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Note and Comment

***139 THE PERMANENT INTERNATIONAL CRIMINAL COURT: AN EXAMINATION OF THE
STATUTORY DEBATE**

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I. Introduction

In 1994, the International Law Commission ("ILC") authored a Draft Statute [FN1] in an attempt to help establish a permanent International Criminal Court ("ICC"). Beginning in March 1996 the United Nations *140 General Assembly held Preparatory Committee meetings ("PrepComs") in which the representatives of the majority of the world's nations gathered to debate the various aspects of the 1994 ILC Draft Statute. [FN2] Each PrepCom lasted between two and three weeks and was essentially a preparatory conference, designed to facilitate debate and fine-tune each State's concerns.

The final PrepCom was held from March 16 to April 3, 1998. At this final PrepCom the 1994 ILC Draft Statute was replaced by a new text, the Report of the Inter-Sessional Meeting from January 19 through January 30, 1998 in Zutphen, The Netherlands ("Zutphen Draft"), which formed the basis of the remainder of the debate leading up to a Diplomatic Conference which will take place from June 15 to July 17, 1998, in Rome, Italy ("Rome Conference"). [FN3] Furthermore, after the completion of the final PrepCom, the official texts ("CRP's") were compiled into one document, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Part I, Draft Statute for the International Criminal Court. [FN4] This final compiled document revised the Zutphen text to reflect the Proposals of the March-April 1998 PrepCom, and will serve as the basic draft text of the Rome Conference. "There is international momentum, that by [June] we must establish an effective, efficient, and independent International Criminal Court," [FN5] the statute for which, it is hoped, will be completed and ready for signature by the end of the Diplomatic Conference.

The purpose of this paper is to examine the progression of some of the key issues that have been under debate, in an attempt to help explain the creation of the "last great legal edifice of the 20th Century." [FN6]

*141 A. The Purpose of the International Criminal Court

For years lawyers, politicians, and lay persons have grappled with the problem of what can be done when there is no justice left to be had. Over the past fifty years some of the most horrendous atrocities in recorded history have unfolded. With the creation of the International Military Tribunal at Nuremberg, for the first time leaders and their peoples were held individually accountable for massive violations of international standards of conduct. Unfortunately, many States and individuals have failed to learn from the mistakes of World War II and the Holocaust. Over the past 50 years there have been approximately 250 conflicts, totaling over 170 million casualties-more casualties than World War I and World War II combined. [FN7] Most recently, in 1994 following the breakup of Yugoslavia, Bosnians, Serbians and Croatians, entered into a war that practiced "ethnic cleansing" in a manner not seen since the Holocaust. [FN8] Also in 1994, a civil war ensued in Rwanda involving the killing of almost 500,000 people. [FN9] To many it appeared that every inhabitant of Rwanda was transformed into both a victim, and a butcher. The law cannot stand silent to crimes so heinous that domestic judicial systems have no adequate solutions. "These types of crimes cannot go forth without some form of accountability, some form of punishment, at least for the most egregious crimes like aggression, genocide, and . . . torture." [FN10]

As the dawning of a new millennium quickly approaches, and international atrocities continue to proliferate, the international community continues to strive for new ways to bring peace and security to

the world. In 1993, Trinidad and Tobago suggested that a permanent international criminal tribunal should be established to try international terrorists and narcotics dealers. Although the international community did not agree upon those bases of subject matter jurisdiction, there was support for a court that would try violators of what many consider the most serious breaches of international law: genocide, war crimes, and crimes against humanity. Learning from the successes of the Nuremberg Tribunal, the idea of a permanent ICC raised the hope of furthering international *142 cooperation, thereby enhancing "the effective prosecution and suppression of crimes of international concern." [\[FN11\]](#)

B. Issues under debate

Almost every aspect of the proposed ICC is still being debated. These issues range from the number of judges required for a quorum, to the specific definition of crimes against humanity. However, the issues which have garnered possibly the most debate are: the consent and triggering process of the Court; the subject matter jurisdiction of the Court; the balance between international and domestic judicial systems, known as complementarity; the process of investigation; and the types of penalties that the Court will have the authority to impose.

Although the specific definitions of the core crimes (the crimes that shall comprise the Court's subject matter jurisdiction) are still under fierce debate, the categories of core crimes which will be incorporated into the Court's statute has been mostly determined. The ILC Draft Statute proposed jurisdiction over genocide, aggression, war crimes, crimes against humanity, and a list of treaty based crimes mostly relating to human rights or terrorism. [\[FN12\]](#) Although there will continue to be debate over the subject matter jurisdiction of the Court until a resolution is officially announced in Rome, it appears that only genocide, war crimes, and crimes against humanity are certain to be retained, and of the others, only aggression still retains even a minimal chance. [\[FN13\]](#)

On the other hand, the debates over trigger mechanisms, investigation, complementarity, and penalties are still unresolved; it is these issues that this paper will examine. [\[FN14\]](#)

II. Trigger Mechanisms (Preconditions to Jurisdiction)

Whenever a new situation arises where the ICC is the preferred forum for adjudication, it will be necessary to "trigger" the Court into action. For the ICC to preside over any given situation it must not only have subject matter jurisdiction, but it must also have personal jurisdiction over individual defendants. However, because this will be an international court, as opposed to a domestic court, the hurdles necessary to acquire such jurisdiction do not merely turn on the place of arrest or place of the crime, but also on the broader concept of State consent.

*143 Under customary international law, there are several different bases of maintaining personal jurisdiction through State consent:

(1) The Territorial Principle - All crimes, be them acts or omissions, which were "committed (or alleged to have been committed) within the [[[territory] of a State may, come before the municipal courts and the accused if convicted may be sentenced. This is so even where the offenders are foreign citizens;" [\[FN15\]](#) (2) The Nationality Principle - "By virtue of nationality, a person becomes entitled to a series of rights ranging from obtaining a valid passport enabling him to travel abroad to being able to

vote. . . . The concept of nationality is important since it determines the benefits to which persons may be entitled and the obligations (such as conscription) which they must perform;" [\[FN16\]](#) (3) The Passive Personality Principle - "[A] State will claim jurisdiction to try an individual for offenses committed abroad which have affect or will affect nationals of the State;" [\[FN17\]](#) (4) The Protective Principle - "[S]tates may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular State concerned;" [\[FN18\]](#) and (5), The Universality Principle - Crimes of the most egregious manner, such as piracy and war crimes, can be tried by any court, because the international sphere as a whole is involved. [\[FN19\]](#)

***144** These five principles, as well as the obligations of treaties, have been used by domestic courts to maintain jurisdiction over individuals which have more than one State attempting to claim jurisdiction. However, an international court, if its statute allowed, could also base jurisdiction under these principles, or others specifically outlined in its statute or other treaties.

According to the 1994 ILC Draft Statute, the Court could exercise its jurisdiction in several different ways. First, in a case of genocide, the Court could exercise its jurisdiction whenever a State party to the 1948 Genocide Convention [\[FN20\]](#) lodges a complaint with the Prosecutor which alleges "that a crime of genocide appears to have been committed." [\[FN21\]](#) Second, in the case of aggression, the Court could exercise jurisdiction if the Security Council "has first determined that a State has committed the act of aggression which is the subject of the complaint." [\[FN22\]](#) The Security Council could also refer any other case to the Court, which it deemed appropriate so long as the Security Council was acting under its Chapter VII powers to maintain or restore international peace and security. [\[FN23\]](#) Furthermore, the ILC Draft Statute provided that in any other case charging one or more of the core crimes, the ICC could exercise its jurisdiction when consent has been granted to the Court by the State which has custody of the suspect ("the custodial State") and the State maintaining territorial jurisdiction. [\[FN24\]](#)

To some it appeared that the ILC Draft Statute offered a fair distribution of power between the States, the Security Council, and the ICC. However, many States objected to this formulation of the Court's preconditions to its exercise of jurisdiction. During the negotiations several alternative proposals were offered which subtly yet drastically changed the jurisdictional authority of the proposed ICC.

A. The Role of the Security Council

Beyond what was mentioned above, the ILC Draft Statute also included a very controversial provision relating to the consent process. The ILC Draft Statute provided that "a complaint of or directly related to an act of aggression," or any other breach of international peace and security, could not be brought under the ILC Draft Statute unless "the Security Council first determined that a State [had] committed the act or ***145** omission which [was] the subject of the complaint." [\[FN25\]](#) In essence this provision would allow the Security Council to prevent the ICC from obtaining jurisdiction over any matter falling within the Security Council's Chapter VII powers. This provision became one of the greatest areas of dispute in regards to the ICC's jurisdictional procedure.

During the August 1997 PrepCom the United States took the position that the Security Council should be the sole body with the power to authorize or prevent any situation from being referred to the ICC. The United States acknowledged that placing the triggering mechanisms of the Court into the Security

Council would be placing the burden of determining jurisdiction into a political institution, but the United States also believed that the same would be true if the consent process was left to governments. [FN26] The United States intervention hinted at the possible expansion of the Security Council, and explained that this expansion would help dilute the political pitfall that the institution currently maintained. According to the United States intervention, "when the Security Council reform process concludes, we expect that the representation of a much wider cross-section of the global society will have been accomplished. Any decision that the Security Council makes with respect to the referral of a situation to the ICC thus will reflect the considered judgment of that larger and more representative group of nations." [FN27]

Not surprisingly, other members of the Security Council shared the US sentiment that the ICC's jurisdiction should be subordinate to the decisions of the Security Council. The French delegate stated on 6 August 1997, that national courts should handle all crimes, and that this right should only be taken away if the Security Council decides it is necessary to refer the matter to the International Criminal Court. [FN28] Furthermore, the delegate argued that this would not be a step backwards, both legally and politically speaking, because this was the method that had been employed during the creation of all of the ad hoc international criminal tribunals.

Germany made a proposal, which was much more expansive than the proposal by France. The German delegation proposed that the ICC should have jurisdiction through several methods: 1) a Security Council referral; 2) a complaint lodged by an interested State; or 3), if the Prosecutor concludes that there is a sufficient basis for prosecution. [FN29] Furthermore, for their proposal to be successful the German delegation believed it was *146 necessary that all parties to the ICC Statute must accept the inherent jurisdiction of the Court with respect to all of its core crimes. [FN30]

As might be evident, the role of the Security Council in respect to the ICC continues to be hotly debated, but the proposals have turned more on subtly than anything else. Throughout the debate, the two sides laid there anchors either upon the stance initiated by the ILC Draft Statute, and furthered by the five permanent members of the Security Council ("P5"), that the Security Council must consent as a precondition to the ICC's jurisdiction, or upon the broader belief that the Security Council was merely one of several methods in which a matter could be referred to the Court. Interestingly, it was Singapore, one of the smallest nations, that put forth the proposal that has now gained the favor of the majority of States including the United Kingdom [FN31] (and possibly soon the United States [FN32]). The compromise, appropriately dubbed, "The Singapore Proposal", states that "no investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect." [FN33] Here the importance of subtle changes is extremely evident. Under the P5 proposals the ICC could only have jurisdiction over a matter referred to it by the Security Council. However, under the Charter of the United Nations, any declaration by the Security Council can be vetoed by the single vote of any of its permanent members. [FN34] Thus, if the United States, United Kingdom, France, China, or the Russian Federation did not want the matter to be referred to the ICC, any one of them could prevent it with a simple veto. However, under the Singapore Proposal, the ICC has the ability to act not once the Security Council so declares, but rather until the Security Council declares otherwise. Therefore, under the Singapore Proposal, a single vote of a permanent member would not be enough to rescind the ICC's jurisdiction, rather a single vote would be all that was required to prevent the Security Council's

interference.

It should be pointed out that in the debate over Security Council referrals, most States have held strong to the belief that "the statute should give to the Security Council the explicit competence to submit to the Court situations involving threats to or breaches of international peace and security and acts of aggression." [FN35] But, as Germany stated on the first day *147 of the August 1997 PrepCom, "it would be in our view quite inappropriate if the Security Council could submit individual cases or prevent the investigation and prosecution of cases involving such situations." [FN36] The distinction here by Germany is that the Security Council should be given the ability to refer matters, issues, or situations to the Court, but that it was the Court's responsibility to choose individual cases that arise out of those broader referrals.

In the beginning of the final PrepCom in March 1998, the ILC Draft Statute was replaced by a newer draft known as the Zutphen Draft (or "Zutphen text"). However, by the end of the PrepCom much of the text had been further revised, including the provisions relating to the role of the Security Council in the consent and triggering process. Regarding aggression there was still much disagreement over an acceptable definition and trigger mechanism, however, in relation to all of the core crimes, only two options remain which explain the Security Council's role in the triggering process. Both options were inserted as Article 10 paragraph 3. [FN37] The first option stated that no prosecution could be commenced if the Security Council decided there was a breach of international peace and security, unless the Security Council consented to such prosecution. [FN38] On the other hand, the second option reflected the input of the Singapore Proposal, allowing the ICC to act without first requiring the consent of the Security Council. The second proposal also stated that although the Security Council could determine that a prosecution should not proceed, it required that the Security Council act within a reasonable amount of time, [FN39] and if it failed to act within that time, the ICC could proceed without the Security Council's consent. [FN40]

B. Interested States

As stated in the previous section, under a proposal submitted by Germany during the August 1997 PrepCom, the Court could exercise jurisdiction not only when the matter is referred to the Court by the Security Council, but also if the complaint is lodged by an interested State, or by the Prosecutor. [FN41] Although the role of the Security Council is possibly the most potentially crippling portion of the Court's consent process, easily the least controversial method occurs when the interested *148 States consent to the Court's personal jurisdiction. But who are the interested States and how many are needed to consent?

Initially, States such as France proposed that the interested States could be: 1) the State on whose territory the acts were committed; 2) the State of the nationality of the victim of those acts; and 3), the State of the nationality of the person suspected of committing the acts. [FN42] France's proposal was based upon the jurisdictional theories of territoriality, passive personality, and nationality, respectively. But soon it became evident that other States might also warrant sufficient concern over the incident to require their consent to the ICC's jurisdiction. The Russian Federation, among other States, believed that custody should also be added as a basis of necessary State consent. [FN43] Custody, being defined as, "the State which has custody of the suspect with respect to the crime." [FN44] Furthermore, a majority of States believed that the existence of extradition treaties might also form a basis of the

Court's jurisdiction. Thus, by the end of the August 1997 PrepCom the above four bases of jurisdiction were included in the definition of interested States, plus a fifth, "if applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purpose of prosecution, unless the request is rejected." [\[FN45\]](#)

In addition to the debate over which States could claim jurisdiction, there was also debate over how many of these interested States should be required to offer their consent before the ICC could maintain jurisdiction over the case. For these issues to be settled, some questions needed to be answered: is unanimous consent required, do only one or two States need to consent, or should the Court have inherent jurisdiction over the core crimes? Obviously, if every State consented to the Court's jurisdiction then there would be no problem for the Court. Such broad consent, however, is not always the likely scenario. Thus, there was great debate over the minimum number of interested States that were required to consent for the Court to exercise jurisdiction. There was universal agreement that if consensual jurisdiction was utilized as the basis of the Court's jurisdiction, it would be necessary to require more than one concerned State to consent, but how many more was undecided. Israel and France, for example, believed it necessary for the complainant State, the custodial State, and the State of nationality of the accused, to all consent in order for the Court to exercise its jurisdiction. [\[FN46\]](#) As explained by the *149 delegate from Niger, this proposal would seem the most realistic because it would enable the investigation to be much more efficient than if the Court were acting without the consent, or against the wishes, of one of those interested parties. [\[FN47\]](#) On the other hand, many other States believed that such broad requirements would severely hinder prosecution at the most formative stage of the proceedings. These States have advocated that it should be up to the Office of the Prosecutor [\[FN48\]](#) to decide whether the Court should or should not exercise its jurisdiction over a case, that the Court should have inherent jurisdiction over its cases.

Before continuing, an important question must be addressed: What exactly is inherent jurisdiction? Simply put, the theory of inherent jurisdiction means that by ratifying the ICC's Statute, States at that point have accepted the automatic jurisdiction of the Court over all of the core crimes, thus obviating the need to obtain further individual consent of all the interested States. As stated by the representative of Ireland, "we should rely on an old-fashioned concept, the concept of justice." [\[FN49\]](#) Essentially, the representative of Ireland proffered that by requiring States accept the inherent jurisdiction of the ICC, as a condition to signing the treaty, States would be prevented from allowing political considerations to mar traditional notions of justice. Therefore, any State which would want the protection of the Court, would also itself have to be subject to the jurisdiction of the Court. Although many States seemed to believe that inherent jurisdiction might make for the most effective court, political concerns prevented them from fully supporting the idea. David Scheffer, United States Ambassador-at-large for War Crimes, explained the United States' position.

There is a reality, and the reality is that the United States is a global military power and presence. Other countries are not. We are. Our forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring our American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power. [\[FN50\]](#)

*150 In Ambassador Scheffer's remarks, he highlighted an important problem for these negotiations: supposedly neutral legal matters were completely colored by political concerns. Thus, often times the debate over appropriate preconditions to jurisdiction turned on which core crimes were in question. As the United States pointed out, no one was arguing for inherent jurisdiction over all of the core crimes, but with respect to genocide, crimes against humanity and war crimes, there was at least some basis for discussion over whether inherent jurisdiction could be involved. [FN51] The Russian Federation proposed that only genocide should be held to the standard of inherent jurisdiction, whereas ICC jurisdiction over the other core crimes needed the consent of the appropriate interested States. [FN52] Furthermore, the United States pointed out that the crime of aggression had to be viewed differently from the other core crimes assuming it was included in the Statute at all because jurisdiction over aggression could never be based upon inherent jurisdiction without the precondition of a Security Council referral; to ignore the Security Council in relation to aggression would be in direct conflict with Chapter VII of the Charter of the United Nations which grants the Security Council the power to determine when a breach of international peace and security has occurred, and what actions should be taken to resolve the situation. [FN53] Even Germany, one of staunchest supporters of the idea of a fully independent ICC, divided the crimes as follows:

the Court should have inherent (automatic) jurisdiction over the three core crimes of genocide, crimes against humanity and war crimes, so that the Court can exercise, if necessary, concurrent jurisdiction with each State party. The Court should also have inherent jurisdiction with regard to the crime of aggression once the Security Council . . . has first determined that a State has committed an act of aggression. [FN54]

By the time the final PrepCom concluded in April 1998, it had become apparent that the only crime that stood a good chance of being characterized as a crime over which the Court had inherent jurisdiction was the crime of genocide. This is because of all of the core crimes, only the definition used for genocide has achieved the benchmark of customary international law. Aggression has never been defined in a prospective manner that States can agree upon, and although war crimes and crimes *151 against humanity have been sufficiently defined by the Geneva Conventions [FN55] and its protocols, [FN56] the drafters of the ICC Statute felt it necessary to modernize the language of those conventions when including them into the ICC Statute. By modernizing the definitions of war crimes and crimes against humanity, as opposed to merely incorporating the language already accepted as customary international law, it becomes harder to reach the universal consensus necessary for States to agree to accept inherent jurisdiction over those crimes. The final text leading up to the diplomatic conference leaves many of these issues greatly unresolved. The five interested States defined earlier, were all included in the text, but it was still unclear whether all or none would have to consent as a precondition to the Court's jurisdiction. [FN57]

C. Prosecutorial Referral

The next method of trigger mechanism under consideration was that of a prosecutorial referral. Initially, the Draft Statute did not provide for this type of trigger mechanism. According to the ILC Draft the prosecutor could only act for the purpose of investigation or otherwise, once the issue had been referred to it by an interested State or the Security Council. [FN58] However, according to the Zutphen

text and its revisions, the Court may have jurisdiction with respect to its core crimes if the matter is brought by the Prosecutor in accordance with information received through its own investigations. [FN59] Utilizing prosecutorial referrals as a trigger mechanism could only work with regard to crimes over which the Court maintained inherent jurisdiction, or over crimes which the situation and not merely individual defendants, had already been consented and directed to the Court by either the Security Council or the necessary States. Furthermore, for States to agree to incorporate the Prosecutor as a trigger mechanism in the ICC's statute, their decision will be highly dependent on what further agreement can be made regarding the Prosecutor's ability to initiate its own investigations. Most States will not agree to a trigger mechanism that would provide for a Prosecutor with unfettered discretion.

*152 III. Investigation

As is the case in any fair trial, either domestic or international, before a suspect can be indicted by the Court an investigation must ensue which concludes that sufficient evidence exists to show that a trial of the accused is warranted. Domestically, investigations are initiated by the local governments through the prosecutor's office. Since the prosecutor is an agent of the State, the State does not attempt to prevent or hinder the investigations. Internationally, this procedure is not so straightforward. The Prosecutor of the ICC will not be working for the States, but for an independent court. For an investigation to succeed a prosecutor will need the consent of the States to enter their territory and pursue its investigations. Sometimes States will cooperate, and sometimes States will not. Thus, for investigations to be effective, the ICC Statute must include provisions detailing what authorization the Prosecutor has in regards to investigation and prosecution.

A. The Role of the Prosecutor

According to the 1994 ILC Draft Statute, the Prosecutor was authorized to initiate investigations whenever a State party to the ICC Statute, or the Security Council, issues a complaint requesting the Prosecutor take action. [FN60] Furthermore, for the purposes of its investigation the Prosecutor could "request the presence of and question suspects, victims, and witnesses; collect documentary and other evidence; conduct on site investigations; take necessary measures to ensure the confidentiality of information or the protection of any person; as appropriate, seek the cooperation of any State or the United Nations." [FN61]

The assumption implicit in the Draft Statute is that any State requesting an investigation will cooperate with the Prosecutor, and then so too will any State upon whose territory the Prosecutor needed to search. However, neither the assumption of the drafters, nor the language itself, was acceptable to most States. Some States believed that this language would require the Prosecutor to act like a blind monkey, ignorant of the food blatantly in front of it, until another State was kind enough to bring the atrocities to the monkey's attention. Other States believed that a Prosecutor with the authority to investigate without State consent would lead to overreaching and inappropriate investigations, which could eventually turn into witch hunts. Thus, much debate has ensued over what type of investigations the Prosecutor can and should be allowed to undertake, and furthermore, what end the investigations should seek.

The delegations of Canada, New Zealand and Samoa issued a joint proposal suggesting the necessity that the Prosecutor "take *153 appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests of victims and

witnesses, including age, gender, and health, and take into account the nature of the crimes [particularly][above all] where it involves sexual and gender violence." [\[FN62\]](#)

Furthermore, the participants of an inter-sessional meeting held in Vienna, in April 1998, thought it important to highlight that the Court should "not only ascertain the truth but also provide effective justice for victims, their families, and assigns," [\[FN63\]](#) since victims are often survivors, and even when not, victims are not merely the dead.

The Zutphen text and its revisions have ended up including similar provisions as the ILC Draft Statute, but with numerous hurdles which the Prosecutor would first need to overcome, such as notifying the States prior to investigation that an investigation was to commence, and allowing States one month to challenge the appropriateness of the Prosecutor's actions. [\[FN64\]](#) Regardless, such provisions are almost all lacking consensus; they are generally only favored by States that wish to hinder the independence of the Court. Many other States believe that the Prosecutor should be able to investigate whenever there is a need, and not merely when all States consent. Much of this debate has also revolved around the appropriateness of including into the text of the Statute one of two terms: *ex officio* or *proprio motu*.

Proponents of the idea of a prosecutor with the authority to initiate investigation on its own accord, tend to refer to the Prosecutor as acting either *ex officio* or *proprio motu*. Germany, for example, stated that "the Prosecutor of the Court should have the competence to initiate investigations *ex officio*, on his or her own initiative, in any case where the Court has jurisdiction. . .". [\[FN65\]](#) Furthermore, at the inter-sessional meeting in Vienna mentioned above, the participants entreated "that the Court be led by a fully independent *ex officio* prosecutor, that can gather information from any source." [\[FN66\]](#) The implication being proffered is that a prosecutor acting *ex officio* would have the authority to take any action required in order to proceed with a thorough and effective investigation.

*154 Article 46 of the Zutphen text states: "The Prosecutor [may] [[[shall] initiate investigations [ex officio][*proprio motu*] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]." [\[FN67\]](#) The structure of the Zutphen text implies that any text in brackets represents one of two things: that the text has not yet been agreed upon, or that it has yet to be determined which of two or more alternatives should be used as the proper language for that portion of the phrase. Regarding the *ex officio* v. *proprio motu* debate, the Zutphen text lays the terms side by side in brackets, implying that one or the other should be chosen. In the debates many States have used the terms as if they were synonymous, but if the terms meant the same thing, then this choice is merely a petty debate over writing style. Obviously, it seems odd at this stage of the negotiations, for States to introduce and quibble over synonymous language.

Although most States use the term *ex officio* when referring to the type of independent prosecutor which they seek, a growing number of States have been substituting *ex officio* with the term *proprio motu*. A translation of the two terms in their context indicates that *ex officio* refers to the duties arising out of "the office" of the Prosecutor, whereas *proprio motu* refers to the duties particular to the individual prosecutor - this is a monumental difference. [\[FN68\]](#) To put it another way, an *ex officio* prosecutor is empowered with the duties granted to all of the prosecutors in the Office of the Prosecutor combined, whereas a *proprio motu* prosecutor is confined only to his respective duties.

Understanding the different meanings of these terms of art clarifies why the United States tends to prefer proprio motu whereas Germany tends to prefer ex officio; particularly in light of United States sentiment that it is more concerned with the possibility of an unfettered prosecutor, than is Germany. [FN69] However, regardless which term, if either, is chosen, many States have made it clear that they believe even an independent Prosecutor's powers should not proceed without some sort of check and balancing system. To rectify this omission, the idea of a Pre-Trial Chamber was born.

***155 B. The Role of the Pre-Trial Chamber**

During the August 1997 PrepCom, while States were arguing over the Court's trigger mechanisms, and particularly whether the Prosecutor itself should be empowered to initiate investigations on its own accord and thus trigger the processes of the Court, the belief emerged that even a fully independent Prosecutor needed some sort of check to keep its acts from getting out of control. To combat this fear, the delegate of France proposed the creation of an organ that would supervise the jurisdictional matters of the Court. [FN70] The French delegate expressed the belief that the Prosecutor needed to be supervised from the very outset of the proceedings. [FN71] Furthermore, the delegate stated that a chambre d'examen of some sort could strike a balance between the accused and the accusation, thereby creating an office separate from the Prosecutor that could protect the rights of the accused, and prevent proceedings from being opened at too early a stage. [FN72]

Initially, France's proposal met with both partial support and partial dissent. The Canadian delegate, for example, agreed that a supervisory chamber could be useful, but only to insure the equality of arms, and not to interfere with the independence of the Prosecutor. [FN73] Ireland's delegate expressed his support for a chamber that would act as a check on the unmonitored ex officio power of the Prosecutor, and affectionately dubbed France's proposal the X-Chamber, since there was agreement on the general concept, but not exactly what it should do or be called. [FN74] The Netherlands then countered with "Pre-Trial Magistrate" because there seemed to be agreement that the chamber would not provide an investigative judge, juge d'instruction, as allowed in civil law systems, but would act to strike a balance between the prosecution and the defense during the pre-trial stage of the proceedings. [FN75] Seeming slightly surprised at how other States had interpreted its proposal, France quickly pointed out that their idea of a pre-trial chamber was merely a suggestion for how to deal with the direct proceedings of a prosecutor who intends to conduct investigations within a State; the implication was not meant to be any more or any less. [FN76] Regardless, the idea was alive that even though no one was quite sure how exactly such a chamber could be incorporated into the Statute, there seemed to be initial consensus that a supervisory chamber of some sort might be in order.

***156** On August 5, 1997, the United Kingdom presented the first written statement regarding the Pre-Trial Chamber. In the document, the United Kingdom summarized its view of the initial debate:

- a) Most delegations which spoke yesterday support the view that a supervising chamber could be established to hold the balance between the Prosecutor and the Defense in respect of certain aspects of the investigation at the early stages of an investigation; this would ensure equality of arms;
- b) Many delegations which spoke yesterday oppose the establishment of a chamber to

supervise the work of the Prosecutor, expressing the opinion that, if the Prosecutor is to be independent, a supervisory role for the Court would tend to undermine the Prosecutor's independence;

c) No clear view has emerged about whether a supervising chamber should be set up in every case; and

d) Many delegations support the view that the rights of States must be protected in cases where on-site investigations are to take place. [\[FN77\]](#)

Despite uncertainty concerning which powers the supervisory chamber would be granted, references to it were quickly added to any proposal which it might concern. In a note by the United States meant to explain a proposal it made regarding the amendment or withdrawal of an indictment, the commentary noted that the Pre-Trial Chamber was meant "to balance the equality of arms between the prosecution and the defense." [\[FN78\]](#)

When the August 1997 PrepCom concluded, the idea of a Pre-Trial Chamber was added to the official text of the proposed Statute, however, the text was not entirely what was originally proposed by France, nor what it will likely be in the end. According to the August 1997 official text, the idea of the Pre-Trial Chamber contemplates that, "in exceptional circumstances in which a unique opportunity appears to exist for the taking or collection of evidence, the Pre-Trial Chamber may be involved in order to assure a fair trial/protect the interests of the defense." [\[FN79\]](#) The text also stressed that some States believed that "the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct," however, others believed the Pre-Trial Chamber's role should be *157 expanded to reflect "the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber." [\[FN80\]](#)

For the most part, the role of the Pre-Trial Chamber has not been revisited during the formal debate at the PrepComs. It has been reflected in the informal discussions that delegations have conducted behind the scenes, but the official text remained the same at the end of the final March-April 1998 PrepCom as at the end of the August 1997 PrepCom. [\[FN81\]](#) Although there has been little formal debate on the matter, a recent proposal submitted by Argentina and Germany received such strong support that it appears the debate is not yet over, nor is it likely that the official text will remain the same.

According to the Argentine/German proposal, when the Prosecutor is acting upon the receipt of information submitted by sources other than the Security Council or interested States, and the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, the Prosecutor "shall submit to the Pre-Trial Chamber a request for authorization" for an investigation. [\[FN82\]](#) It would then be the responsibility of the Pre-Trial Chamber to consider whether "there is a reasonable basis to proceed with an investigation," and whether "the case appears to fall within the jurisdiction of the Court." [\[FN83\]](#) A United States proposal which came out later the same day, agreed that before the Prosecutor could commence investigation of suspected criminals, "the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination." [\[FN84\]](#) If the Argentine/German proposal survives debate and ends up incorporated into the text of the Statute, then an effective means will have been created to allow the Prosecutor to act as a third trigger mechanism for the Court.

Furthermore, by incorporating the Argentine/German proposal, the Prosecutor would be entitled to initiate its own investigations, but at the same time the Pre-Trial Chamber would be able to protect the rights of the defense and balance the independence of the Prosecutor with the sovereignty of the States.

IV. Complementarity

Underlying every case brought before an international tribunal is the tension between domestic and international claims over the same offenses. This tension exists because of the universal agreement over the importance *158 of the prevention of double jeopardy, or non bis in idem, [FN85] that no person should be twice tried for the same crime. To rectify this potential problem, each of the ad hoc international military and criminal tribunals were granted supremacy over national courts' jurisdiction. In Nuremberg and Tokyo supremacy was accepted to a great extent because the tribunals were set up by the undisputed victors of World War II. [FN86] In the former Yugoslavia and Rwanda the tribunals were again granted supremacy over domestic jurisdiction, this time not merely because of victors' will, but rather to maintain and restore international peace and security to the regions. The decision to implement supremacy clauses in all of these instances was eased by the retrospective nature of the proceedings. The tribunals were not being created to adjudicate possible future crimes, but rather over specific instances that had already occurred, and where agreement had already been reached that international tribunals would be the best forum to adjudicate such crimes.

For the creation of a permanent International Criminal Court, the retrospective nature of the prior tribunals is impossible to maintain, and must instead be replaced by a prospective outlook. Indeed, the ICC will not adjudicate crimes that have already occurred, but rather crimes that may occur after the Court has been established. [FN87] Because of this difference in perspective, most States are unwilling to relinquish their future claims to the jurisdiction of an international court, especially when their domestic judicial systems are just and effective.

To balance the ICC's ability to maintain jurisdiction (when appropriate), with national concerns over the importance of State sovereignty, the concept of "complementarity" was developed. The general premise of complementarity is that the ICC would only have jurisdiction to try an individual when the respective national criminal justice systems were either unwilling or unable to try the case themselves. [FN88] To paraphrase the delegate of Korea, the core of the principle of jurisdiction is to find a nexus between the ICC and the national courts; it should not be meant to define supremacy, but rather balance. [FN89] Although it is easy to give a general definition of complementarity, it has been much harder for States to agree on a specific definition that should be included in the Statute of the ICC.

*159 The ILC Draft Statute proposed that the ICC could not have jurisdiction when the crime in question:

has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded; is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or is not of such gravity to justify further action by the Court. [FN90]

However, the ILC definition was considered to be much too broad.

At the beginning of the August 1997 PrepCom, Germany entreated, "the Court itself should have the power to determine whether in a given situation national trial procedures are not available or may be ineffective." [FN91] Germany, joined by Canada, then issued a proposal in which they suggested that a case would be inadmissible if "the case is under investigation or prosecution by a State which has or may have jurisdiction over the case, and the investigation or prosecution is being diligently undertaken," or the diligent investigation resulted in the decision not to proceed to prosecution, based on "well-founded . . . knowledge of all relevant facts." [FN92]

Italy proposed that in making a determination on admissibility, the ICC should be entitled to consider whether:

there has been and continues to be unreasonable delay in the conduct of national investigations or proceedings, or . . . the said investigations or proceedings . . . were or are designed to shield the accused from international criminal responsibility, or were or are conducted with full respect for the fundamental rights of the accused, and . . . the case was, or is, diligently prosecuted. [FN93]

The United States added that the burden of proof should be vented onto the ICC, however, a dual burden is also on the States to handle the case properly. [FN94]

During the formal working groups some States proposed the inclusion of the term, good faith, in the explanation of complementarity. But since *160 good faith was not a term utilized by, or familiar to, most civil law nations, this too was rejected. A rolling text issued on the subject, stated that the case would be admissible to the ICC if the relevant national criminal justice systems were either "unable or unwilling to carry out effectively the investigation or prosecution." [FN95] The text then footnoted that phrase "unable or unwilling" with the comment that "these terms attempt to reflect the rationale underlying the issue of complementarity, and are suggested in the absence of any other generally accepted phrase." [FN96] Ironically, however, this phrase stuck, and was included in the next rolling text [FN97] and then in the final official text of the August 1997 PrepCom, [FN98] with only a slight modification the ICC has jurisdiction over the case when "the State is unwilling or unable genuinely to carry out the investigation or prosecution." [FN99]

Aspects of the complementarity principle surfaces in numerous sections of the Statute of the ICC. However, the simple definition of complementarity as laid out by the Zutphen Draft and its revisions, was as follows:

1. Having regard to paragraph 3 of the preamble, the Court shall determine that a case is inadmissible where:
 - a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - b) the case has been investigated by a State which has jurisdiction over it and the State

has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 13; and

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

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

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

b) there has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and

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 partial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. [\[FN100\]](#)

Heading into the Diplomatic Conference in Rome, there appears to be consensus that this definition of complementarity will survive any further negotiations. On the other hand, a minority of delegations still hold to the belief that the Court should not be granted complementary jurisdiction at all, and that the Court "has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it." [\[FN101\]](#) However, as the delegate of Austria pointed out, "complementarity constitutes a guiding spirit," [\[FN102\]](#) and as the delegate of Ireland concluded, complementarity might not be the strongest grounds for the Court to rest on, but it might be the best. [\[FN103\]](#)

V. Punishment and Reparations

Thus far this paper has dealt primarily with the processes of the ICC leading up to a trial. However, underlying the entire process including the trial itself, is what actions the Court should take once it has determined that ***162** a person was guilty of the crimes with which he or she was charged. Is the purpose of this court merely to punish the world's most egregious international criminals, or to offer satisfaction and redress to their victims as well? To answer this final question it is necessary to examine the possible punishments that the Court may be empowered to impose.

A. Applicable Penalties

The ILC draft appears to have assumed that the penalties phase of the proceedings would be quite simple and up-front. The ILC Draft stated that the Court could impose a life sentence of imprisonment or imprisonment for a specified number of years, and/or a fine. [FN104] The fines could be transferred by the Court to: the Registrar, "to defray the costs of the trial"; [FN105] a State whose nationals were the victims of the crime in question; [FN106] and/or a trust fund "established by the secretary-general of the United Nations for the benefit of victims of crime." [FN107] Furthermore, the ILC Draft proposed that in determining the length of sentence or amount of fine to be imposed, the laws of the passive personality State, the territorial State, and the custodial State could all be taken under consideration. [FN108] Although clear and concise, this draft had many holes.

The most glaring missing piece was the death penalty. Thus, upon much political pressure the death penalty was added, at least for the time being, into the official text as another possible penalty. The new text explained that the Court could impose the death penalty, "as an option, in case of aggravating circumstances and when the Trial Chamber finds it necessary in the light of the gravity of the crime, the number of victims and the severity of the damage." [FN109] However, the provision on the death penalty was immediately placed in brackets, to indicate that it needed further debate. After that, it was purposefully skipped over in the formal debates, and left completely untouched leading up to Rome, except for one minor change. The text relating to the death penalty was changed in the Zutphen text to read as the first of two options, then the second option merely stated, "No provision on death penalty." [FN110] Apparently the lines had been drawn, but it was recognized that only the plenipotentiaries meeting in Rome were the appropriate figures to attempt some sort of compromise.

*163 Another aspect that many felt was missing from the ILC Draft was a provision relating to minors. It was proposed that the ILC Draft should be amended to include a provision where anyone who committed the crimes between the ages of 13 and 18 could not be sentenced for more than 20 years of imprisonment. [FN111] However, that same text also provided that the Court could determine that the circumstances of the case could allow the Court to take exception and ignore age as a mitigating circumstance, allowing minors to be sentenced as adults. [FN112] This second provision met with much opposition, particularly from non-governmental organizations and the UN Committee on the Rights of the Child. The Zutphen text removed the second provision, and stated that no person who committed a core crime while under the age of 18 could be sentenced for more than 20 years of imprisonment. [FN113]

Debate also ensued over the applicability of national legal standards to the imposition of penalties, but the text remained essentially the same heading into Rome. One provision was added in brackets, "In cases where national law does not regulate a specific crime, the Court will apply penalties ascribed to analogous crimes in the same national law." [FN114] Regardless, the entire article has been footnoted to say that "the view was held that this kind of provision should be avoided altogether." [FN115] Therefore, it seems likely that the Court will be allowed to set its own international standards for appropriate penalties, and not be limited or hindered by domestic norms. However, "A sentence may be appealed, in accordance with the Rules, by the Prosecutor or the convicted person on the ground of [significant] disproportion between the crime and the sentence." [FN116]

Finally, during the March-April 1998 PrepCom, victim's groups lobbied for a reordering of the listing of the types of fines that could be collected by the Court. The delegate of France seemed to agree with the non-governmental organizations and then argued themselves that the listing of fines should be rearranged to reflect the difference in the importance of each type of fine. The final official text of the March-April 1998 PrepCom stated that fines and possibly assets collected by the Court could be transferred to one or more of the following: a trust fund, the State whose nationals were victims of the crime in question, and the Registrar. [\[FN117\]](#) Also added to the text in brackets was a point stressing that the listing was in an *164 order of priority. [\[FN118\]](#) Furthermore, a footnote stressed that it was suggested that there may be other options other than the first two listed, "as to the manner in which fines or assets collected by the Court could be distributed to victims." [\[FN119\]](#)

B. Reparations

The ILC Draft Statute did not include any provisions for reparations. The closest the draft came to including provisions on reparations were the references to how the fines collected by the Court could be distributed. [\[FN120\]](#) However, even there, the money was not going directly to victims, their families or assigns, but rather to intermediary bodies, which could then utilize the money in an undefined manner. To rectify this omission, delegations suggested two areas where reparations could be incorporated into the statute: first, as another applicable penalty; and second, as a separate article dealing specifically with compensation to victims.

The formal debate over reparations was supposed to occur during the December 1997 and March-April 1998 PrepComs. Although formal debate did occur to some extent, most of the negotiations over reparations occurred during informal, off the record, discussions and working groups. However, without breaching any bonds of secrecy, it is still quite possible to explain what developed through a look at the few official texts, which did surface on the subject.

In the official text on the Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997, [\[FN121\]](#) the Working Group on Penalties recommended that under the Applicable Penalties article, a fifth penalty should be included, "Appropriate forms of reparation." The suggestion meant that besides imprisonment, fines, and possibly the death penalty, the Court should also be able to impose on the convicted person the responsibility of paying reparations to victims, their families or assigns. However, there was still much disagreement on not only whether reparations should even be considered a penalty, but also if it were, what wording should be used. The suggestion of the working group read as follows: "[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State] [or reparation through any other international arrangement] appropriate forms of reparation [[including] [such as] restitution, compensation and rehabilitation]]." [\[FN122\]](#) This language was then inserted into *165 the Zutphen text under the article on penalties and will be debated more in Rome. [\[FN123\]](#) However, not everyone was convinced that reparations were a penalty, nor was everyone convinced that that brief explanation was sufficient in explaining what type of reparations could be granted to victims. Thus, another article was inserted into the Zutphen text, which did not exist in the ILC Draft, Compensation to Victims. [\[FN124\]](#)

The Zutphen text offered three proposals regarding Compensation to Victims. The first proposal granted the Court with the binding authority to declare the criminal liability of the person convicted, but

granted States the competence to determine issues of reparations. [\[FN125\]](#) The second proposal stated that where necessary,

the Trial Chamber shall also determine the scope and extent of the victimization and establish principles relating to compensation for damage caused to the victims and to restitution of property unlawfully acquired by the person convicted, in order to allow victims to rely on that judgment for the pursuit of appropriate forms of reparations, such as restitution, compensation and rehabilitation either in national courts or through their governments, in accordance with national law. [\[FN126\]](#)

Essentially, this proposal allowed the Court to make recommendations as to what it felt domestic courts or governments should award, but did not bind the States to its judgment. Under the third proposal, it was suggested that the Court itself should be able to order a convicted individual to issue both pecuniary and non-pecuniary forms of reparations. [\[FN127\]](#) As could be assumed about any text with so many different proposals, the text included in the Zutphen Draft did not last very long before being modified.

On February 10, 1998, a joint proposal issued by France and the United Kingdom shrunk the article into two proposals. The first, in very broad language, granted the Court the ability to order both individuals and States to pay reparations to victims, their families and assigns. [\[FN128\]](#) The second, suggested that the Court could only order a "monetary award, or any other award by way of reparations," against an individual, but not *166 against a State. [\[FN129\]](#) Furthermore, the monetary award could be comprised of a punitive element, a compensatory element, or both, and the reparations could include an order for restitution of property or "any other order which the Court considers appropriate." [\[FN130\]](#) Both proposals had their merits and pitfalls. The first proposal allowed the Court to essentially order whatever forms of reparations it considered appropriate, both against an individual and a State, but did not allow for monetary awards, which is possibly the easiest form of compensation that could be granted. On the other hand, the second proposal allowed for monetary awards, but not from States, which are the most likely and effective source of monetary awards and other forms of reparations.

A rolling text issued on March 23, 1998 by the Working Group on Procedures, combined the two proposals submitted by France and the United Kingdom, into one text incorporating the better elements of both, but unfortunately most of the text was still in brackets indicating lack of consensus. In the rolling text there was agreement that the Court should be authorized to make an order directly against a convicted individual for an appropriate form of reparations, including restitution, compensation and rehabilitation. [\[FN131\]](#) The rolling text also seemed to indicate that there had been agreement that monetary awards of reparations could be composed by both an exemplary element and a compensatory element, or both. [\[FN132\]](#) However, it later turned out that such agreement had not in fact been met. [\[FN133\]](#) Furthermore, included in brackets, and thus indicating a lack of agreement, were references to the Court being able to "recommend that States grant an appropriate form of reparations to, or in respect of, victims . . ." [\[FN134\]](#)

The final official text of the March-April 1998 PrepCom, mirrored most of the language of the March 23, 1998 rolling text. It included a footnote explaining that the references to appropriate reparations was "to be granted not only to victims but also to others such as the victim's families and successors (in French, "ayant-droit"). [\[FN135\]](#) The official text also explained, albeit in brackets, that orders of

reparations made by the Court against States could only be made "[if the convicted person is unable to do so himself/herself; [[[and . . . the convicted person was, in committing the offense, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]]]." [\[FN136\]](#) It appears that much of the *167 debate that will continue with regard to compensation to victims, will be centered on whether a monetary award could also be included as a form of reparations, whether the ICC should compel States to make reparations, and whether reparations should be considered a penalty, a separate form of compensation, or both.

VI. Conclusion

There is cautious-optimism leading into the Diplomatic Conference in Rome. Over 1700 sets of brackets remain in the proposed text, all of which must be resolved before the treaty can be signed. Although many people believe compromise can be met in time, almost as many wonder what the cost of compromise will be. Still others are concerned that five weeks in Rome will not be enough to hammer out the differences, and future conferences will have to be held, possibly undermining support for the creation of an International Criminal Court.

Much of the uncertainty exists regarding the outcome of the negotiations because delegations are unsure where to draw the bottom line in their compromises. Some scholars already believe that a fatal mistake was incurred in the beginning of the PrepComs when States decided that the Statute should not merely be the procedural creation of a court, but also a redefinition and modernization of fundamental concepts of international law, such as the definitions of aggression, crimes against humanity and war crimes. However, that choice was made, so heading into Rome governmental and non-governmental representatives are proceeding under the premise that both goals can be accomplished.

To help States decide what bottom line should now be drawn, many State delegations have requested that non-governmental representatives offer their advice as to what they see as a bottom line. No State wants to sign a treaty that its citizens will reject. Amnesty International has suggested sixteen fundamental principles for a "[j]ust, fair and effective International Criminal Court." [\[FN137\]](#)

*168 Whether Amnesty International has highlighted the appropriate sixteen principles is surely debatable, but at the same time their input was greatly appreciated by the delegations. The importance of State cooperation, respect for the principle of complementarity, and removal of political interference from the Court, will hopefully receive unanimous acceptance. It is beyond dispute that for the creation of the Court to be considered a success, the ICC must be an independent, impartial, just and effective, permanent judicial institution.

This paper has attempted to show the progression of the negotiations on certain key elements concerning the creation of the permanent International Criminal Court. This attempt is intended to help explain the creation of, and how close we are to, mankind's greatest effort towards the eradication of impunity. However, one of the biggest problems the negotiations and the Court might face, is the basic redefinition of the core crimes. It appears that most States are unwilling to sign onto a treaty that does not explicitly lay out culpability. On the other hand, just as failing to modernize the core crimes would have allowed these same States to limit the jurisdiction of the Court to only historical frameworks, not allowing the definitions to be reexamined in the future will limit the Court solely to the notions of today.

In 1928 no one ever dreamt of genocide. In 1948 no one equated rape with a crime against humanity. What understandings will the new millennium bring? Regardless of all of the obstacles we need a court that can offer public acknowledgment of international crimes. To do so, this Court must uphold and imbue the evolving face of international *169 criminal law, humanitarian law and human rights. Through a permanent International Criminal Court, not only will the world's most egregious international criminals be relieved of their impunity, but their victims will be allowed a vehicle for satisfaction and redress.

[FN1]. This article was written in June 1998, just prior to the Rome Diplomatic Conference, which completed and adopted the Rome Statute for an International Criminal Court. This article discusses the expectations heading into the final diplomatic conference, and examines the statutory debate, which had been undertaken prior to Rome.

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[FN1]. Report of the International Law Commission on the Work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, U.N. Doc A/49/355, Sept. 1, 1994.

[FN2]. Although only State representatives have an official place in the negotiations, participating on one level or another are representatives of various subsidiary organizations of the United Nations such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as other international and non-governmental organizations such as the International Committee of the Red Cross, UNICEF, Amnesty International, Redress, and the Lawyer's Committee for Human Rights. Furthermore, this is by no means an exhaustive list of the organizations involved in the PrepComs. For example, working under the umbrella organization of the Coalition for an International Criminal Court, over 450 non-governmental organizations have lobbied for the inclusion or exclusion of numerous proposals relating to these debates.

[FN3]. See generally, "Zutphen Draft," U.N. Doc. A/AC.249/L.13, (1998).

[FN4]. Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/2/Add.1 (1988).

[FN5]. Roy S. Lee, Director, Codifications, Office of Legal Affairs, United Nations, addressing the American Branch of the International Bar Association on Nov. 7, 1997 at its International Law Weekend'97 during the panel "The Establishment of a Permanent International Criminal Court: The Need, The Possibilities and the Legal, Political and Practical Realities."

[FN6]. Richard C. Hottelet, A Forum for International Justice, The Christian Sci. Monitor, Aug. 26,

1997, p. 18.

[FN7]. Dekar Declaration for the Establishment of the International Criminal Court in 1998, Dakar, 6 Feb. 1998; European Parliament Resolution on the International Criminal Court, Mar. 12, 1998.

[FN8]. See generally, Noel Malcolm, *Bosnia: A Short History* (1996).

[FN9]. See generally, Gerard Prunier, *The Rwandan Crisis: History of a Genocide* (1995).

[FN10]. Professor M. Cherif Bassiouni, Vice Chair, UN Preparatory Committee of the Establishment of a Permanent International Criminal Court, addressing the American Branch of the International Bar Association on Nov. 7, 1997 at its International Law Weekend'97 during the panel "The Establishment of a Permanent International Criminal Court: The Need, The Possibilities and the Legal, Political and Practical Realities."

[FN11]. See supra note 3.

[FN12]. Art. 20, U.N. DOC. A/49/355.

[FN13]. Many conclusions such as this one are based not upon formal written proposals but rather on oral interventions or informal comments. However, when possible, citations to written proposals will be noted.

[FN14]. This paper will not discuss the specific definitional debate still undergoing over the Court's core crimes; so much remains unresolved that any fair discussion would require a separate paper of its own.

[FN15]. M.N. Shaw, *INTERNATIONAL LAW* 401 (1995). See *The Lotus Case* (France v. Turkey), P.C.I.J., Series A, no. 10, 1927, 4 I.L.R. 153.

[FN16]. Shaw, supra note 15, at 404. See *Nationality Decrees in Tunis and Morocco Case*, P.C.I.J., Series B, no. 4, 1923, 2 I.L.R. 349 ("The question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question, it depends upon the development of international relations. Thus in the present state of international law, questions of nationality are, in the opinion of this court, in principle within this reserved domain."). The problem is that there is no consistent, accepted definition of nationality in international law and only the conflicting descriptions of the different municipal laws of States, Shaw, p. 404. Civil law States tend to claim jurisdiction based on all crimes committed by their nationals, whereas common law States tend to restrict their claims regarding their nationals abroad to only very serious crimes. *Id.* at 407. But see [The Nottebohm Case \(Liechtenstein v. Guatemala\), 1955 I.C.J. 4, 22 I.L.R. 349](#) (Nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.").

[FN17]. Shaw, supra note 15, at 408. See *The Cutting Case*, (1886), Moore, *Dig of Int'l Law*, 1906, vol. 2, p. 228.

[FN18]. Shaw, *supra* note 15, at 410. See *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347, 15 I.L.R. 91.

[FN19]. Shaw, *supra* note 15, at 411. See *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 5 (1961); *The Barbie Cases (Matter of Barbie)*, [1983] Gaz.Pal.Jur. 710 (Cass.Crim. Oct. 6, 1983), 78 I.L.R. 78, 125, 136; [Demjanjuk v. Petrovsky, 776 F.2d 571 \(6th Cir. 1985\)](#), cert. denied, [475 U.S. 1016, 106 S.Ct. 1198, 89 L.Ed.2d 312 \(1986\)](#).

[FN20]. *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (1948).

[FN21]. Art. 25, U.N. DOC. A/49/355.

[FN22]. Art. 23(2), U.N. DOC. A/49/355.

[FN23]. Art. 23(1), U.N. DOC. A/49/355.

[FN24]. Art. 21, U.N. DOC. A/49/355.

[FN25]. Art. 23(2), U.N. DOC. A/49/355.

[FN26]. Report of the United States Delegation to the Preparatory Committee of the International Criminal Court Amendments to arts. 23, 25 ("Trigger Mechanism") (Aug. 8, 1997).

[FN27]. *Id.*

[FN28]. Oral Intervention by French delegation on Aug.6, 1997.

[FN29]. Modified German draft proposal of 1996, Aug. 6, 1997.

[FN30]. *Id.*

[FN31]. Proposal by the United Kingdom of Great Britain and Northern Ireland, Trigger Mechanism, U.N. DOC. A/AC.249/WG.3/DP.1 (1998).

[FN32]. John M. Goshko, A Shift on Role of UN Court? Envoy Suggests US May Alter Demands on Proposed Tribunal, *The Wash. Post*, Mar. 18, 1998 at A2.

[FN33]. Non-Paper/WG.3/No.16, Aug. 8, 1997.

[FN34]. Article 27(3), Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevens 1153 (1945).

[FN35]. Statement by Hans-Peter Kaul, Head of the German delegation, on Aug. 4, 1997.

[FN36]. *Id.*

[FN37]. Art. 10(7), supra note 4, art. 10(7).A/CONF.183/2/Add.1.

[FN38]. Draft Statute Proposal to the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/CRP.8, (April 2, 1998); supra note 4.

[FN39]. What totals a reasonable amount of time has not yet been determined; proposals have ranged from 30 days to one year.

[FN40]. See supra note 38, A/AC.249//CRP.8, (1998); supra note 4, A/ CONF.183/2/Add.1.

[FN41]. Modified German draft proposal of 1996, Aug. 6, 1997.

[FN42]. France Amended Proposals, arts. 21, 22 of the International Law Comm'n (Non-paper/WG.3/No. 12) (Aug. 7, 1997).

[FN43]. Proposal of the Russian Federation on arts. (Non-paper/Non-Paper/WG.3/No.13, Aug. 8, 1997.WG.3/No. 13) (Aug. 8, 1997).

[FN44]. Id.

[FN45]. Id.; supra note 38; see supra note 4.

[FN46]. Oral intervention made on Aug. 7, 1997.

[FN47]. Id.

[FN48]. Also referred to as the Procuracy, see art. 12, A/49/355; art. 36, A/AC.249//L.13.

[FN49]. Oral intervention made on Aug.7, 1997.

[FN50]. Barbara Crossette, World Criminal Court Having a Painful Birth, N.Y. Times, Aug. 13, 1997, at A10 (quoting David Scheffer).

[FN51]. Oral intervention made on Aug. 7, 1997.

[FN52]. Non-Paper/WG.3/No.13.

[FN53]. Article 39, Charter of the United Nations; Oral intervention made on Aug. 7, 1997. This conclusion assumes that the Security Council would not agree to amend the Charter of the United Nations so as to comply with the Statute of the ICC.

[FN54]. Statement by Hans-Peter Kaul, Head of the German delegation, on Aug. 4, 1997.

[FN55]. 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).

[FN56]. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 16 I.L.M. 1391 (1977); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 16 I.L.M. 1442 (1977).

[FN57]. See supra note 38; see supra note 4.

[FN58]. Arts. 21, 23, and 26, A/49/355.

[FN59]. Arts. 6 and 46, A/AC.249//L.13 (1998); A/AC.249/CRP.8 (1998); arts. 6 and 12, A/CONF.183/2/Add.1.

[FN60]. Arts. 25 and 26, A/49/355.

[FN61]. Arts. 26, A/49/355 (sub-numbering omitted).

[FN62]. Non-Paper/WG.4/No.22, Aug. 14, 1997.

[FN63]. Vienna Declaration on the Establishment of a Permanent International Criminal Court, The European Law Students' Association, United Nations Centre for International Crime Prevention, Apr. 12-24, 1998, The Int'l Crim. Ct. Monitor, Issue 8, June 1998, at 12. [hereinafter Vienna Declaration].

[FN64]. Art. 47[26], A/AC.249//L.13 (1998); A/AC.249//CRP.11 (1998); Apr. 1, 1998; Art. 54, A/CONF.183/2/Add.1.

[FN65]. Statement by Hans-Peter Kaul, Head of the German delegation, on Aug. 4, 1997.

[FN66]. Vienna Declaration, supra note 63.

[FN67]. A/AC.249/L.13 (1998).

[FN68]. Black's Law Dictionary, (1990); Cassell's Latin Dictionary, Latin-English and English-Latin.

[FN69]. BetsyPisik, US Lobbies to Protect Citizens from World Court, The Wash Times, Apr. 3, 1998, at A1; James Bone, US Seeks to Limit War Crimes Court, The Times of London, Mar. 30, 1998, at 14; Statement by Hans-Peter Kaul, Head of the German delegation, on Aug. 4, 1997.

[FN70]. Oral intervention made on Aug. 4, 1997.

[FN71]. Id.

[FN72]. Id.

[\[FN73\]](#). Id.

[\[FN74\]](#). Id.

[\[FN75\]](#). Oral intervention made on Aug. 4, 1997.

[\[FN76\]](#). Id.

[\[FN77\]](#). UK Delegation, Supervision Chamber, Non-paper/WG.4/No.3 (Aug. 5, 1997).

[\[FN78\]](#). U.S. Proposal regarding amendment or withdrawal of the indictment, art. 27, para. 4 (Non-paper/WG.4/No.7) (Aug. 8, 1997).

[\[FN79\]](#). A/AC.249/L.8/Rev.1 (Aug. 14, 1997).

[\[FN80\]](#). Id.

[\[FN81\]](#). Draft Statute Proposed to the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/AC.249/CRP.11, (Apr. 1, 1998); see supra note 4.

[\[FN82\]](#). Draft Proposal by Argentina/Germany to the Preparatory Committee regarding a Pre-Trial Chamber, U.N. Doc A/AC.249/1998/WG.4/DP.35, (Mar. 25, 1998).

[\[FN83\]](#). Id.

[\[FN84\]](#). Art. 11 bis: Preliminary Rulings Regarding Admissibility, Proposal by the United States Delegation, Mar. 25, 1998.

[\[FN85\]](#). Also referred to as ne bis in idem, A/AC.249//CRP.20 (1988); art. 18, A/CONF.183/2/Add.1.

[\[FN86\]](#). Charles W. Alexander, JUSTICE AT NUERNBERG, (1946); Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS, (1992); Daniel Goldhagen, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996).

[\[FN87\]](#). Arts. 8 and 16, A/AC.249/L.13 (1998).

[\[FN88\]](#). Preamble, A/49/355.

[\[FN89\]](#). Oral intervention made on Aug. 5, 1997.

[\[FN90\]](#). Art. 35, A/49/355 (sub-numbering omitted).

[\[FN91\]](#). Statement by Hans-Peter Kaul, Head of the German delegation, on Aug.4, 1997.

[\[FN92\]](#). Non-Paper/WG.3/No.3, Aug. 5, 1997.

[\[FN93\]](#). Non-Paper/WG.3/No.4, Aug. 5, 1997.

[\[FN94\]](#). Oral intervention made on Aug. 5, 1997. It was unclear from the comment made by the US delegate whether the burden placed on States not to adulterate domestic prosecutions, should be a legal onus or a moral responsibility.

[\[FN95\]](#). Informal Consultation on art. 35, Coordinator's Draft Consolidated Text, Aug. 6, 1997.

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

[\[FN97\]](#). Informal Consultation on Article 35, Coordinator's Draft Consolidated Text, 11 Aug. 1997.

[\[FN98\]](#). A/AC.249//WG.3/CRP.2 (1997).

[\[FN99\]](#). Id.

[\[FN100\]](#). Art. 11, A/AC.249/L.13 (1998); A/AC.249/CRP.8 (1998); Art. 15, A/ CONF.183/2/Add.1.

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

[\[FN102\]](#). Oral intervention made on Aug. 6, 1997.

[\[FN103\]](#). Id.

[\[FN104\]](#). Art. 47, A/49/355.

[\[FN105\]](#). Id.

[\[FN106\]](#). Id.

[\[FN107\]](#). Id.

[\[FN108\]](#). Id.

[\[FN109\]](#). A/AC.249/CRP.1 (1997).

[\[FN110\]](#). A/AC.249/L.13 (1998).

[\[FN111\]](#). A/AC.249//CRP.1 (1997).

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

[\[FN113\]](#). Art. 68, A/AC.249//L.13, (1998).

[\[FN114\]](#). A/AC.249/CRP.13 (1998); art. 78, A/CONF.183/2/Add.1.

[\[FN115\]](#). Id.

[\[FN116\]](#). A/AC.249/WG.4/CRP.7 (1998); art. 80, A/CONF.183/2/Add.1.

[\[FN117\]](#). A/AC.249/CRP.13 (1998); art. 79, A/CONF.183/2/Add.1.

[\[FN118\]](#). Id.

[\[FN119\]](#). Id.

[\[FN120\]](#). Art. 47, A/49/355.

[\[FN121\]](#). A/AC.249/L.9/Rev.1 (1997).

[\[FN122\]](#). Id. The examples used to suggest forms of reparations (i.e. restitution, compensation and rehabilitation), as well as the definition used to explain the term "victim", were made in reference to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, ARes/40/34, Nov. 29, 1985, and the 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.2/1996/17, May 24, 1996.

[\[FN123\]](#). Art. 68, A/AC.249/L.13 (1998).

[\[FN124\]](#). Art.66, A/AC.249/L.13 (1999); Art. 73, retitled, Reparations to Victims, A/CONF.183/2/Add.1.

[\[FN125\]](#). Id.

[\[FN126\]](#). Id.

[\[FN127\]](#). Id.

[\[FN128\]](#). A/AC.249/WG.4/DP.19 (1998).

[\[FN129\]](#). Id.

[\[FN130\]](#). Id.

[\[FN131\]](#). Art. 66: Reparations to Victims, Rolling Text, Mar. 23, 1998.

[\[FN132\]](#). Id.

[\[FN133\]](#). A/AC.249/WG.4/CRP.5 (1998); A/AC.249/WG.4/CRP.5/Corr.1 (1998).

[FN134]. Art. 66: Reparations to Victims, Rolling Text, Mar. 23, 1998.

[FN135]. A/AC.249/CRP.12 (1998); art. 73, A/CONF.183/2/Add.1.

[FN136]. Id.

[FN137]. Sixteen Fundamental Principles for a Just, Fair and Effective International Criminal Court, Amnesty International, AI Index: IOR 40/12/98, (May 1998), <<http://www.igc.org/icc/>>.

1. The Court should have jurisdiction over the crime of genocide . . .
2. The Court should have jurisdiction over other crimes against humanity . . .
3. The Court should have jurisdiction over serious violation of humanitarian law in international and non-international armed conflict . . .
4. The Court must ensure justice for women . . .
5. The Court must have inherent (automatic) jurisdiction . . .
6. The Court must have the same universal jurisdiction over these crimes as any of its States parties . . .
7. The Court must have the power in all cases to determine whether it has jurisdiction and whether to exercise it without political interference from any source . . .
8. The Court should be an effective complement to national courts when these courts are unable or unwilling to bring to justice those responsible for these grave crimes . . .
9. An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate judicial scrutiny, and present search and arrest warrants and indictments to the Court for approval . . .
10. No political body, including the Security Council and States, should have the power to stop or even delay an investigation or prosecution under any circumstances whatsoever . . .
11. To ensure that justice is done, the Court must develop effective victim and witness protection programs, involving the assistance of all States parties, without prejudicing the rights of suspects and the accused . . .
12. The Court must have the power to award victims and their families reparations, including restitution, compensation and rehabilitation . . .
13. The Statute must ensure suspects and accused the right to a fair trial in accordance with the highest international standards at all stages of the proceedings . . .

14. States parties, including their courts and officials, must provide full cooperation without delay to the Court at all stages of the proceedings . . .

15. The Court should be financed by the regular UN budget, supplemented, under appropriate safeguards for its independence, by the peace-keeping budget and by a voluntary trust fund . . .

16. There should be no reservations to the Statute . . .

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