the ICC's proponents, there is not a shred of evidence to support their deterrence theories. Instead, it is simply a near-religious article of faith. Rarely, if ever, has so sweeping a proposal for restructuring international life had so little empirical evidence to support it.[111]

His second point was that

> the ICC's advocates mistakenly believe that the international search for "justice" is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within states, and the reconciliation of hostile neighbors. In the real world, as opposed to theory, justice and reconciliation may be consistent -- or they may not be. Our recent experiences in situations as diverse as Bosnia, Rwanda, South Africa, Cambodia and Iraq argue in favor of a case-by-case approach rather than the artificially imposed uniformity of the ICC.

His third point was that the Prosecutor's power might be abused.

> Let there be no mistake: our main concern from the US perspective is not that the Prosecutor will indict the occasional US soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Our main concern should be for the President, the Cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable Prosecutor.

The American Bar Association (ABA) adopted a formal recommendation that the USA should become party to the Statute. It argued that the Court will have jurisdiction over US citizens whether the USA is party or not, and that this is an extension of the normal jurisdiction which a foreign state has over crimes committed in its territory. If the state where a US national allegedly commits a crime is a state party to the Statute, that state has the right anyway to try the case, and also has the sovereign right to accept the

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[110] *Los Angeles Times*, 15 February 2001.

[111] *Prepared Statement of John R Bolton … before the House International Relations Committee on the American Servicemembers' Protection Act of 2000*, 25 July 2000.

jurisdiction of the ICC over such crimes. If the USA were to ratify the Statute, it would gain a level of jurisdiction over its own nationals abroad which it currently lacks. The ABA said, "the Rome Statute affords American military personnel the best available assurance of the benefits of an American trial."[112] It also argued against the view that there were constitutional impediments to the USA ratifying. It concluded that the Rome Statute was a "milestone for the legal community," that it "bears the imprint of the best of American legal professionalism, expertise and values" and that "national and individual interests are better protected if the US joins the ICC than if we reject it."

Human Rights Watch, a New York human rights group, has campaigned for US ratification, arguing that "the United States is the biggest obstacle in this important advance in the protection of human rights" and that "the US has all the legal protections it could possibly need."[113]

Lloyd Axworthy, the Canadian Foreign Minister, said that "there are so many safeguards built into the treaty that the chances of a US soldier being hauled before the Court are minute."[114]

4. Amnesties

There has been some discussion of the implications which the Statute might have for states parties to seek political solutions to conflicts and in particular to include amnesties in peace agreements with terrorist or guerrilla groups. In the British context, the Lords debates on the present Bill included comments on the situations in Sierra Leone, Angola, South Africa, Chile and Northern Ireland. Lord Lamont argued that

> sometimes wars - civil wars in particular - are brought to an end only by politics, negotiation and offers of safe conduct for those who have been involved.[115]

Lord Hurd echoed the point by suggesting that "quite often, there is a tension between peace making and justice."[116]

The Attorney-General, Lord Williams, argued in terms of the deterrent effect of the Statute, which on an optimistic reading might obviate the need for amnesties by preventing the crimes, and he also pointed to a more general protection in the Statute.[117]

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[112] ABA Recommendation and Report, 1-NY/1222708.1, February 2001.

[113] *'Scare Tactics' on International Court Denounced*, Press Release, Human Rights Watch, 14 June 2000, http://www.hrw.org/press/2000/06/icc-0614.htm.

[114] *Financial Times*, 20 July 1998.

[115] HL Deb 12 February 2001, c23.

[116] HL Deb 12 February 2001, c26.

[117] HL Deb 12 February 2001, cc28-9 & 8 February 2001, c1288.

This takes the form of the discretion which the Prosecutor enjoys as to whether or not to proceed. S/he takes into consideration whether

> taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[118]

The right of the Security Council to block investigations and prosecutions under Article 16 is also relevant here.

5. Questions on details of the Statute

The Statute came after a long preparatory process, but in the Conference itself it was subject to a great deal of late amendment and was the result of political bargaining as well as legal drafting. As a result there are examples of untidiness in it. For instance, Elizabeth Wilmshurst, the Deputy Leader of the UK delegation to the Rome Conference, poses questions relating to Article 124, including the following:

> once a declaration has terminated, may the Court exercise its jurisdiction, in respect of a suspect national of the declaring State, over war crimes committed during the period of seven years covered by the declaration but after the entry into force of the Statute for that State? No reference to Article 124 is made in Article 11, which deals with jurisdiction *ratione temporis*.[119]

She claims that "the failure to make an appropriate reference to Article 124 in Article 11 is due to the fact that Article 124 was added at the very last stage of the negotiations."

There is a similar omission in respect of those situations referred to the Court by the Security Council.

Article 13 (b) mentions reference of situations to the Prosecutor by the Security Council, acting under Chapter VII of the UN Charter. Article 12 (2) provides that the condition that either the state where the crime occurred or the state of nationality of the suspect should be party to the Statute or agree to jurisdiction in a particular case applies only in situations referred by a state party under Article 13 (a) or taken up at the Prosecutor's own initiative under Article 13 (c). So, if the Security Council can reach agreement that a suspect should be brought to trial, who is not a national of a state party and whose alleged crimes were not committed on the territory of a state party, it can refer the matter to the Prosecutor.[120]

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[118] Article 53 (1)(c).
[119] R Lee (ed), *The International Criminal Court. The making of the Rome Statute*, 1999, pp140-1.
[120] It could of course also refer any other crime which did involve a state party.

However, Article 11 (1) provides that the Court has jurisdiction only with respect to crimes committed after the entry into force of the Statute. There is no cross-reference here to Article 13 (b) to the effect that this does not prejudice the role of the Security Council or that it applies only to cases arising from referrals under Article 13 (a) or (c). Indeed, Article 13 holds that the Court may exercise its jurisdiction in the case of the various referrals "in accordance with the provisions of this Statute," which includes Article 11. This appears to limit the situations which the Security Council may refer. This fits with the general principle that the Court should not have retrospective jurisdiction, a principle which has been taken as read by most commentators and was repeated by the Foreign Secretary during his statement after the Diplomatic Conference:

> I must be clear with the House - I do not want there to be any misunderstanding on this point - that, as a general principle, the International Criminal Court will not have a retrospective character.[121]

Also, 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 the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3 [a declaration that it does accept jurisdiction over an earlier crime].

If this has the same general validity as Article 11 (1), and again it is not qualified or given a cross-reference, then it seems to imply that the Security Council again lacks the power to refer (or at least the Court has no jurisdiction over) situations involving non-states parties unless they consent in a particular case. The Security Council's role in relation to referral would then be no different from that of other states parties or the Prosecutor, despite the apparent attempt in Article 12 (2) to give it a different status.[122]

The probable answer to this would be that the Security Council, if making a 'decision' under Chapter VII of the UN Charter, has an overriding authority in international law and the states parties to the Statute would be obliged to carry out its mandatory decision.[123] The Foreign Secretary said during his statement to the House after the Diplomatic Conference, that "there is, of course, power for the Security Council, by resolution, to refer any country or individual to the court without any consent by that country or its Government."[124] However, if this is the sole basis for its possible referral of situations involving non-states parties, then it is no different from a general authority to refer any

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[121] HC Deb 20 July 1998, c809.

[122] Drafts of the Statute show efforts to preserve the special status of the Security Council, but in areas other than that covered by Article 11.

[123] Under Article 25 of the UN Charter, members of the UN agree to carry out the Security Council's decisions.

[124] HC Deb 20 July 1998, c807.

matter, including one before the entry into force of the Statute. Of course, the Security Council must have referred the situation under Chapter VII (threats to or breaches of international peace and security), so a situation it has referred is unlikely to be one of purely historical interest, but there is no reason to suppose that such a threat or breach might not continue before and after entry into force. If the intention, on the other hand, is for the Security Council to refer only those situations occurring after entry into force of the Statute, but before entry into force for a particular state, in other words for the Statute to apply one of the Article 11 conditions to Article 13 (b) but not the other, then it might seem reasonable to expect a reference to this distinction in Article 11, 12 or 13.

Per Saland, Deputy Head of the Swedish delegation to the Rome Conference and Chair of the Working Group on the General Principles of Criminal Law throughout the drafting process, draws attention to a similar problem in the relationship between Article 11 and Article 24. He suggests that

> the discrepancy will not make it easy for the Court to resolve the issue of "continuous crimes" that stretch over a period of time from before the entry into force of the Statute and continuing after its entry into force.[125]

As noted above in footnote 93, it is not explicit in the Statute whether a non-state party may accept the Court's jurisdiction over a case occuring before entry into force of the Statute. The most obvious reading of Articles 11 and 12 is that a non-state party may accept the Court's jurisdiction over a case occurring after entry into force but before it has become a party itself. However, it might be possible to construe the text in a different way.

[125] P Saland, "International Criminal Law Principles" in R Lee (ed), *The International Criminal Court: the making of the Rome Statute*, 1999, p197.

IV The ICC Bill

The UK signed the Statute on 30 November 1998. The Government expressed its intention to be among the first 60 states to ratify, but indicated that a substantial piece of legislation would be required before it would be in a position to do so.

A. Draft Bill

In the Queen's Speech on 17 November 1999 the Government announced that it would introduce draft legislation on the ICC in that session.

The draft Bill was published on 25 August 2000, in Cm 4847, and the consultation period closed on 12 October 2000. The Government published a report on the consultation process, entitled *International Criminal Court Bill: Report on the Responses to the Draft Legislation*, in January 2001.[126]

A number of respondents drew attention to the lack of a clause in the draft Bill making explicit that diplomatic or state immunities should not apply to Statute crimes unless they are enjoyed by representatives of non-states parties which have not agreed to waive them. The Government introduced a clause into the Bill proper, Clause 23, which concerns this matter.[127] Amnesty International and others argued that the provisions in Clause 39 on national security were not as carefully defined as in the Statute, and might be open to abuse. The Government rejected this view.[128] Twenty-two of the forty-five respondents, including the Liberal Democrats, argued in favour of universal jurisdiction over Statute crimes (see Part IV, C [1] below). The Government rejected this, arguing that it is long-established British practice to take universal jurisdiction only when an international agreement so requires. The Statute does not do so, and the Government argued that instead the international community's response to these crimes had been to set up the Court. It did make changes to the extradition provisions of the Bill to remove the requirement of dual criminality when a third country seeks extradition over a Statute crime.[129]

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[126] Dep 01/165, 16 January 2001.
[127] Dep 01/165, pp2-3.
[128] Dep 01/165, p8.
[129] Dep 01/165, p9. See Part IV B (3) below for extradition.

B. The Bill

In the Queen's Speech on 6 December 2000 the Government announced its intention to introduce an ICC Bill proper. The Bill was introduced in the House of Lords on 14 December 2000, and had its Second Reading there on 15 January 2001.[130] The Committee Stage took place on 8 and 12 February 2001,[131] Report was on 8 March 2001[132] and Third Reading took place on 20 March 2001.[133] Second Reading in the Commons is scheduled for 3 April 2001.

The Bill comprises 83 clauses, arrranged into six parts, and 10 schedules, and its publication was accompanied by a set of Explanatory Notes.[134] Members are referred to these for explanation of the Bill as a whole, and this Research Paper does not seek to duplicate the explanations given there. What follows is a guide to the intentions behind the Bill, its shape and some of the more notable aspects.

1. Purpose

The first intent of the Bill is to allow the UK to comply with the obligations of a party to the Statute and hence to ratify it. This involves making provision for the forms of cooperation called for in the Statute, including the arrest and surrender of persons wanted by the Court. The Bill also provides for an agreement allowing for imprisonment in the UK of those convicted by the Court. Finally the Bill seeks to make all the offences over which the ICC has jurisdiction triable in British courts, and it does this by incorporating all the Statute crimes into domestic law. The most serious of the crimes which will come under the ICC's jurisdiction would be covered already under offences such as genocide, torture or murder, but incorporation makes more than a symbolic point. It ensures that British courts may try all cases falling within their own jurisdiction which might otherwise be brought before the ICC. The British Government places great emphasis on this 'complementarity principle' as a safeguard against abuse of the ICC. This principle allows that the ICC may investigate and prosecute only those cases which relevant states are unwilling or unable to deal with themselves. The Government has chosen to make domestic courts competent to try exactly the same charges in an effort to guarantee that 'ability' will always exist and the safeguard will be meaningful.

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130 *International Criminal Court Bill [HL]*, Bill 8, 2000/01. Second reading at HL Deb 15 January 2001, cc924ff. As amended versions are HL Bill 22 and 35. Commons version is HC Bill 70.

131 HL Deb 8 February 2001, cc1270-1329, & HL Deb 12 February 2001, cc11-30, 46-88, & 102-32.

132 HL Deb 8 March 2001, cc340-87 & 404-38.

133 HL Deb 20 March 2001, cc1290-1334.

134 HL Bill 8 - EN, 14 December 2000.

2. Territorial extent

The Bill extends to England, Wales and Northern Ireland. Many of the provisions also extend to Scotland, but there is still a need for Scottish legislation as well.

Parts I, II, IV and VI apply to the whole UK. The Scottish Executive will bring forward its own International Criminal Court Bill to deal with the remaining issues falling within the competence of the Scottish Parliament. It will contain provisions to match those in Part III and Part V of the UK Bill. The most significant of these concern the incorporation of the Statute crimes as offences in domestic law. Part V of the present Bill achieves this for England, Wales and Northern Ireland.

Some of the provisions of the Bill touch on devolved matters, but by agreement these were treated along with the reserved matters on ground of convenience. This was approved in a motion by the Scottish Parliament under the so-called 'Sewel convention.'[135]

3. Clauses

Part I of the Bill defines basic terms such as 'the ICC' and 'ICC crime.'

Part II deals with arrest and delivery of persons. This is necessary to allow the UK to comply with its obligations to cooperate with the Court, and it sets up a system different from that used in extradition to other states. It includes provisions relating to immunity in Clause 23.

Part III deals with other forms of assistance. Apart from arrest and surrender of suspects most of these are outlined in Article 93 of the Statute, and the obligation to provide them is contained in Article 88. This part of the Bill confers new powers where these are needed to allow the Secretary of State to provide assistance to the Court on request in the course of an investigation or prosecution. It includes provisions relating to national security in Clause 39, such that documents or information need not be released to the Court if the Secretary of State signs a certificate to the effect that disclosure would be prejudicial to the security of the UK.

Part IV deals with enforcement of sentences and orders. It continues the work of Part III, which provides for cooperation during the investigation and prosecution, by providing for cooperation after conviction. States parties are obliged to implement orders for fines, forfeitures and reparations made by the Court against a convicted person, and Part IV provides for the same. However, states parties are not obliged to accept convicted

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[135] See SPOR 18 January 2001, vol 10, cols 401-8 & 474-6.

prisoners to serve their sentences. Instead they may indicate willingness to do so, subject to conditions, and then they may be designated by the Court to accept particular prisoners, subject to a right of refusal. The Government intends to conclude an agreement allowing for enforcement of sentences in the UK, and Part IV makes provisions in expectation of this.

Part V incorporates the Statute crimes into domestic law.

Under Article 70 of the Statute states parties are obliged to extend their own protection of justice laws to include a list of offences against the administration of justice by the Court (such as false testimony or bribing an official of the Court) when committed by their nationals or on their territory. This is done in Clause 54.

However, the Statute does not require that its main crimes, genocide, crimes against humanity and war crimes, be incorporated. As noted above, the Government wishes to take this step in order to ensure that any Statute crime committed in this country or abroad by UK nationals may be investigated and if necessary prosecuted in British courts. This is intended to ensure that the complementarity principle will work in practice. Clause 50 defines 'genocide,' 'crime against humanity,' and 'war crime,' and Clauses 51 (England and Wales) and 58 (Northern Ireland) make them offences in domestic law.

Also in this Part is Clause 65, which deals with command responsibility. It includes Article 28 of the Statute almost word for word, and this includes the provision that a military commander is responsible for offences committed by forces under his control if he knew or "owing to the circumstances at the time, should have known" that they were committing or about to commit offences and if he failed to take the necessary steps to prevent or report the offences. A superior of any other type (for instance, a government official) is similarly responsible if s/he knew "or consciously disregarded information which clearly indicated" the offences. This distinction between military commanders, for whom negligence is described in terms of what they "should have known," and other superiors for whom negligence is a conscious disregard of information, is in the Statute. According to the Explanatory Notes "it is recognised that [non-military superiors] may not have the same degree of control [as will military commanders] over the actions of their subordinates."[136] The liability which occurs under this Clause is regarded as a form of aiding and abetting, and it neither excludes the possibility that the commander may be liable for actually ordering the offences, nor that the subordinates may be liable for carrying them out.

Clauses 70, 71 and 72 relate to extradition. Clause 71 disapplies the rule of dual criminality (extradition can only take place if the act was a crime in both the UK and the state requesting extradition at the time it was committed) in cases involving Statute crimes where the requesting state has extra-territorial jurisdiction and the UK does not,

[136] HL Bill 8 - EN, pp19-20.

and thereby permits extradition in those cases. Clause 72 provides that Statute crimes will not be regarded as offences of a political nature, and hence not normally extraditable, and also allows that extradition for these crimes may take place regardless of whether they were offences when they were committed.

Clause 73 provides that Statute crimes will not be tried in service courts (courts-martial etc) when committed in the UK, although, as the Explanatory Notes make clear, this does not affect the jurisdiction of service courts to deal with offences committed overseas.

Part VI is entitled "General Provisions." One of these, under Clause 76, applies the provisions of the present Bill as regards immunity and enforcement of sentences to the International Criminal Tribunals for Yugoslavia and Rwanda, and also allows for similar action in relation to any similar tribunals which the Security Council may create in the future.

4. Schedules

Schedule 1 covers a range of forms of cooperation with the Court. For instance, paragraph 1 allows for Orders in Council to confer immunities and privileges on the Court and its officers, paragraph 2 allows for an Order in Council to permit the Court to sit in the UK, and paragraph 7 deals with pension arrangements for British judges serving with the Court.

Schedule 2, Part I, gives detail on how a person already before the British courts or serving a prison term may be surrendered to the Court. Part II deals with the procedure when the Court seeks surrender of a person who is also the subject of an extradition request by another state, and Part III deals with the paradoxical situation that both the Court and one of the International Criminal Tribunals seek surrender of the same person, and the UK is left with an international obligation to surrender to both.

Schedule 4 covers the taking of non-intimate samples for identification.

Schedule 5 covers the investigation of the proceeds of Statute crimes.

Schedule 6 gives the Secretary of State power to make freezing orders on property where the Court has made a forfeiture order or there are reasonable grounds to believe that such may be made.

Schedule 7 disapplies certain provisions of domestic law which might affect the ICC's power to have sole discretion over the length, and possible reduction, of sentences served in the UK by those sentenced by the ICC.

Schedule 8 relates to the offences set out in Part V of the Bill. It reproduces the definitions of genocide, crimes against humanity and war crimes from the Statute. They are near verbatim reproductions of Articles 6-9 of the Statute, with the exception of

Articles 8 (1) and 8 (3), which are not definitions, and 8 (2)(b)(xx) (use of inherently indiscriminate weapons, which is designed possibly to include nuclear weapons), which will become operative only after a comprehensive prohibition on such weapons and an amendment of the Statute.

Schedule 9 reproduces parts of Article 70 of the Statute, covering offences against the administration of justice.

Schedule 10 lists the provisions of existing legislation which are to be repealed. Amongst others the whole of the *Genocide Act 1969* is repealed, as its provisions are subsumed within Part V of the Bill.

5. Costs

According to the Explanatory Notes there are two forms of public expenditure which will arise from the Bill. The costs of bringing prosecutions, cooperating with the Court and having prisoners serve their sentences here are described as "unpredictable" and "not quantifiable in advance."[137] The cost of the UK's regular contribution to the Court is not yet known, but it will be set according to a scale of assessment which is currently being negotiated in the Preparatory Commission. The Explanatory Notes suggest that an instructive comparison may be made with the contribution to the two International Criminal Tribunals, which they give as £5.7m in total in 2000.

C. Issues concerning the Bill: the Lords debates

The Foreign Office Minister, Baroness Scotland, introduced the Second Reading in the Lords thus:

> I cannot overstate the historic importance of the creation of the International Criminal Court. To quote Kofi Annan, the Secretary-General of the United Nations, on the subject,
>
> "People all over the world want to know that humanity can strike back - that whatever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to the global culture of impunity."
>
> The Bill before us today will put into practice the Government's commitment to that principle. It will pave the way for us to implement our obligations under the Rome Statute of the International Criminal Court and to ratify it.[138]

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[137] Explanatory Notes, p30.
[138] HL Deb 15 January 2001, c924.

For the Conservatives Lord Howell said

> I should like to make it clear that we on this side of the House strongly welcome all forms of enhanced international cooperation to bring to book the butchers and perpetrators of monstrous crimes against humanity who would otherwise go free. That must be a worthy aim. It is right that people in many countries have striven very hard over the years in good faith to achieve it. I should also like to make clear that we also agree with the principle of the Bill. I hope that there will be no doubt in that respect.[139]

He drew attention to concerns over some issues, however, and many of these gave rise to amendments later. He mentioned reservations in the USA over the Court, and argued that "some of them are serious and fundamental and should worry all those who love justice."[140] He called for reassurance as to whether the provisions of the Statute were compatible with British legal traditions and the European Convention on Human Rights, especially as regards fair trial. For instance, the Court will not involve trial by jury. He also drew attention to the possible exposure of "people deemed to have served the state well" such as intelligence officers or military personnel.[141] If the Court must have strong powers to achieve its primary objectives, "we need to ensure that the power is not used in a more indiscriminate or arbitrary way."[142] He also made the point that there may be difficulties in apprehending suspects, and suggested there was a narrow range of countries from which wanted persons could realistically be taken:

> one has to remember that while some people were picked up in Bosnia, a country where NATO is in effect in control, there has been reluctance to pick up many others. So what would the chances be in countries where it is not in control?[143]

This concern lies behind the feeling which some people have that the developed democracies, which generally have a better record on abiding by international law, might find themselves more frequently exposed before the Court than less scrupulous states. This might provide the latter with propaganda material or even contribute to isolationist tendencies among the democracies. A counter-argument is that all war criminals deserve the same treatment, whatever the general record of their state of origin. This may itself be countered with the argument that the Court will achieve little in preventive terms if it does not tackle those states which persistently set out to commit abuses.

For the Liberal Democrats Lord Lester said

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[139] HL Deb 15 January 2001, c930.
[140] HL Deb 15 January 2001, c931.
[141] HL Deb 15 January 2001, c934.
[142] HL Deb 15 January 2001, c933.
[143] HL Deb 15 January 2001, c933.

> we greatly welcome the Government's decision to introduce the Bill, which will enable the UK to ratify the ICC Statute and to be among the court's founding members,

and he described the Statute as "a great achievement" and congratulated the Government on its "influential and constructive role in making the statute and on introducing the Bill."[144]

He drew attention to what he saw as shortcomings in the process for parliamentary scrutiny of treaties, and argued that

> the Bill is inevitably complex and technical in nature. One cannot understand its implications without a firm grasp of the principles contained in the treaty.[145]

He responded to the Conservatives'concerns, saying

> the provisions in the treaty are designed to secure an effective and efficient justice system while protecting individuals from frivolous, vexatious or politically motivated investigations. I have heard nothing from the noble Lord, Lord Howell, to suggest that they are other than well designed. The prosecutor is given independent and discretionary power, but there are adequate safeguards to ensure impartiality and to avoid abuse. The prosecutor's investigative powers are carefully balanced with the rights of the accused.[146]

He drew particular attention to the principle of complementarity and described it as "the key to the Statute and one of the real achievements at Rome."[147]

He set out a number of concerns as well. The first of these was that the Bill does not assert universal jurisdiction, that is jurisdiction over all Statute crimes wherever committed. He argued that the potential inability of the Court to exercise jurisdiction in many cases placed a responsibility on states to assert universal jurisdiction over Statute crimes:

> there may be significant gaps in the ability of the court to consider cases - gaps which should be filled by national courts.[148]

As Lord Lester pointed out, there are examples already of universal jurisdiction in British law, in relation to certain grave breaches of the Geneva Conventions, torture and hijacking. This means that non-UK nationals who commit these offences outside the UK may be tried in British courts. However, with other Statute crimes, the Bill as introduced

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144 HL Deb 15 January 2001, c935.
145 HL Deb 15 January 2001, c936.
146 HL Deb 15 January 2001, c936.
147 HL Deb 15 January 2001, c937.
148 HL Deb 15 January 2001, c938.

did not include any such provision, so that a national of a non-state party who carried out acts outside the UK which would otherwise be offences could live in the UK with impunity: neither the ICC nor the British courts could try such a person. The Government later amended the Bill to include jurisdiction over UK residents.

He also expressed concern over the preservation of certain immunities within the Bill, over the provision in Clause 49 for the Secretary of State to make regulations on reparations orders, which he felt was inexplicit, and over the restriction of the right to review of a delivery order to an application for *habeas corpus* rather than for judicial review, since the matters to be considered "[seem] to go further than the issues that one is entitled to raise by way of application for *habeas corpus*."[149] This final concern was dealt with in a group of related Government amendments.[150]

1. Universal jurisdiction

One area of concern during the debates in the Lords, which had been raised previously by campaigners, was the question of jurisdiction over those who are not UK nationals and who have not committed crimes in the UK.[151] There was a fear that the UK could become a safe haven for criminals if their state of nationality and the state where their crimes were committed were not party to the Statute.

This matter was the subject of debate in Committee.[152] The Government held to the position that universal jurisdiction was neither required by the Statute nor helpful to its operation. Baroness Scotland said,

> we have taken the view that it would be inappropriate for the UK to adopt the role of global prosecutor. The way that the ICC is intended to work is for states of the nationality of the accused, or on whose territory the crime was committed, to take jurisdiction and, failing that, the ICC. We continue to believe that the best place for an effective prosecution is the state of the accused where investigation and prosecution are likely to be most practical.[153]

However, she accepted that there were possible contradictions, for instance if two people, one a UK national and the other not, were to commit offences together abroad and then return to the UK, since the former could be tried before British courts but the latter would not. If the ICC were not able to exercise jurisdiction and none of the other states involved sought extradition, the offender would live in the UK free of punishment. She indicated

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149 HL Deb 15 January 2001, c940.
150 See HL Deb 8 March 2001, cc405-6 & 408.
151 See also G Bindman, "Loopholes for torturers," *Guardian*, 5 December 2000; F McKay, "A safe haven for torture suspects?", *Legal Action*, October 2000.
152 See HL Deb 12 February 2001, cc73-87.
153 HL Deb 12 February 2001, c84.

that the Government would introduce amendments on Report to give the UK jurisdiction over Statute crimes committed by UK residents.

Baroness Scotland said that this was intended to have a deterrent effect (for instance, to deter foreign nationals living here from enlisting as mercenaries) as well as to prevent offenders from seeking refuge in the UK. She argued that

> these amendments, together with the existing provisions of the Bill, provide a robust regime which will prevent the UK being, or being seen as, a safe haven for war criminals.[154]

The amended Bill speaks of "a United Kingdom resident" and in doing so it draws on the precedent of the *War Crimes Act 1991*. Section 1 of that Act merely refers to a person who was at the appropriate date "a British citizen or resident in the United Kingdom, the Isle of Man or any of the Channel Islands." There is no explanation as to what 'resident' means.[155] The Minister gave the following reasoning for its use in the present Bill:

> It seems to us that the use of the term 'residence' gives us a certain flexibility that would be capable of being interpreted in a purposeful way when one deals with different situations as they may arise on a case by case basis.[156]

An attempt to deal with some further cases outside the jurisdiction established under the Bill was an amendment introduced by Lord Avebury on Third Reading to extend jurisdiction also to crimes of which the victims were British. The Government resisted this on the basis that it was contrary to British legal tradition to take jurisdiction on the basis of nationality of the victim and also that there could be difficulties in investigating a crime which took place overseas.[157]

2. Command responsibility

A major concern, raised especially by the Conservatives, was the nature of the concept of command responsibility used in the Bill. One fear revolves around the phrase "should have known" in Clause 65: military commanders may be liable for offences carried out by those under their command if they knew or should have known that the troops were behaving in that way. There is concern that 'should' relies on a subjective interpretation and that the Court may not be best placed to make that interpretation outside the conditions, perhaps of war, in which an accused commander failed to know of the offences.

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[154] HL Deb 8 March 2001, cc418-9.

[155] *Stroud's Judicial Dictionary*, 1986, under 'Reside; Residence; Resident' gives eight pages of possible statutory and judicial construals of these words.

[156] HL Deb 12 February 2001, c86.

[157] HL Deb 20 March 2001, cc1315-18.

Lord Howell moved an amendment to Clause 65 which would have made the test for negligence by a military commander the same as that for a civilian, the conscious disregard of information which clearly indicated that subordinates were engaging in offences. He said,

> the problem as usual is one of subjectivity. It is easy with hindsight to say that a commander under the circumstances at the time should have known. What is the test? What is he supposed to have known? How should he have known it? As it stands, the clause allows for the dissection and scrutiny of the actions of commanders and other superior officers after the event, presumably by the investigatory branch and the prosecutor of the International Criminal Court. … However, can we be sure that the ICC, which may not understand the details of military action and the pressures that operate during a military action, will know the ways of armed forces and be able to apportion blame to a commander because of what he should have known in the circumstances of the time?[158]

Lord Lamont pointed out divergences of opinion between international lawyers as to the fairness of the concept, in particular in relation to the case of the Japanese General Tumoyuki Yamashita, who was tried after World War II by an American military tribunal and executed over the behaviour of troops under his command in the Philippines. The US Supreme Court upheld the conviction, but with a dissenting opinion from one of the judges.[159]

The Government resisted the amendment on the grounds that it would endanger the complementarity principle, and also on the grounds that command responsibility was a well-developed concept deriving from the Nuremberg tribunal and jurisprudence since.[160] There was further detailed discussion on the operation of the concept during Third Reading, when Baroness Scotland said that

> what we are talking about is a neglect of the basic duty that a military commander has to ensure that those under his effective command and control do not commit war crimes.[161]

Per Saland, who chaired the Working Group on the General Principles of Criminal Law at the Rome Conference, described the "different mental requirement for civilian superiors in comparison with that for military commanders" in Article 28 as "perhaps the most debatable point in the article."[162]

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158 HL Deb 12 February 2001, c105.
159 HL Deb 12 February 2001, c107, and Government response at c109.
160 HL Deb 12 February 2001, cc108-9.
161 HL Deb 20 March 2001, c1325, and see thereafter to c1328.
162 P Saland, "International Criminal Law Principles" in R Lee (ed), *The International Criminal Court: the making of the Rome Statute*, 1999, p197.

A related strand of concern was the fear that commanders might take into account the prospect of litigation in battlefield conditions and thereby endanger an operation or even the welfare of their troops. This was a source of unease in the military itself. In March 2001 military sources briefed newspapers on their concerns over command responsibility, arguing that they had raised them with Ministers but were not satisfied with the response. According to the *Guardian*, the military sources felt that "wrong rules of engagement"could expose them to prosecution as war criminals, and that "we have got to [ensure] there is a framework that does not prevent us from doing what we set out to do." [163] In the Lords, Earl Attlee said

> I should like to ask the Minister to what extent she expects commanders to compromise the possible success of an operation in order to ensure that no offences are committed.[164]

As regards the provisions relating to accidental killings of civilians or damage to civilian objects, some argued that the accidental civilian casualties during the Kosovo campaign, combined with the concept of command responsibility, could have led the Prime Minister to be prosecuted if the Court had been in existence at the time.[165]

These concerns were expressed as part of a wider debate over the application to the armed forces of wide-ranging civil and human rights legislation.[166] Mention was made in the press that the military sources were concerned over the application of laws originating in Brussels. The Rome Statute does not emanate from the EU in any way.

The Government's response on these points was that the Statute crimes were based on existing international law, and in some cases were already incorporated into domestic law as well. On Third Reading the Attorney-General gave a list of offences in the Bill which are either existing offences or are repeated from binding treaties to which the UK has been party since the early and mid-20th century. He said

> we have lived by them for many years and have no difficulty in accepting them now. I repeat that I have confidence in the ability of Her Majesty's Armed Forces to discharge their duties honourably and lawfully.[167]

It is probably fair to say that the Statute crimes incorporate little of substance which is novel. Ministers repeatedly drew attention to the *Manual of Military Law*, which is supposed to be issued to all units, and which spells out the legal constraints within which service personnel have been expected to operate for many years. However, the new element which has been added is that a number of existing crimes have now been made

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[163] *Guardian*, 7 March 2001.
[164] HL Deb 12 February 2001, c108.
[165] *Guardian*, 7 March 2001, *Times*, 7 March 2001.
[166] See eg J Rant, "The Military Justice System and Human Rights," *RUSI Journal*, April 2000.
[167] HL Deb 20 March 2001, cc1302-3.

justiciable in a way which was not possible before. Detailed provisions bringing together a whole range of existing treaty obligations impose personal criminal responsibility on individual commanders and personnel, who may be investigated and prosecuted at the request of an international body. If their trial in the UK or a UK service court is held to be unsatisfactory in the specific ways spelled out in the Statute, they may be prosecuted by that international body. Critics of these aspects of the Bill and the Statute argue that this new justiciability will introduce unwarranted constraints and doubts which individual service personnel will have to mull in conditions of active service.[168] It will also mean, through the complementarity principle, that the conduct of military operations will be placed to some extent under the ambit of domestic criminal jurisdiction.[169]

3. War crimes

Wider concern over the definitions used for war crimes was expressed in particular by Lord Shore. This is an issue which has exercised France, and led it to make the declaration under Article 124. Lord Shore focused on the implementation of Article 8 (2)(b). He argued that

> the kind of circumstance which most noble Lords have addressed when speaking in favour of the Bill would be covered entirely by the enactment of Articles 6, 7 and 8 (2)(a). Dreadful monsters such as Pol Pot and Saddam Hussein, who have inflicted such misery on their own people and on others, would be caught under those provisions.[170]

However, he felt that aspects of Article 8 (2)(b) would

> affect our ability to wage war. The article would make it a war crime deliberately to bomb civilians in a major war, intentionally to direct attacks against civilian objects or intentionally to launch an attack 'in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects.'
>
> It would be dishonest to put my name to that. No one can fight a major war without engaging in measures that will involve civilians and civilian property. There is no point in denying that.[171]

He mentioned aspects of the Allied campaigns during World War II and over Kosovo which he felt would have been inhibited by these definitions.

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[168] See, eg, HL Deb 20 March 2001, c1319.
[169] For instance, in a defensive war in the UK.
[170] HL Deb 20 March 2001, c1292.
[171] HL Deb 20 March 2001, c1293.

Again, the Government's response, backed by the Liberal Democrats, was that the Statute crimes drew on existing law and in their view the UK had succeeded in operating within that in the past.

According to Herman von Hebel and Darryl Robinson, members respectively of the Dutch and Canadian delegations to the Rome Conference,

> Article 8, paragraph 2 (b), contains a compilation of norms from precedents other than the grave breaches provisions of the Geneva Conventions. The selection of appropriate precedents and the wording of the provisions proved most challenging.[172]

4. Immunities

There was discussion on the question of immunities, covered in Clause 23. Under the Statute, states parties accept that state or diplomatic immunities will not protect their representatives from the jurisdiction of the Court.[173] Non-states parties may waive immunities in particular cases, but if they do not, their representatives are protected from the Court.

Clause 23 allows, in subsections (1) and (2), for proceedings to be taken against a suspect regardless of state or diplomatic immunities if that person is a national of a state party to the Statute or if the Court secures a waiver of the immunities. However, under subsection (4) the Secretary of State may direct that proceedings not be taken against a person enjoying such immunities (ie by virtue of connection with a state party or with a waiving non-state party), after consultation with the Court and the state concerned.

Lord Avebury moved an amendment in Committee, supported by Lord Lester among others, to remove this discretionary power by leaving out subsection (4). Lord Avebury spoke of an "unfettered discretion to direct that further proceedings shall not be taken, whether or not the person concerned is a national of a state party."[174] Lord Archer of Sandwell argued that Clause 23 was crucial to the purpose of the Bill and the Statute, to apprehend those guilty of the most serious of crimes, but that in subsection (4) "the Bill proceeds to explain that it does not really mean what it says."[175] The subsection, he continued, "appears to frustrate the whole purpose of Article 27."

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[172] H von Hebel & D Robinson, "Crimes within the Jurisdiction of the Court," in R Lee (ed) *The International Criminal Court: the making of the Rome Statute*, 1999, p109. Mr von Hebel was Coordinator for the definition of war crimes at the Rome Conference.

[173] Article 27.

[174] HL Deb 12 February 2001, c12.

[175] HL Deb 12 February 2001, c15.

The Attorney-General explained the purpose behind the discretion to direct that proceedings not be taken against a suspect who has immunity by virtue of connection with a state party by saying that "it is possible in exceptional circumstances, which I concede are difficult to envisage, that the point might be engaged."[176] On the question of non-states parties, he argued in terms of the international obligations which the UK might have towards these and which the Statute does not override, and also mentioned that subsection (4) requires the Secretary of State to consult with the Court and the state concerned before exercising his discretion.[177] He did not explicitly address the point that subsection (4) applies to non-states parties which have already waived immunity (see subsection (2)(b)).

On Report Lord Lester moved another amendment to leave out subsection (4). The Government resisted this, again on the grounds that

> we do not envisage that this is a circumstance which will arise often. The situation we are providing for will be rare. Precise details are difficult to predict. Subsection (4) was included for that reason.[178]

Baroness Scotland did bring forward an alternative amendment, intended to clarify the extent of subsection (4) and this was accepted, but the discretion was not affected.

5. Consistency with the language of the Statute

Throughout the Lords stages the Government placed emphasis on the need to maintain consistency between the Bill and the Statute. However, there was some debate as to whether this necessitated a precise mirroring of the language of the Statute. In debating a Conservative amendment to change the test of command responsibility from the 'should have known' provision to a form of negligence based on wanton or reckless disregard of information, some Peers mentioned the Canadian ICC legislation. This talks of those who are 'criminally negligent in failing to know.' Lord Waddington asked whether the point had been reached

> that we do not actually have to put in our own legislation the exact words of the ICC statute and we can, if we think fit, amend the Bill to change the wording so long as the new wording does not depart from the intention of the ICC statute?[179]

Baroness Scotland argued that Canada was effectively bound to depart from the Statute by jurisprudence on criminal negligence under its own Charter of Rights and Freedoms.

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[176] HL Deb 12 February 2001, c18.
[177] HL Deb 12 February 2001, cc17-9.
[178] HL Deb 8 March 2001, c411.
[179] HL Deb 20 March 2001, c1326.

She said that the Canadian Government considered the effect of the two wordings to be identical.[180]

6. Amending the Statute

A related point which the Government has made is that the Statute is not currently open to amendment. Some amendments to the Bill called for ratification to be made conditional upon changes to the Statute. These were resisted on the grounds that to accept them would place the Government in an impossible situation. However, it remains open to the Government to ratify and then to introduce amendments at the Review Conference which will take place seven years after entry into force, or, of course, to delay ratification until after the Review Conference. In the past the UK did not ratify the Genocide Convention until more than 20 years after its adoption, ratification of the Geneva Conventions waited eight years and there was a gap of 21 years between signing and ratifying the Additional Protocols to the Geneva Conventions.

7. Superior orders

The Chief of the Defence Staff, Admiral Sir Michael Boyce, was asked in the Select Committee on the Armed Forces Bill whether he had any concerns over the ratification of the Statute in terms of its impact on morale and effectiveness. He said

> I think we need to be very careful indeed that when the Bill is taken through Parliament, we do not put ourselves in a situation where a junior person carrying out orders which he believes to be entirely proper can subsequently find himself in front of the International Criminal Court. So far I have been told that this is unlikely to happen,

as a result of the complementarity principle. He went on to say, "I cannot say that 'unlikely' fills me with huge confidence."[181] This relates to the inadmissibility of the defence of superior orders set out in Article 33, and discussed in Part III, B (1) above.

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[180] HL Deb 20 March 2001, c1326.

[181] Special Report from the Select Committee on the Armed Forces Bill, vol II, Minutes of Evidence and Appendices, HC 154-II 2000-01, 13 March 2001, p145.

V Conclusion

Optimism and pessimism may be equally seductive and the Court has attracted its share of both. Some campaigners have despaired that non-states parties will not fall routinely within the scope of the Court, and some politicians have expressed fears over unanticipated consequences, while others close to the negotiations have enjoyed a congratulatory mood and advertised the objectives of the Court as its achievements.

The challenge facing the drafters of the Statute has been summarised as

> to create a non-political institution which, in fundamental respects, reconciled the pragmatic concerns of individual governments with ideals of global justice. Yet traditional norms of international behaviour are not naturally amenable to the priorities embodied by the ICC, with its focus on the basic rights and responsibilities of each individual.[182]

It may be that neither side of this equation has been fully solved, but the Court does represent, for better or worse, a key development in international law.

On Second Reading in the Lords, Lord Goldsmith quoted Hersch Lauterpacht's comment in 1950 that

> the individual has now acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right.[183]

Lord Goldsmith argued that this may have been wishful thinking at the time, but that the ICC could play a part in transforming the aspiration into reality. He was not alone in placing the Court in the context of state sovereignty, suggesting that while state sovereignty might be a positive force to protect groups from oppression by their neighbours it could also be a negative force to render subjects vulnerable to their leaders. On one reading the ICC might provide a means to rein in those leaders who practice excesses on their own as well as others' populations. However, if the Rome Statute does represent a milestone in the creation of a subjectivity which transcends the nation state, it does so not just by providing redress for abuses at the international level, but also by creating accountability for the same. The object of compassion has been transformed not only into a subject of right but also into a subject of responsibility.

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[182] *RUSI Newsbrief*, October 1998.

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