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**\*37 THE ROME STATUTE EXPLAINED**

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## **I. Introduction**

On 17 July 1998, one hundred states adopted a treaty which lays the groundwork for the world's first permanent international criminal tribunal. With one hundred votes in favor, twenty abstentions, and seven opposing votes, [\[FN1\]](#) member states of the United Nations ended four years of exhaustive negotiations and forty years of debate by adopting the Rome Statute of the International Criminal Court [\[FN2\]](#) (the "Statute" or "Rome Statute"), the charter that will guide the International Criminal Court (the "ICC" or the "Court") into the next millennium.

The Court, which will have its seat at the Hague in the Netherlands, [\[FN3\]](#) will be a "permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern." [\[FN4\]](#) According to the Statute, the ICC shall have international legal capacity and may exercise its functions and powers "on the territory of any State Party and, by special agreement, on the territory of any other State." [\[FN5\]](#)

Although the ICC is the first permanent international criminal tribunal, four ad hoc international criminal tribunals have preceded it: the International Military Tribunal [\[FN6\]](#) (the "Nuremberg Tribunal"); the International Military Tribunal for the Far East [\[FN7\]](#) (the "Tokyo Tribunal"); the International Criminal Tribunal for the Former Yugoslavia ("ICTY"); and the International Criminal Tribunal for Rwanda ("ICTR"). The ad hoc tribunals have had varying degrees of success. Nevertheless, it is hoped that the ICC will be able to function both as a deterrent and as a means towards the elimination of the world's most horrendous crimes.

This article is not intended as a historical or political analysis of the Court. Rather, by relying primarily on the ICC's Statute, this article will attempt to explain as clearly and concisely as possible just how the International Criminal Court is intended to work.

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## II. Subject Matter Jurisdiction

It was the intention of the framers of the Statute to restrict the Court's subject matter jurisdiction solely to the most serious abuses of international law: genocide; crimes against humanity; war crimes; and aggression (collectively called the "core crimes"). [FN8] Other crimes were originally proposed to be incorporated into the Statute, such as drug trafficking, terrorism, and several other treaty-based crimes. [FN9] However, it has been difficult to find consensus on including these crimes in the Statute. Instead, the Court's jurisdiction was "limited to the most serious crimes of concern to the international community as a whole," [FN10] that is, the most serious crimes upon which consensus could be reached.

### A. Genocide

During the Nuremberg trials genocide, per se, was not a crime punishable under the jurisdiction of the tribunal. This is primarily because genocide had yet to be defined under international law. However, extermination of a civilian population, part of what later became understood as genocide, was punishable as a crime against humanity. [FN11] Soon after the conclusion of the Nuremberg and Tokyo trials, member states of the United Nations codified a definition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide, [FN12] which defined genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [or] forcibly transferring children of the group to another group. [FN13]

This definition has since been incorporated into the statutes of the ICTY [FN14] and the ICTR [FN15] in nearly identical language, and similarly into the Rome Statute. [FN16]

### B. Crimes against Humanity and War Crimes

Although genocide was easily defined by the framers of the ICC Statute, crimes against humanity and war crimes did not find such quick agreement. Even though crimes against humanity and war crimes had been defined by the Geneva Conventions [FN17]--which had long been accepted as customary international law--in creating the ICC, the framers refused to utilize the previously accepted language. Instead, definitions of crimes against humanity and war crimes were modernized to reflect the changing face of international law, humanitarian law and human rights.

As stated above, the Nuremberg trials did not punish those who committed genocide, per se, but instead punished persons who committed crimes against humanity. The Genocide Convention then went on to define just \*38 what the term meant, but not everything previously considered to be a crime against humanity was included within the concept of genocide and the Genocide Convention. Thus, it can be inferred that genocide was either separate from a crime against

humanity or was instead a distinct subsection thereof. One difference has always been that genocide does not include persecution based on political grounds. Hence, the massacres in Cambodia during the reign of the Khmer Rouge do not actually fall within the scope of the Genocide Convention, because the mass murders were primarily based on the eradication of political foes. International law, and the Rome Statute in particular, have taken broad steps to plug up that essential loophole in the law. Thus, article 7 of the Rome Statute defines "crimes against humanity" to include any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law, in conjunction with any act referred to in this paragraph or any crime within the jurisdiction of the Court; enforced disappearance of persons; the crimes of apartheid; [or any] other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. [\[FN18\]](#)

Furthermore, the inclusion of rape and other forms of crimes of sexual violence as part of the definition of crimes against humanity continues the growing recognition of the severity of such crimes. [\[FN19\]](#) Prior to the creation of the ad hoc tribunals in Rwanda and the former Yugoslavia, rape and other crimes of sexual violence had not been given much weight under international contexts. Interestingly, these crimes are also included as part of the Statute's definition of war crimes, [\[FN20\]](#) recognition that crimes of sexual violence will no longer be shielded by the lesser historical power of women. However, it should also be noted that the framers of the Statute believed that crimes of sexual violence and crimes which relate to gender are not solely committed against women, and that it was understood that gender "refers to the two sexes, male and female, within the context of society." [\[FN21\]](#)

Obviously, crimes of sexual violence are hardly the only crimes considered war crimes by the ICC. The Statute incorporates the Geneva Conventions and numerous other issues of international concern into its extensive definition of war crimes, including torture and biological experiments; taking of hostages; conscripting or enlisting children under the age of fifteen in the army or to participate actively in hostilities; committing outrages upon personal dignity; and starvation of civilians as a means of warfare. [\[FN22\]](#) Furthermore, the Statute incorporates common article 3 of the Geneva Conventions, thus establishing that the Court's jurisdiction encompasses crimes committed both during times of war and peace. [\[FN23\]](#)

On the other hand, one type of modern crime that is left ambiguous as to whether it is within the jurisdiction of the ICC is the illegal use of nuclear weapons. The Statute states that war crimes can include "[e]mploying weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international law of armed conflict." [\[FN24\]](#) However, the Statute goes on to stipulate that the use of such weapons could only be a war crime admissible to the

jurisdiction of the ICC if "such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex" to the ICC's Statute. [FN25] It seems from the language of the Statute that the use of nuclear weapons currently is not considered a war crime. Nonetheless, however, the possibility is open that such an inclusion could occur some time in the future.

### C. Aggression

It might seem an obvious conclusion that the Statute of the ICC would define, either specifically or by reference to other documents, all four of its core crimes. However, this is not the case. In fact, the Statute does not offer any definition for what is probably its most controversial core crime: aggression. The crime of aggression is controversial because there has never been a broadly accepted definition of it. The Charter of the Nuremberg Tribunal attempted to define aggression by including under its jurisdiction "crimes against peace." This crime, which is similar to the commonly accepted notion of aggression, defines itself as the "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." [FN26] In 1945, the notion of crimes against peace was easily accepted by the international community because it was understood to refer specifically to the crimes of the Axis Powers during World War II, but it still left the term "aggression" without any further guidance.

The Charter of the United Nations also referred to crimes against peace by stating that all member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State ...." [FN27] Moreover, in 1974, the United Nations General Assembly offered its own suggestion, specifically defining aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations ...." [FN28] Unfortunately, the General Assembly definition leaves open the issues of self-defense and self-determination, and thus has never received much support. Furthermore, despite optimism to the contrary, the numerous ICC Preparatory Committee meetings ("PrepComs") failed to find agreement on a specific definition for the broadly used term. Instead, the Rome Statute proposes that aggression will be incorporated into the Statute at a later date, [FN29] presumably once international agreement has finally been reached on exactly what the term means.

### III. Exercise of Jurisdiction

With the ICC's subject matter jurisdiction in tow, the Rome Statute moves on to the means by which the Court will be able to establish jurisdiction with respect to a specific crime. For this to occur, the situation itself must be referred to the Court. [FN30] This added consent can be made when:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party ...
- (b) A situation in which one or more of such crimes appears to have been committed is

referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime ... [\[FN31\]](#)

Furthermore, when a situation is referred to the Court by a concerned state or by the prosecutor, either the territorial state--the state within whose territory the conduct occurred or the state of which the person accused is a national--must also have specifically consented to the jurisdiction of the Court. [\[FN32\]](#) This can occur in two ways. First, all states that are party to the Statute, merely by being a party to the Statute, accept the inherent (automatic) jurisdiction of the Court over its subject matter jurisdiction. [\[FN33\]](#) Second, states that are not party to the Statute may opt in by declaring that they accept the jurisdiction of the Court with respect to the situation being presented. [\[FN34\]](#) For example, if a state has a general who committed international atrocities during a war, but the state has not become a party to the Statute, the state could consent to the Court's jurisdiction involving crimes that occurred during the war.

Note that the consent would not be made with respect to the individual, but rather to the larger situation at hand. Note also that the Court only has jurisdiction "with respect to crimes committed after the entry into force of this Statute." [\[FN35\]](#) Thus, even if Pol Pot were still alive, his crimes could not be tried before the ICC. Regardless, it is the responsibility of the prosecutor to determine which individuals are investigated and brought before the Court. [\[FN36\]](#) Furthermore, "as far as possible, [the referrals] shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation." [\[FN37\]](#)

#### **IV. Complementarity**

A significant difficulty behind creating a permanent (as opposed to ad hoc) International Criminal Court was the competing interests of state sovereignty and judicial independence. Many states, and the U.S. in particular, were greatly concerned by the possibility that their own citizens could be brought before an international tribunal without state consent. [\[FN38\]](#) However, without creating a court free of state vetoes, the ability of states to wrongfully shield the accused could overcome the Court's desire to bring the accused to justice. None of the ad hoc tribunals faced such interference, primarily because each tribunal was granted supremacy (primary) jurisdiction to try the crimes of the respective conflict over which it had rule. However, in creating a court that would deal with future crimes, most states were unwilling to grant a permanent court a supremacy clause. It is one thing to create a court when you know exactly who will be tried; it is quite another to create a court when such determinations remain unknown. As a compromise to balance the competing interests of state sovereignty and the judicial independence of the ICC, the theory of complementarity was born.

According to its Preamble and article 1, the Rome Statute was adopted to, among other things, emphasize that the jurisdiction of the ICC would be complementary to national criminal jurisdiction. [\[FN39\]](#) But what exactly does complementarity mean? After much struggle and debate, the framers of the Statute agreed to define complementarity as an issue of admissibility which both the states and the ICC would have to face to determine whether the Court should

have personal jurisdiction over the accused. Complementarity places the responsibility for determining admissibility on the Court, and states that

1. Having regard to [complementarity], the Court shall determine that a case is inadmissible where:

\*40 (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

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

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

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

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

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

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

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. [\[FN40\]](#)

Essentially, states have primary jurisdiction to try their own citizens who have committed any of the ICC's core crimes. However, if the ICC determines that a state is unwilling or genuinely unable to initiate such prosecution, then the case becomes admissible to the Court's jurisdiction. Furthermore, in keeping with the principle of complementarity, the protection against double jeopardy is also incorporated into the Statute. [\[FN41\]](#)

1. ...[N]o person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

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

3. No person who has been tried by another court for conduct also proscribed [by the Statute] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court

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

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in

the circumstances, was inconsistent with an intent to bring the person concerned to justice. [\[FN42\]](#)

## V. Organs of the Court

The Statute of the International Criminal Court divides the Court into four organs: the Presidency; a Judiciary made up of an Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor; and the Registry. [\[FN43\]](#) The Presidency and the Registry are the administrative organs of the Court, whereas the Judiciary and the Prosecutor handle responsibilities which concern the trials. To fulfill its responsibilities, the Statute states that the Court will "enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes," [\[FN44\]](#) and to maintain the integrity of the Court, the judges will be fully "independent in the performance of their functions." [\[FN45\]](#)

### A. The Presidency and Registry

The Presidency is defined as the president and the first and second vice-presidents. [\[FN46\]](#) All three members of the Presidency will "be elected by an absolute majority of the judges." [\[FN47\]](#) However, members of the Presidency must also be judges duly elected as full-time members of the Court. [\[FN48\]](#) Furthermore, members of the Presidency will "serve for a term of three years or until the end of their respective term of office as judges, whichever expires earlier," and they will only be eligible for one re-election. [\[FN49\]](#) Moreover, the Presidency will be responsible for "(a) the proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) the other functions conferred upon" it by the Rome Statute. [\[FN50\]](#) One example of the "other functions" referred to in the Statute is that \*41 the "Presidency may, on a case-by-case basis, designate, as available, one or more alienate judges to be present at each stage of the trial and [may] replace a member of the Trial Chamber if that member is unable to continue attending." [\[FN51\]](#)

Like the Presidency, the Registry is primarily an administrative organ. [\[FN52\]](#) According to the Statute, the Registry will "be responsible for the nonjudicial aspects of the administration and servicing of the Court." [\[FN53\]](#) The principal administrative officer of the Registry is the registrar who, like the president and vice-presidents, will be elected by an absolute majority of a vote by the judges. [\[FN54\]](#) Unlike the three-year term of the members of the Presidency, the registrar (and deputy registrar, if established) will hold office for a five-year term and again be allowed only one re-election. [\[FN55\]](#)

Although the Registry may appear to be a rather bland organ, it will also set up and control a highly debated element of the Court, the Victims and Witnesses Unit. [\[FN56\]](#) This is not the first occurrence of a victims and witness protection unit under international criminal law. Both the ICTY and the ICTR also maintain such units. [\[FN57\]](#) However, both the ICTY and the ICTR have been heavily criticized for their respective units' failure to offer proper protections. [\[FN58\]](#) During the PrepComs that preceded the ICC's diplomatic conference in Rome, many states and individual scholars argued that such a unit would be more effective if controlled by either the Judiciary or the Office of the Prosecutor. In the end, it seems that the unit was left to remain in

the Registry, where previously it had been housed in the respective ICTs.

Regardless, to ensure the improvements thought necessary over previous victims and witness protection units, the Rome Statute laid out that the Victims and Witnesses Unit "shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses." To do so, the "Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence," thought by many to be one of the most psychologically devastating crimes. [\[FN59\]](#)

## **B. The Judiciary**

Any case under the ICC's consideration has the potential to go through all three judicial divisions of the Court. Within each division the judicial functions of the Court are to be carried out by its respective chamber. For example, the Appeals Chamber will be composed of all of the judges of the Appeals Division; the Trial Chamber will comprise three judges of the Trial Division; and the functions of the Pre-Trial Chamber will be carried out by one or three judges of the Pre-Trial Division. [\[FN60\]](#)

### **1. The Pre-Trial Chamber**

Realistically speaking, it would not be surprising if routine challenges are made against the admissibility of a case or jurisdiction of the Court. This has already been seen in *The Prosecutor v. Dusko Tadic*, [\[FN61\]](#) the seminal case granting the ICTY legal jurisdiction. [\[FN62\]](#) As a safeguard against frivolous prosecution and a balance against extraneous appeals, the ICC Statute delegates to the Pre-Trial Chamber primary responsibility for handling challenges to various aspects of the Court's jurisdiction. [\[FN63\]](#) Therefore, when such challenges are made they can be ruled upon from the very outset of the proceedings and need not be left to a post-trial appeal.

Jurisdiction and admissibility are not the only duties of the Pre-Trial Chamber: most evidentiary issues are also weighed by this chamber. [\[FN64\]](#) Furthermore, when an investigation is ongoing and the prosecutor considers there is a "unique opportunity to take testimony or a statement from a witness or to examine, collect or take evidence, which may not be subsequently available for the purposes of a trial," the Pre-Trial Chamber may "take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defense." [\[FN65\]](#) In fact, maintaining a check on the powers of the prosecutor was the primary reason for the Chamber's creation. [\[FN66\]](#) In addition, the Pre-Trial Chamber is also authorized to:

- (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
- (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons ... issue such orders ... or seek such cooperation ... as may be necessary to assist the person in the preparation of his or her defense;
- (c) Where necessary, provide for the protection of privacy of victims and witnesses, the

preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State ... if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State 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 ...

\*42 (e) Where a warrant of arrest or a summons has been issued ... and having due regard to the strength of the evidence and the rights of the parties concerned ... to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims. [\[FN67\]](#)

A final but important function of the Pre-Trial Chamber is to act as the equivalent of a grand jury. Prior to the commencement of trial, and within a reasonable time after the accused's surrender or voluntary appearance before the Court, the Pre-Trial Chamber will hold a hearing to confirm the charges levied against the accused. [\[FN68\]](#) During the hearing, both the prosecutor and the accused will be given the opportunity to present evidence to maintain or disprove the crimes charged. [\[FN69\]](#) On the basis of the hearing, it then becomes the Pre-Trial Chamber's responsibility, similar to a grand jury, to determine whether there is sufficient evidence to "establish substantial grounds to believe that the person committed each of the crimes charged." [\[FN70\]](#) Based on its determination, the Pre-Trial Chamber may then confirm, decline, adjourn or amend the charges, and when appropriate, refer the case to the Trial Chamber to proceed with the trial. [\[FN71\]](#)

## 2. The Trial Chamber

After a case has been approved by the Pre-Trial Chamber, it is referred to the Trial Chamber, which "shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses." [\[FN72\]](#) For bench trial, the functions of the Trial Chamber will be carried out by a three-judge bench, [\[FN73\]](#) chosen from a pool of judges who have been elected as full-time members of the Court. [\[FN74\]](#)

To ensure the independence and equality of the Court, no two judges elected to the Court may be nationals of the same state, and they 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." [\[FN75\]](#) Furthermore, each candidate for election to the Court must have experience in either criminal law or relevant areas of international law, such as humanitarian law and human rights. [\[FN76\]](#) Moreover, when electing judges, the states party to the Statute ("states parties") will take into account the need for representing the principal legal systems of the world, for equitable geographical representation, and for a fair representation of female and male judges. [\[FN77\]](#)

The trial itself will maintain characteristics similar to a Westernized domestic trial. For starters, the accused will be assumed innocent until proven guilty, and the onus will be on the prosecutor to prove the guilt of the accused. [\[FN78\]](#) Furthermore, to convict the accused, "the Court must be

convinced of the guilt of the accused beyond reasonable doubt." [FN79] Interestingly, even when the accused has pleaded guilty, the Trial Chamber has the discretion to set aside the guilty plea if the Chamber does not believe that the guilt can be proven by the facts in evidence. [FN80] Specifically, the Trial Chamber must determine whether the accused understands the nature and consequences of the admission of guilt, whether the admission is made voluntarily by the accused after sufficient consultation with defense counsel, and whether the admission of guilt is supported by the facts presented in the case. [FN81]

The basic rights of the accused may also sound familiar, since the American constitutional concept of the right not to incriminate oneself, as also reflected in the so-called Miranda [FN82] rights, have been incorporated into the Statute. Namely, the accused has the right to remain silent, cannot be compelled to testify, and the silence may not be used in considering the accused's guilt or innocence. [FN83] Furthermore, the accused has the right to legal counsel, or to have Court-appointed defense counsel if the accused cannot afford one of his or her own choosing. [FN84] Also, the accused has the right to be charged without undue delay, in public, and to be informed promptly and in detail "of the nature, cause and content of the charge." [FN85] Moreover, the charge must be explained in a language which the accused fully understands and speaks; thus, if necessary, the accused may have "free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness" and justice. [FN86]

According to the Statute, all of the judges must be present at each stage of the trial and throughout their deliberations. [FN87] For the judges to reach their decision, they must achieve either unanimity or a majority decision. [FN88] The decision must then be in writing and cannot contain any concurring or dissenting opinions. [FN89] "The Trial Chamber will issue only one decision. When there is no unanimity, the Trial Chamber's decision will contain the views of the majority and the minority," and a summary of the opinion will be read aloud in open court. [FN90] Obviously, the Court can only base its decisions on the "evidence submitted and discussed before it at the trial." [FN91] After the decision is rendered, the trial moves to the sentencing stage, and in the event of an appeal, to the Appeals Chamber.

### 3. The Appeals Chamber

According to the Rome Statute, the Appeals Chamber is composed of all of the judges of the Appeals Division, which is composed of the President and four other judges. [FN92] Appeals can be taken at each stage of the trial. Prior to and during trial, appeals can be made against the decision of the Pre-Trial Chamber, a decision \*43 with respect to jurisdiction or admissibility, a decision granting or denying the release of a person being investigated or prosecuted, or a decision that involves an issue "that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial." [FN93]

After a decision has been rendered by the Trial Chamber, both the prosecutor and the defendant may appeal. The prosecutor can make appeals on the basis of a procedural error, an error of fact or an error of law. [FN94] Furthermore, either the convicted person or the prosecutor acting on the basis of the convicted person can appeal on the same basis, or on "any other ground that

affects the fairness or reliability of the proceedings or decision." [\[FN95\]](#) Moreover, the sentence imposed by the Trial Chamber may also be appealed by either side on the ground of "disproportion between the crime and the sentence." [\[FN96\]](#)

Interestingly, although a decision of the Trial Chamber cannot have dissents or concurrences, the same does not hold true for decisions of the Appeals Chamber. Similar to a decision of the Trial Chamber, decisions on appeal must include the reasoning of both the majority and dissent when there is no unanimity. [\[FN97\]](#) However, a judge may deliver a "separate or dissenting opinion on a question of law." [\[FN98\]](#) Also, if it is later proven that the convicted person was, in fact, innocent, and that "there has been a grave and manifest miscarriage of justice," the Court has the discretion to award compensation in accordance with the Court's Rules of Procedure and Evidence. [\[FN99\]](#)

### **C. Office of the Prosecutor**

Although the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber all have intertwined responsibilities and powers, the Office of the Prosecutor will be a wholly separate organ of the Court, which cannot be vetoed by another of the Court's organs. [\[FN100\]](#) The Office of the Prosecutor will be headed by the prosecutor and will also contain one or more deputy prosecutors, all of whom will serve on a full-time basis for one nine-year term. [\[FN101\]](#) Unlike judges, the prosecutor and deputy prosecutors will not be eligible for re-election. [\[FN102\]](#)

The prosecutor will be primarily responsible for both the prosecution and the investigation of all judicial matters before the Court. [\[FN103\]](#) According to the Statute, the investigatory powers of the prosecutor not only include determining whether there is a legal or factual basis to seek a warrant, summons, or indictment, but also whether the case itself is admissible to the Court. [\[FN104\]](#)

Furthermore, in order to complete its investigation, the prosecutor may, among other things, conduct investigations on the territory of a state, collect and examine evidence, and negotiate plea bargains with witnesses and defendants. [\[FN105\]](#)

To fulfill its responsibilities, the Office of the Prosecutor will be granted a great deal of independence. Although it is not as much power as was originally proposed by the 1994 ILC Draft Statute, [\[FN106\]](#) the Rome Statute grants the prosecutor the power to "initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court." [\[FN107\]](#) Therefore, once information has been brought to the Court which suggests that an investigation might be necessary, the prosecutor may initiate its investigations without first seeking any outside approval. However, an investigation may be postponed for twelve-month periods by the United Nations Security Council if the council makes a resolution to do so under its chapter VII powers, acting to restore or maintain international peace and security. [\[FN108\]](#)

Interestingly, because of the independence of the Office of the Prosecutor, the Statute requires that the office be completely impartial, and thus neither the prosecutor nor the deputy prosecutors may participate in any matter which might bring their impartiality into question,

including any case with which they were previously involved on a domestic level. [\[FN109\]](#)

## VI. Penalties

As with any court, once the ICC has found the defendant guilty, the Trial Chamber proceeds to sentencing. [\[FN110\]](#) There was much debate as to what penalties should be imposed for violations of the Court's core crimes. Since the crimes are of such a heinous manner, many states' representatives believed that the death penalty would be appropriate. Both the Nuremberg and Tokyo tribunals sentenced numerous of its defendants to death. However, over the past fifty years almost all Western nations have abandoned capital punishment. Thus, since at least as many states were opposed to the death penalty as were in favor of it, it was excluded from the ICC's possible penalties.

Instead of capital punishment, the Court can imprison anyone convicted of a core crime for a specified number of years, which may not exceed thirty years; or for a term of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." [\[FN111\]](#) The Court may also levy fines and order a "forfeiture of proceeds, property and assets derived directly or indirectly from that crime." [\[FN112\]](#) To determine the length of imprisonment, the Court may also pronounce multiple sentences for each crime and a joint sentence specifying the total period of imprisonment. [\[FN113\]](#) However, this period cannot exceed thirty years unless one of the convictions carried with it a life sentence. [\[FN114\]](#)

\*44 The Rome Statute consistently underscores that one of the primary purposes of the Court is the protection and vindication of the victims of these horrendous crimes. Thus, the Statute also states that a Trust Fund will be established "for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims." [\[FN115\]](#) Furthermore, the Court has the discretion to order money and other property collected by the Court through fines or forfeiture to be transferred to the Trust Fund. [\[FN116\]](#) The Statute does not detail how the Trust Fund is to be managed, but instead leaves that determination to the states party to the Statute. [\[FN117\]](#)

Besides the Trust Fund, the Statute also authorizes the Court to award reparations to, or in respect of, the victims of these crimes. [\[FN118\]](#) By reparations, the Court defines the term to include "restitution, compensation and rehabilitation." [\[FN119\]](#) The Court will not be empowered to order that states award reparations to victims. However, the Court may make the order "directly against a convicted person," and states party to the Statute are required to cooperate in the collection of such awards. [\[FN120\]](#) Furthermore, when appropriate, the Court can order that the reparations be made through the Trust Fund discussed above. [\[FN121\]](#) Moreover, "[b]efore making an order [for reparations], the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States." [\[FN122\]](#)

It is unfortunate that the Court will not be empowered with the ability to order that the states themselves make reparations to victims, since states will be in a much better situation than individuals to make such an offer. However, it became evident during the PrepComs that the

Court was meant solely to prosecute individuals, and thus any power to enforce awards of reparations against states would threaten not only the sovereignty of the states involved, but also their support for the creation of the Court.

## VII. Conclusion

All told, the Rome Statute of the International Criminal Court contains one preamble, thirteen additional parts, one hundred twenty-eight articles, and, most importantly, no brackets! [FN123] Although there were unfinished portions of the Statute--such as the definition of aggression and the Rules of Procedure and Evidence, which will be appended to the Statute later [FN124]--all questions about alternate texts and multiple options were removed in blazing speed over the five weeks of the Statute's final diplomatic conference. [FN125]

Partly because of the swiftness with which the Statute was finalized, the states parties agreed that provisions should be made to handle disputes relating to the interpretation of the Statute itself. According to article 119, any disputes relating to the judicial functions of the Court will be settled by the Court itself. However, any other dispute relating to the interpretation or application of the Statute could be settled either through negotiations between the concerned states, by the assembly of all of the states parties, or by referring the dispute to the International Court of Justice for settlement of the states' dispute. [FN126] This provision is particularly necessary because the Statute does not allow for any reservations to be made to it. [FN127] Thus, when making their individual ratification, states may not simply state which provisions they would or would not follow, nor which interpretations they wish to choose.

It will still be several years before the ICC enters into force--the most generous estimates are that it will only take five years. Regardless, the ICC cannot take life until sixty states ratify the treaty. [FN128] Currently, seventy-five states have signed the Rome Statute, including France, Germany and the United Kingdom. [FN129] However, signature alone is not sufficient to constitute the ratification or acceptance required to effectuate the Court. The signatures are a start, but most states face a tough political row ahead of them. States must now convince their respective legislatures to accept what their diplomats have already adopted--a court that will fight impunity and usher in a new order of peace for the upcoming millennium.

[FN1]. **Mr. Bachrach is a June 1999 graduate of the Benjamin N. Cardozo School of Law in New York City.**

[FN1]. Following the request of the United States, the vote was held orally.

[FN2]. A/CONF. 183/9, 17 July 1998.

[FN3]. Art. 3, Seat of the Court, *id.* Unless otherwise noted, all citations in this article refer to the Rome Statute of the International Criminal Court, note 2 *supra*.

[FN4]. Art. 1, The Court.

[\[FN5\]](#). Art. 4, Legal status and powers of the Court.

[\[FN6\]](#). See generally Trial of the Major German War Criminals, Cmd. 6964 (1948) (compilation of documents and transcripts concerning the background, investigation, trial and sentencing of the Nuremberg Trials).

[\[FN7\]](#). See generally Trial of the Japanese Major War Criminals, 15 I.L.R. 356 (1948) (compilation of documents and transcripts concerning the background, investigation, trial and sentencing of the Tokyo Trials).

[\[FN8\]](#). Art. 5, Crimes within the jurisdiction of the Court.

[\[FN9\]](#). Annex, Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, A/491355, 1 September 1994.

[\[FN10\]](#). Art. 5.

[\[FN11\]](#). Art. 6(c), Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945).

[\[FN12\]](#). Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948).

[\[FN13\]](#). Art. 11, id.

[\[FN14\]](#). Art. 4, Genocide; Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia, [32 I.L.M. 1159](#) (1993).

[\[FN15\]](#). Art. 2, Genocide; Security Council Resolution 955 (1994); Establishing the International Tribunal for Rwanda, [33 I.L.M. 1598](#) (1994).

[\[FN16\]](#). Art. 6.

[\[FN17\]](#). The Four Geneva "Red Cross" Conventions of 1949, 75 U.N.T.S. 287, 75 U.N.T.S. 135, 75 U.N.T.S. 31, 75 U.N.T.S. 85 (1949); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11), 16 I.L.M. 1442 (1977).

[\[FN18\]](#). Art. 7, Crimes against humanity.

[\[FN19\]](#). Although by no means binding on the ICC, the ICTR recently ruled that "rape and sexual violence ... constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as

such." The Prosecutor v. Jean-Paul Akavesu, ICTR-96-4-T (2 September 1998).

[FN20]. Arts. 8(i)(b)(xxi), 8(2)(e)(vi), War crimes.

[FN21]. Art. 7(3), Crimes against humanity.

[FN22]. Art. 8, War crimes.

[FN23]. Id.

[FN24]. Art. 8(2)(b)(xx), War crimes.

[FN25]. Id.

[FN26]. Art. 6(a), The Charter of the International Military Tribunal, 82 U.N.T.S. 279.

[FN27]. Art. 2(4), Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945).

[FN28]. Art. 1, Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), 14 December 1974, 69 A/J/I/L 480 (1975).

[FN29]. Art. 5, Crimes with the jurisdiction of the Court.

[FN30]. Art. 13, Exercise of jurisdiction.

[FN31]. Id.

[FN32]. Individual state consent is not required if the referral is based on a chapter VII Security Council resolution. Art. 13(b), Exercise of jurisdiction.

[FN33]. Art. 12(1), Preconditions to the exercise of jurisdiction.

[FN34]. Art. 12(3), id.

[FN35]. Art. 11, Jurisdiction rations temporis.

[FN36]. Art. 15, Prosecutor.

[FN37]. Art. 14(2), Referral of a situation by a State Party.

[FN38]. On 26 March 1998, U.S. Sen Jesse Helms, Chairman of the Senate Committee on Foreign Relations, sent a letter to U.S. Secretary of State Madeleine Albright objecting on political grounds to the Court. In the letter, Sen. Helms wrote: "I am unalterably opposed to the creation of a permanent UN criminal court because any permanent judiciary within the United Nations system would be totally inappropriate ... it would grant the UN a principal trapping of

sovereignty. The UN is not now--nor will it ever be so long as I have breath in me--a sovereign entity.... Under this scenario, an American citizen could very well come under the jurisdiction of a UN criminal court, even over the express objection of the United States Government ... [I]f they manage to conclude a treaty establishing such a court without a clear U.S. veto, it will be dead-on-arrival at the Senate Foreign Relations Committee."

[FN39]. Preamble, ¶ 10;art. 1, The Court.

[FN40]. Art. 17, Issues of admissibility.

[FN41]. Art. 20, Ne bis in idem.

[FN42]. Id.

[FN43]. Art. 34, Organs of the Court.

[FN44]. Art. 48, Privileges and immunities.

[FN45]. Art. 40, Independence of the judges. However, the privileges and immunities of the various organs may be waived. Art. 48(5): "The privileges and immunities of: (a) A judge or the Prosecutor may be waived by an absolute majority of the judges; (b) The Registrar may be waived by the President; (c) The Deputy Prosecutors and the staff of the Office of the Prosecutor may be waived by the Prosecutor; (d) The Deputy Registrar and staff of the Registry may be waived by the Registrar." And a member of the Court may be removed from office if he or she is found to have committed serious misconduct, a serious breach of his or her duties, or is unable to exercise the functions required by the Statute. Art. 46, Removal from office.

[FN46]. Art. 38, The Presidency: "The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified."

[FN47]. Id.

[FN48]. Art. 35, Service of judges. For the initial establishment of the Court, all judges, including the members of the Presidency, will be selected by the states party to the Statute, and shall take into account "the representation of the principle legal systems of the world, equitable geographical representation, and a fair representation of female and male judges." Art. 36, Qualifications, nomination and election of judges.

[FN49]. Art. 38, The Presidency.

[FN50]. Id.

[FN51]. Art. 74, Requirements for the decision.

[FN52]. Art. 43, The Registry.

[FN53]. Id.

[FN54]. Id.

[FN55]. Id.

[FN56]. Id. See also art. 68, Protection of the victims and witnesses and their participation in the proceedings.

[FN57]. Rule 34, Victims and Witnesses Unit, Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, adopted 11 February 1994, as amended 9-10 July 1998; Rule 34, Victims and Witnesses Support Unit, Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, adopted 29 June 1995, as amended 8 June 1998.

[FN58]. Shaker & Huntley, "No Justice, No Peace'--Uncovering Campaign of Horror: Rape Victims' and Witnesses' Fear of Reprisals and Distrust of the International Community Threaten to Underlie Efforts to Heal the Conflict's Wounds," Chicago Tribune, 18 May 1997; Kronenberger & Moseley, "The Key to Prosecuting Rape as a War Crime," Christian Science Monitor, 6 April 1995.

[FN59]. Art. 43, The Registry. See also art. 68, Protection of the victims and witnesses and their participation in the proceedings.

[FN60]. Art. 39, Chambers.

[FN61]. The Prosecutor v. Dusko Tadic, [36 I.L.M. 908](#) (1997).

[FN62]. In Dusko Tadic, the ICTY concluded that it had been properly established in accordance with the chapter VII powers of the United Nations Security Council, and thus had the judicial authority to bring to trial anyone accused of genocide, crimes against humanity or war crimes committed in the territory of the former Yugoslavia since 1991. In many respects, Dusko Tadic is considered the Marbury v. Madison of international criminal law.

[FN63]. Art. 19, Challenges to the jurisdiction of the Court or the admissibility of a case.

[FN64]. See also arts. 15, 18, 19, 54(2), 61(7) and 72.

[FN65]. Art. 56, Role of the Pre-Trial Chamber in relation to a unique investigative opportunity.

[FN66]. Oral intervention by the delegate of France to the United Nations Preparatory Meeting for the Establishment of a Permanent International Criminal Court, 4 August 1997; Proposal of United Kingdom, Non-paper/WG.4/No.3, 5 August 1997; Proposal of Germany and Argentina,

AIAC.249/19981WG.41DP.35, 25 March 1998.

[FN67]. Art. 7(3), Functions and powers of the Pre-Trial Chamber.

[FN68]. Art. 61(1), Confirmation of the charges before trial.

[FN69]. Art. 61(5)(6).

[FN70]. Art. 61(7).

[FN71]. Id.

[FN72]. Art. 64(2), Functions and powers of the Trial Chamber.

[FN73]. Art. 39(2)(b)(ii), Chambers.

[FN74]. Art. 35, Service of judges.

[FN75]. Art. 36, Qualifications, nomination and election of judges.

[FN76]. Id.

[FN77]. See also art. 36(8)(b) ("States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.").

[FN78]. Art. 66, Presumption of innocence.

[FN79]. Id.

[FN80]. Art. 65, Proceedings on an admission of guilt.

[FN81]. Id.

[FN82]. *Miranda v. Arizona*, 385 U.S. 436 (1966).

[FN83]. Art. 67, Rights of the accused; art. 55(2), Rights of persons during an investigation.

[FN84]. Id.

[FN85]. Id.

[FN86]. Id.

[FN87]. Art. 74(1), Requirements for the decision.

[\[FN88\]](#). Art. 74(3).

[\[FN89\]](#). Art. 74(5).

[\[FN90\]](#). Id.

[\[FN91\]](#). Art. 74(2).

[\[FN92\]](#). Art. 39, Chambers.

[\[FN93\]](#). Art. 82, Appeal against other decisions.

[\[FN94\]](#). Art. 81, Appeal against decision of acquittal or conviction or against sentence.

[\[FN95\]](#). Id.

[\[FN96\]](#). Id.

[\[FN97\]](#). Art. 84, Revision of conviction or sentence.

[\[FN98\]](#). Id.

[\[FN99\]](#). Art. 85, Compensation to an arrested or convicted person. Just how much compensation should be offered or how it should be determined is still unknown, since the Rules of Procedure and Evidence have not been finalized by the plenipotentiaries assigned to create the ICC.

[\[FN100\]](#). Art. 42, The Office of the Prosecutor.

[\[FN101\]](#). Id.

[\[FN102\]](#). Id.

[\[FN103\]](#). Art. 5, Investigation and Prosecution.

[\[FN104\]](#). Art. 53, Initiation of an investigation; art. 17, Issues of admissibility.

[\[FN105\]](#). Art. 54, Duties and powers of the Prosecutor with respect to investigations; art. 65, Proceedings on an admission of guilt.

[\[FN106\]](#). The 1994 ILC Draft Statute was the first draft of what later became the Rome Statute for an International Criminal Court

[\[FN107\]](#). Art. 15, Prosecutor.

[\[FN108\]](#). Art. 16, Deferral of investigation or prosecution.

[\[FN109\]](#). Id.

[\[FN110\]](#). Art. 76, Sentencing.

[\[FN111\]](#). Art. 77, Applicable penalties.

[\[FN112\]](#). Id.

[\[FN113\]](#). Id.

[\[FN114\]](#). Id.

[\[FN115\]](#). Art. 79, Trust Fund.

[\[FN116\]](#). Id.

[\[FN117\]](#). Id.

[\[FN118\]](#). Art. 75, Reparations to victims.

[\[FN119\]](#). Id. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ARes/40/34, 29 November 1985; Revised Draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law, E/CN.4/Sub.2/1996/70.

[\[FN120\]](#). Art. 75, Reparations to victims.

[\[FN121\]](#). Id.

[\[FN122\]](#). Id.

[\[FN123\]](#). During the PrepComs and the Rome Conference, "brackets" were used by states on their proposals and on the numerous drafts of the ICC Statute to indicate that a portion of text lacked consensus or to highlight alternate texts for states to choose from in deciding their positions on the appropriate language and provisions to be incorporated into the Statute. Heading into the Diplomatic Conference there were approximately two thousand sets of brackets remaining in the text, a daunting figure, especially since all were required to be removed before the Statute could be completed.

[\[FN124\]](#). The Statute provides that it may be amended by a vote of two-thirds of the states party to the Statute. Art. 121(3), Amendments. The amendments would then enter into force after seven-eighths of the states parties have deposited their instruments of ratification or acceptance with the Secretary-General of the United Nations. Art. 121(4), Amendments.

[FN125]. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June 1998 to 17 July 1998.

[FN126]. Art. 119, Settlement of disputes.

[FN127]. Art. 120, Reservations.

[FN128]. Art. 126, Entry into force.

[FN129]. Rome Statute Signature and Ratification Chart, <http://www.icc.org/icc/rome/html/ratify.html>. As of 11 February 1999, seventy-five states have signed the Rome Statute, and one state, Senegal, has ratified it. However, the United States, Israel, China, and Russia are among the states whose signatures are absent.

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