



United Nations

**United Nations
Diplomatic Conference
of Plenipotentiaries
on the Establishment
of an International Criminal Court**

Rome, 15 June – 17 July 1998

Official Records

Volume III

Reports and other documents

United Nations
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of Plenipotentiaries
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United Nations • New York, 2002

INTRODUCTORY NOTE

The *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* consists of three volumes.

Volume I contains the Rome Statute of the International Criminal Court, as corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, as well as the Final Act, with an annex containing the resolutions adopted by the Conference. The Statute entered into force on 1 July 2002. The volume also contains a complete table of contents for volumes I, II and III.

Volume II contains the relevant General Assembly resolutions, the agenda, the Rules of Procedure, the lists of delegations, Officers of the Conference and its Committees and the secretariat of the Conference, as well as the summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole.

Volume III contains, in sections A to D, the reports of the Credentials Committee, the Preparatory Committee, the Committee of the Whole and the Drafting Committee.

Volume III also contains, in section E, the documents of the plenary and, in section F, the documents of the Committee of the Whole (proposals, working papers, recommendations, reports and other documents). The documents in section F are arranged in relation to the relevant part of the draft Statute and the draft Final Act and are organized according to the body to which they were submitted and the numerical order of the document symbols. The corrigenda and addenda to the various documents have been incorporated in the respective documents and, where necessary, the footnotes have been renumbered accordingly. The numbers of the articles contained in these documents correspond to those of the draft Statute submitted by the Preparatory Committee and not those of the Rome Statute adopted by the Conference.

Volume III further contains a complete index of the documents relevant to the proceedings of the Conference, a list of documents arranged by article and a list of documents submitted by delegations.

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The summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole contained in volume II were originally circulated in mimeograph form as documents A/CONF.183/SR.1 to 9 and A/CONF.183/C.1/SR.1 to 42, respectively. They include such editorial changes as were considered necessary.

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Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

Summary Contents

Volume I

Final documents

- A. Rome Statute of the International Criminal Court
- B. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [with an annex containing the resolutions adopted by the Conference]

Volume II

Summary records of the plenary meetings and of the meetings of the Committee of the Whole

- General Assembly resolutions relative to the Conference
- List of delegations
- Officers of the Conference and its Committees
- Secretariat of the Conference
- Agenda
- Rules of Procedure
- Summary records of the plenary meetings
- Summary records of the meetings of the Committee of the Whole

Volume III

Reports and other documents

Part One. Reports of Committees

- A. Report of the Credentials Committee
- B. Report of the Preparatory Committee on the Establishment of an International Criminal Court
- C. Report of the Committee of the Whole
- D. Report of the Drafting Committee

Part Two. Proposals, reports and other documents

- E. Documents of the plenary
- F. Documents of the Committee of the Whole

Index to the documents of the Conference

List of documents arranged by article

List of documents submitted by delegations

Contents

Volume III

	<i>Page</i>
Part One. Reports of Committees	
A. Report of the Credentials Committee.....	3
B. Report of the Preparatory Committee on the Establishment of an International Criminal Court.....	5
C. Report of the Committee of the Whole.....	93
D. Report of the Drafting Committee.....	149
Part Two. Proposals, reports and other documents	
E. Documents of the plenary.....	187
1. Organization of work	187
2. Communications received by the Rome Conference	189
(a) Communications regarding consultations on the draft rules of procedure and the candidature of the Chairman of the Committee of the Whole.....	189
(b) Other communications	191
3. Non-governmental organizations	193
F. Documents of the Committee of the Whole.....	197
1. Preamble	
(a) Documents submitted by the Coordinator	197
(i) Working document	197
(ii) Recommendations/Report	199
(b) Documents submitted by delegations.....	202
2. Part 1. Establishment of the Court	
Notes contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	203
3. Part 2. Jurisdiction, admissibility and applicable law	
(a) Documents submitted by the Bureau.....	204
(i) Discussion paper	204
(ii) Proposal	212
(b) Documents submitted by the Coordinator	220
(i) Working document	220
(ii) Recommendations/Report	221
(c) Documents of the Working Group on Applicable Law	222
(i) Working documents.....	222
(ii) Recommendations/Report	223
(d) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	224

Contents

(e)	Documents submitted by delegations.....	224
4.	Part 3. General principles of criminal law	
(a)	Documents of the Working Group on General Principles of Criminal Law	250
(i)	Working documents.....	250
(ii)	Recommendations/Report	253
(b)	Documents of the Working Group on Penalties.....	257
(i)	Working document	257
(ii)	Recommendations/Report	257
(c)	Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	257
(d)	Documents submitted by delegations.....	258
5.	Part 4. Composition and administration of the Court	
(a)	Documents submitted by the Coordinator	260
(i)	Working document	260
(ii)	Recommendations/Report	263
(b)	Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	269
(c)	Documents submitted by delegations.....	269
6.	Part 5. Investigation and prosecution	
(a)	Documents of the Working Group on Procedural Matters	271
(i)	Working documents.....	271
(ii)	Recommendations/Report	277
(b)	Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	292
(c)	Documents submitted by delegations.....	293
7.	Part 6. The trial	
(a)	Documents of the Working Group on Procedural Matters	295
(i)	Working documents.....	295
(ii)	Recommendations/Report	301
(b)	Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	301
(c)	Documents submitted by delegations.....	302
8.	Part 7. Penalties	
(a)	Documents of the Working Group on Penalties.....	314
(i)	Working documents.....	314
(ii)	Recommendations/Report	315
(b)	Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee	317
(c)	Documents submitted by delegations.....	318

Contents

9.	Part 8. Appeal and review	
	(a) Documents of the Working Group on Procedural Matters	319
	(i) Working documents.....	319
	(ii) Recommendations/Report.....	320
	(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee.....	320
	(c) Documents submitted by delegations.....	321
10.	Part 9. International cooperation and judicial assistance	
	(a) Documents of the Working Group on International Cooperation and Judicial Assistance	323
	(i) Working documents.....	323
	(ii) Recommendations/Report.....	325
	(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee.....	333
	(c) Documents submitted by delegations.....	335
11.	Part 10. Enforcement	
	(a) Documents of the Working Group on Enforcement.....	338
	(i) Working documents.....	338
	(ii) Recommendations/Report.....	341
	(b) Documents submitted by delegations.....	344
12.	Part 11. Assembly of States Parties	
	(a) Documents submitted by the Coordinator	345
	(i) Working document.....	345
	(ii) Recommendations/Report.....	346
	(b) Documents submitted by delegations.....	347
13.	Part 12. Financing of the Court	
	Documents submitted by the Coordinator	347
	(i) Working document.....	347
	(ii) Recommendations/Report.....	347
14.	Part 13. Final clauses	
	(a) Documents submitted by the Coordinator	348
	(i) Working document.....	348
	(ii) Recommendations/Report.....	348
	(b) Documents submitted by delegations.....	348
15.	Final Act	
	(a) Documents submitted by the Coordinator	349
	Recommendations/Report.....	349
	(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee.....	353
	(c) Documents submitted by delegations.....	353
	Index to the documents of the Conference	355
	List of documents arranged by article	365
	List of documents submitted by delegations	389

Part One
Reports of Committees

A. Report of the Credentials Committee

DOCUMENT A/CONF.183/7

[incorporating documents A/CONF.183/7/Corr.1 and 2 of 17 July 1998]

[Original: English]
[14 July 1998]

1. At its 1st and 8th plenary meetings, on 15 and 18 June 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, in accordance with rule 4 of its rules of procedure, appointed a Credentials Committee consisting of the following States: Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.

2. The Credentials Committee met on 10 July 1998.

3. Ms. Angela Hannelore Benjamin (Dominica) was unanimously elected Chairman.

4. The Committee had before it a memorandum by the Secretary-General, dated 9 July 1998, concerning the credentials and corresponding documents of representatives to the Conference. The Legal Counsel made a statement relating to the memorandum by the Secretary-General.

5. Credentials issued by the Head of State or Government or by the Minister for Foreign Affairs, as required by rule 3 of the rules of procedure of the Conference, have been received in respect of representatives from the following 150 States: Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Central African Republic, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Thailand, the former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and

Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Zambia and Zimbabwe.

6. Credentials in the form of photocopies or faxes of credentials issued by the Head of State or Government or by the Minister for Foreign Affairs have been received from the following five States: Bosnia and Herzegovina, Chad, Honduras, Malawi and Rwanda.

7. Credentials in the form of information concerning the appointment of representatives to the Conference have been received by means of facsimile or in the form of letters or notes verbales from embassies, permanent missions to the United Nations, or other government offices or authorities from the following five States: Eritrea, Guinea-Bissau, Kyrgyzstan, Republic of Moldova and Tajikistan.

8. The Chairman recommended that the Committee accept the credentials of the representatives of all States mentioned in paragraph 5. The Chairman also recommended that the Committee accept provisionally the communications relating to the representatives listed in paragraphs 6 and 7, pending the receipt of credentials complying with rule 3 of the rules of procedure.

9. Having considered the question of the credentials of Afghanistan, the Committee decided to adopt the same approach as adopted by the Credentials Committee of the General Assembly and approved by the Assembly for its fifty-second session.

10. On the proposal of the Chairman, the Committee adopted the following draft resolution:

"The Credentials Committee,

"Having examined the credentials of the representatives to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court of the States referred to in paragraphs 5 to 7 of its report,

"Accepts, subject to the decision contained in paragraph 9 of its report, the credentials of the representatives of the States referred to in paragraph 5 of its report;

"Accepts provisionally the communications relating to the representatives of the States referred to in paragraphs 6 and 7 of its report, pending the receipt of credentials complying with rule 3 of the rules of procedure;

"Requests the representatives of States referred to in paragraphs 6 and 7 of its report to submit original formal credentials as soon as possible."

11. The draft resolution proposed by the Chairman was adopted without a vote.

A. Report of the Credentials Committee

12. The Committee further decided to authorize the Chairman, with the assistance of the secretariat, to prepare the report of the Committee and to present the report to the Conference after consultation with interested members of the Committee. The Chairman was also authorized to supplement the report of the Committee so as to reflect any additional credentials and communications received by the secretariat subsequent to the Committee's meeting.

13. The Chairman then proposed that the Committee should recommend to the plenary of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court the adoption of a draft resolution (see para. 15 below). The proposal was adopted without a vote.

14. In the light of the foregoing, the present report is submitted to the Conference.

RECOMMENDATION OF THE CREDENTIALS COMMITTEE

15. The Credentials Committee recommends to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court the adoption of the following draft resolution:

*“Credentials of representatives to the United Nations
Diplomatic Conference of Plenipotentiaries
on the Establishment of an International Criminal Court*

*“The United Nations Diplomatic Conference
of Plenipotentiaries on the Establishment of an
International Criminal Court,*

*“Having considered the report of the Credentials
Committee and the recommendation contained therein,*

*“Approves the report of the Credentials
Committee.”*

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

DOCUMENT A/CONF.183/2

[incorporating documents A/CONF.183/2/Add.1 of 14 April 1998, Add.1/Corr.1 of 26 May 1998 and Add.2/Rev.1 of 15 April 1998]

[Original: English]
[14 April 1998]

Contents

	<i>Page</i>
Introduction	11
Part One. Draft Statute for the International Criminal Court	13
PREAMBLE	13
PART 1. ESTABLISHMENT OF THE COURT	13
Article 1. The Court	13
Article 2. Relationship of the Court with the United Nations	13
Article 3. Seat of the Court	13
Article 4. Status and legal capacity	14
PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW	14
Article 5. Crimes within the jurisdiction of the Court	14
Crime of genocide	14
[Crime of aggression]	14
War crimes	15
Crimes against humanity	20
[Crimes of terrorism]	21
[Crimes against United Nations and associated personnel]	21
[Crimes involving the illicit traffic in narcotic drugs and psychotropic substances]	22
Article 6. [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]	22
[Article 7]. Preconditions to the exercise of jurisdiction	23
[Article 8]. Temporal jurisdiction	23
[Article 9]. Acceptance of the jurisdiction of the Court	23
[Article 10]. [[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court]	24
Article 11. Complaint by State	25
[Article 12]. Prosecutor	25
[Article 13]. Information submitted to the Prosecutor	26
Further option for articles 6, 7, 10 and 11	26
Article 14. Duty of the Court as to jurisdiction	27
Article 15. Issues of admissibility	27

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
[Article 16]. Preliminary rulings regarding admissibility.....	28
Article 17. Challenges to the jurisdiction of the Court or the admissibility of a case	28
Article 18. <i>Ne bis in idem</i>	29
[Article 19].	29
Article 20. Applicable law	30
PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW	30
Article 21. <i>Nullum crimen sine lege</i>	30
Article 22. Non-retroactivity.....	30
Article 23. Individual criminal responsibility	30
Article 24. Irrelevance of official position.....	31
Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates]	32
Article 26. Age of responsibility	32
Article 27. Statute of limitations.....	32
[Article 28]. Actus reus (act and/or omission).....	33
Article 29. Mens rea (mental elements).....	33
Article 30. Mistake of fact or of law	34
Article 31. Grounds for excluding criminal responsibility.....	34
Article 32. Superior orders and prescription of law	35
[Article 33]. Possible grounds for excluding criminal responsibility specifically referring to war crimes.....	35
Article 34. Other grounds for excluding criminal responsibility.....	35
PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT	35
Article 35. Organs of the Court	35
Article 36. Judges serving on a full-time basis.....	35
Article 37. Qualification and election of judges	36
Article 38. Judicial vacancies	37
Article 39. The Presidency	37
Article 40. Chambers.....	37
Article 41. Independence of the judges	38
Article 42. Excusing and disqualification of judges.....	38
Article 43. The Office of the Prosecutor	38
Article 44. The Registry	39
Article 45. Staff	39
Article 46. Solemn undertaking.....	40
Article 47. Removal from office	40
Article 48. Disciplinary measures	40
Article 49. Privileges and immunities.....	40

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
Article 50. Salaries, allowances and expenses.....	41
Article 51. Working languages.....	41
Article 52. Rules of Procedure and Evidence.....	41
Article 53. Regulations of the Court.....	41
PART 5. INVESTIGATION AND PROSECUTION.....	41
Article 54. Investigation of alleged crimes.....	41
[Article 55]. Information on national investigations or proceedings.....	44
[Article 56]. Deferral of an investigation by the Prosecutor.....	44
[Article 57]. Functions of the Pre-Trial Chamber in relation with investigation.....	45
Article 58. Commencement of prosecution.....	45
Article 59. Arrest.....	47
Article 60. Pre-trial detention or release.....	48
Article 61. Notification of the indictment.....	49
Further option for articles 58 to 61.....	50
PART 6. THE TRIAL.....	53
Article 62. Place of trial.....	53
Article 63. Trial in presence of the accused.....	53
Article 64. Functions and powers of the Trial Chamber.....	55
Article 65. Proceedings on an admission of guilt.....	55
Article 66. Presumption of innocence.....	56
Article 67. Rights of the accused.....	56
Article 68. Protection of the [accused], victims and witnesses [and their participation in the proceedings].....	57
Article 69. Evidence.....	57
Article 70. Offences or acts against the integrity of the Court.....	58
[Article 71]. Sensitive national security information.....	59
Article 72. Quorum and judgement.....	60
[Article 73]. Reparations to victims.....	61
Article 74. Sentencing.....	62
PART 7. PENALTIES.....	62
Article 75. Applicable penalties.....	62
[Article 76]. Penalties applicable to legal persons.....	63
Article 77. Determination of the sentence.....	63
[Article 78]. Applicable national legal standards.....	64
[Article 79]. Fines [and assets] collected by the Court.....	64
PART 8. APPEAL AND REVIEW.....	64
Article 80. Appeal against judgement or sentence.....	64

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
Article 81. Appeal against interlocutory decision	65
Article 82. Proceedings on appeal	65
Article 83. Revision of conviction or sentence	66
[Article 84]. Compensation to a suspect/accused/convicted person	66
PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE.....	67
Article 85. General obligation to cooperate	67
Article 86. [Requests for cooperation: general provisions]	67
Article 87. [Surrender] [Transfer] [Extradition] of persons to the Court.....	68
Article 88. Contents of request for [surrender] [transfer] [extradition]	71
Article 89. Provisional arrest.....	72
Article 90. Other forms of cooperation [and judicial and legal [mutual] assistance].....	72
Article 91. Execution of requests under article 90	74
[Article 92]. Rule of speciality	75
PART 10. ENFORCEMENT	76
Article 93. General obligation regarding recognition [and enforcement] of judgements.....	76
Article 94. Role of States in enforcement [and supervision] of sentences of imprisonment	76
Article 95. Enforcement of the sentence	76
Article 96. Supervision and administration of sentence	76
Article 97. Transfer of the person upon completion of sentence.....	77
[Article 98]. Limitation of prosecution/punishment for other offences.....	77
[Article 99]. Enforcement of fines and forfeiture measures.....	77
Article 100. Pardon, parole and commutation of sentences [early release].....	78
[Article 101]. Escape	78
PART 11. ASSEMBLY OF STATES PARTIES	78
Article 102. Assembly of States Parties.....	78
PART 12. FINANCING OF THE COURT	79
Article 103. Payment of expenses of the Court	79
Article 104. Funds of the Court	79
Article 105. Voluntary contributions	79
Article 106. Assessment of contributions.....	80
Article 107. Annual audit.....	80
PART 13. FINAL CLAUSES	80
Article 108. Settlement of disputes	80
Article 109. Reservations	80
Article 110. Amendments	80
Article 111. Review of the Statute	81

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
Article 112. Signature, ratification, acceptance, approval or accession	81
[Article 113]. Early activation of principles and rules of the Statute	81
Article 114. Entry into force	82
Article 115. Withdrawal	82
Article 116. Authentic texts	82
Part Two. Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	82
Part Three. Draft rules of procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	85
<i>Rule</i>	
CHAPTER I – REPRESENTATION AND CREDENTIALS	85
1. Composition of delegations.....	85
2. Alternates and advisers.....	85
3. Submission of credentials	85
4. Credentials Committee.....	85
5. Provisional participation in the Conference.....	85
CHAPTER II – OFFICERS	85
6. Elections.....	85
7. General powers of the President	85
8. Acting President.....	86
9. Replacement of the President	86
10. Voting rights of the President.....	86
CHAPTER III – GENERAL COMMITTEE.....	86
11. Composition	86
12. Substitute members	86
13. Functions.....	86
CHAPTER IV – SECRETARIAT	86
14. Duties of the Secretary-General	86
15. Duties of the secretariat	86
16. Statements by the secretariat	86
CHAPTER V – OPENING OF THE CONFERENCE	87
17. Temporary President	87
18. Decisions concerning organization.....	87
CHAPTER VI – CONDUCT OF BUSINESS	87
19. Quorum.....	87
20. Speeches	87
21. Precedence.....	87
22. Points of order	87

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
23. Closing of the list of speakers.....	87
24. Right of reply.....	87
25. Adjournment of debate	87
26. Closure of debate	87
27. Suspension or adjournment of the meeting	88
28. Order of motions.....	88
29. Basic proposal	88
30. Other proposals	88
31. Withdrawal of proposals and motions.....	88
32. Decisions on competence	88
33. Reconsideration of proposals	88
CHAPTER VII – DECISION-TAKING	88
34. General agreement.....	88
35. Voting rights.....	88
36. Majority required.....	88
37. Meaning of the expression “representatives present and voting”	89
38. Method of voting	89
39. Conduct during voting	89
40. Explanation of vote.....	89
41. Division of proposals.....	89
42. Amendments	89
43. Decisions on amendments	89
44. Decisions on proposals.....	89
45. Elections.....	89
46. Elections.....	89
47. Elections.....	90
CHAPTER VIII – SUBSIDIARY BODIES	90
48. Committee of the Whole.....	90
49. Drafting Committee.....	90
50. Other subsidiary bodies.....	90
51. Officers.....	90
52. Officers, conduct of business and voting	90
CHAPTER IX – LANGUAGES AND RECORDS	90
53. Languages of the Conference.....	90
54. Interpretation	91
55. Languages of official documents.....	91
56. Records and sound recordings of meetings	91
CHAPTER X – PUBLIC AND PRIVATE MEETINGS.....	91
57. Plenary meetings and meetings of the Committee of the Whole.....	91

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

	<i>Page</i>
58. Meetings of other subsidiary bodies.....	91
59. Communiqués on private meetings.....	91
CHAPTER XI – OBSERVERS.....	91
60. Representatives of organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work.....	91
61. Representatives of other regional intergovernmental organizations.....	91
62. Representatives of other international bodies.....	91
63. Representatives of non-governmental organizations.....	91
64. Written statements.....	92
CHAPTER XII – AMENDMENTS TO THE RULES OF PROCEDURE.....	92
65. Method of amendment.....	92
Part Four. Draft organization of work of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	92

Introduction

1. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee for the establishment of an international criminal court to discuss the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission in 1994 and to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

2. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time it discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.¹

3. Pursuant to paragraph 2 of General Assembly resolution 50/46, the Preparatory Committee was open to all States Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency.

4. Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, opened the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of

the Preparatory Committee. The Codification Division provided substantive servicing for the Preparatory Committee.

5. The Bureau of the Preparatory Committee comprised the following:

<i>Chairman:</i>	Mr. Adriaan Bos (Netherlands)
<i>Vice-Chairmen:</i>	Mr. Cherif Bassiouni (Egypt)
	Ms. Silvia Alejandra Fernández de Gurmendi (Argentina)
	Mr. Marek Madej (Poland) (1996–1997)
	Mr. Peter Tomka (Slovakia) (1998)
<i>Rapporteurs:</i>	Mr. Jun Yoshida (Japan) (1996)
	Mr. Masataka Okano (Japan) (1997–1998)

6. By paragraphs 3 and 4 of its resolution 51/207 of 17 December 1996, the General Assembly reaffirmed the mandate of the Preparatory Committee and decided that it should meet from 11 to 21 February, 4 to 15 August and 1 to 12 December 1997, and from 16 March to 3 April 1998, in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference of plenipotentiaries, and requested the Secretary-General to provide the necessary facilities for the performance of its work.

¹ See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 22 (A/51/22)*.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

7. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and decided to hold the Conference in Rome from 15 June to 17 July 1998.

8. In the same resolution, the General Assembly requested the Preparatory Committee to continue its work in accordance with Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

9. The Preparatory Committee held sessions at United Nations Headquarters from 11 to 21 February, 4 to 15 August and 1 to 12 December 1997.² At its last session, from 16 March to 3 April 1998, also held at Headquarters, the Committee had before it a consolidated text³ prepared by its Bureau and coordinators on the basis of all the texts that it had elaborated or that had been submitted to it. The compilation was used as a basis for the work of the Committee at that session.

10. At its 56th meeting, on 16 March 1998, the Preparatory Committee decided to conduct its work through working groups on the following subjects: procedural matters (chaired by Ms. Silvia Alejandra Fernández de Gurmendi (Argentina)), composition and administration of the court (chaired by Mr. Lionel Yee (Singapore)), establishment of the court and its relationship with the United Nations (chaired by Mr. Sankurathripati Rama Rao (India)), applicable law (chaired by Mr. Per Saland (Sweden)), *ne bis in idem* (chaired by Mr. John Holmes (Canada)), jurisdictional issues (chaired by Mr. Erkki Kourula (Finland)) and enforcement (chaired by Ms. Mary Ellen Warlow (United States of America)). The final clauses were considered at the informal meetings under the chairmanship of Mr. Adriaan Bos (Netherlands).

11. At its 57th meeting, on 1 April 1998, the Preparatory Committee adopted the reports of the working groups mentioned above.

12. At its 60th meeting, on 3 April 1998, the Preparatory Committee adopted the text of a draft statute on the establishment of an international criminal court⁴ and the draft final act of the Conference.⁵

13. In its resolution 52/160, the General Assembly had requested the Secretary-General to prepare the text of the draft rules of procedure for the Conference, to be submitted to the

Preparatory Committee for its consideration and recommendations to the Conference, with a view to the adoption of such rules by the Conference in accordance with the rules of procedure of the General Assembly, and to provide for consultations on the organization and methods of work of the Conference, including rules of procedure, prior to the convening of the last session of the Committee. At its 61st meeting, on 3 April 1998, the Preparatory Committee adopted for recommendation to the Conference the draft rules of procedure for the Conference,⁶ as amended orally, pursuant to resolution 52/160.

14. At its 61st meeting, on 3 April 1998, the Preparatory Committee took note of the draft organization of work prepared by the Secretariat and decided to transmit it to the Conference.

15. At the same meeting, the Preparatory Committee agreed to transmit to the Conference the following:

- Draft Statute for the International Criminal Court (part one of the present report; see A/CONF.183/2/Add.1 and Corr.1);
- Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (part two of the present report; see A/CONF.183/2/Add.1 and Corr.1);
- Draft rules of procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (part three of the present report; see A/CONF.183/2/Add.2);
- Draft organization of work of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (part four of the present report; see below).

16. In its resolution 52/160, the General Assembly requested the Secretary-General to invite non-governmental organizations, accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Committee, on the understanding that participation meant attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate, in accordance with the rules of procedure to be adopted by the Conference. On the basis of the

² For the decisions taken by the Preparatory Committee at those sessions, see A/AC.249/1997/L.5, A/AC.249/1997/L.8/Rev.1 and A/AC.249/1997/L.9/Rev.1.

³ A/AC.249/1998/L.13.

⁴ A/AC.249/1998/CRP.6-18 and corrigenda.

⁵ A/AC.249/1998/CRP.19.

⁶ A/AC.249/1998/CRP.3/Rev.1.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

lists of non-governmental organizations compiled by the Secretariat with the assistance of the NGO Coalition for an International Criminal Court,⁷ the Committee decided that the non-governmental organizations listed therein should be invited to participate in the Conference in the manner set out in resolution 52/160.

17. At the 57th meeting of the Preparatory Committee, on 1 April 1998, the representative of the Netherlands announced his country's candidacy of The Hague for the seat of the international criminal court.

18. Pursuant to paragraph 7 of resolution 51/207, the Secretary-General established a trust fund for the participation of the least developed countries in the work of the Preparatory Committee and in the Conference. Guidelines were established for the administration of the fund. The Committee noted that the following Governments had made contributions to the fund: Belgium, Canada, Denmark, Finland, Netherlands, Norway, Sweden and United Kingdom of Great Britain and Northern Ireland. Thirty-three representatives from 18 States had thus far utilized the trust fund to facilitate their participation in the meetings of the Committee during 1997 and 1998. The European Commission had awarded a grant to the trust fund, but owing to procedural difficulties, the transfer of the contribution had been delayed.

19. Furthermore, pursuant to paragraph 7 of resolution 52/160, the Secretary-General also established a trust fund for the participation of other developing countries in the work of the Preparatory Committee and in the Conference. The Government of the Netherlands had made a contribution, which would be available to those developing countries requesting assistance to facilitate their participation in the Conference.

20. The Preparatory Committee expressed its deep appreciation to the Governments that had made contributions and to the European Commission for its award to the above-mentioned trust funds. The Committee noted that the General Assembly, in its resolution 52/160, had called upon States to contribute voluntarily to the trust funds.

21. At its 61st meeting, on 3 April 1998, the Preparatory Committee took note of the following nominations for officers of the Conference:

President: Mr. Giovanni Conso
(Italy)

*Chairman of the
Committee of the Whole:* Mr. Adriaan Bos
(Netherlands)

*Chairman of the
Drafting Committee:* Mr. Cherif Bassiouni
(Egypt)

⁷ A/AC.249/1998/CRP.22.

Part One. Draft Statute for the International Criminal Court

PREAMBLE⁸

The States Parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court,

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole,

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective,⁹

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1 The Court

There is established an International Criminal Court ("the Court"), which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

NB: Attention should be paid to using the term "Court" throughout the Statute in a consistent manner.

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations by an agreement to be approved by the States Parties to this Statute and concluded by the President on behalf of the Court.

Article 3 Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

⁸ In this connection, there was a proposal contained in document A/AC.249/1998/DP.6.

⁹ Delegations have expressed their opposition to the wording of the third paragraph of the preamble and have asked that this paragraph be made consistent with article 1 of the Statute so as to read as follows:

"Emphasizing further that such a court shall be complementary to national criminal jurisdictions,".

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

2. The President, with the approval of the Assembly of States Parties, may conclude an agreement with the host State, establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States Parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) The crime of aggression;
- (c) War crimes;
- (d) Crimes against humanity;
- (e) ...

NB: Once a decision is made as to which crimes should be included in the draft Statute, the paragraphs of this introductory article should be adjusted and the subsequent provisions placed in separate articles and numbered accordingly.

Crime of genocide

For the purpose of the present Statute, “the crime of genocide” means any of the following acts committed with intent¹⁰ to destroy, in whole or in part, a national, ethnical, racial or religious group,¹¹ as such:

- (a) Killing members of the group;

- (b) Causing serious bodily or mental harm¹² to members of the group;

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- (d) Imposing measures intended to prevent births within the group;

- (e) Forcibly transferring children of the group to another group;

[The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.]¹³

[¹⁴Crime of aggression¹⁵

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10.

Option 1

[For the purpose of the present Statute, “the crime [of aggression] [against peace]” means any of the following acts committed by an individual [who is in a position of exercising control or capable of directing political/military action in a State]:

- (a) planning,
- (b) preparing,
- (c) ordering,
- (d) initiating, or
- (e) carrying out

¹⁰ The reference to “intent to destroy, in whole or in part, a ... group, as such” was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group.

¹¹ The Preparatory Committee took note of the suggestion to examine the possibility of addressing “social and political” groups in the context of crimes against humanity.

NB: The need for this footnote should be reviewed in the light of the discussions that have taken place in respect of crimes against humanity.

¹² The reference to “mental harm” is understood to mean more than the minor or temporary impairment of mental faculties.

¹³ The Working Group will return to the question of the placement of article III of the Genocide Convention once the Working Group on General Principles of Criminal Law has considered this issue in the context of its work.

NB: See also article 23 (Individual criminal responsibility).

¹⁴ These brackets close at the end of paragraph 2.

¹⁵ The proposal reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[an armed attack] [the use of armed force] [a war of aggression,] [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] by a State against the [sovereignty,] territorial integrity [or political independence] of another State [when this] [armed attack] [use of force] [is] [in contravention of the Charter of the United Nations] [[in contravention of the Charter of the United Nations as determined by the Security Council].]

Option 2

1. [For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State.]

[2. [Acts constituting [aggression] [armed attack] include the following:]¹⁶

[Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression [are] [include] the following:]

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State [, or the use of any weapons by a State against the territory of another State];

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of

armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.]]

Option 3

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

(a) initiating, or

(b) carrying out

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

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

(a) the planning,

(b) the preparing, or

(c) the ordering

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

War crimes¹⁷

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

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering, or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

¹⁶ Paragraph 2 of the text reflects the view held by some delegations that the definition should include an enumeration of the acts constituting aggression.

¹⁷ Views were expressed that certain provisions should be placed within brackets. The relative placement of the various options does not indicate in any way the measure of support for such options. Some options commanded very limited support.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

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

(a) *Option 1*

Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(a bis) *Option 1*

Intentionally directing attacks against civilian objects which are not military objectives;

Option 2

No paragraph (a bis).

(b) *Option 1*

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity;¹⁸

Option 2

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural

environment which would be excessive in relation to the concrete and direct overall military advantage anticipated;¹⁸

Option 3

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;¹⁸

Option 4

No paragraph (b).

(b bis) *Option 1*

Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;

Option 2

No paragraph (b bis).

(c) *Option 1*

Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended;

Option 2

Making non-defended localities and demilitarized zones the objects of attack;

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

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

(f) *Option 1*

The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

Option 2

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

¹⁸ It has been accepted that it will be necessary to insert a provision, probably in the general principles section, which sets out the elements of knowledge and intent which must be found to have existed for an accused to be convicted of a war crime. For example: "in order to conclude that an accused had the knowledge and criminal intention required to be convicted of a crime, the Court must first determine that, taking account of the relevant circumstances of, and information available to, the accused at the time, the accused had the requisite knowledge and intent to commit the crime."

NB: With respect to this footnote see, however, article 29 (Mens rea (mental elements)) and article 30 (Mistake of fact or of law), which deal with similar issues.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Option 3

- (i) The establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;
- (ii) The transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

Option 4

No paragraph (f).

(g) *Option 1*

Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

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

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) *Option 1*

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

- (i) Poison or poisoned weapons,
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction;

Option 2

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

- (i) Poison or poisoned weapons,
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,
- (vi) Such other weapons or weapons systems as become the subject of a

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

comprehensive prohibition pursuant to customary or conventional international law;

Option 3

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

Option 4

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

or

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate, such as but not limited to:

- (i) Poison or poisoned weapons,
- (ii) Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,
- (iii) Bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,
- (iv) Bacteriological (biological) agents or toxins for hostile purposes or in armed conflict,
- (v) Chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,
- (vi) Nuclear weapons,
- (vii) Anti-personnel mines,
- (viii) Blinding laser weapons,
- (ix) Such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law;

(p) Option 1

Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Option 2

Committing outrages upon personal dignity, in particular humiliating and degrading treatment as well as practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination;

(p bis) Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(q) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t) Option 1

Forcing children under the age of fifteen years to take direct part in hostilities.

Option 2

Recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities.¹⁹

Option 3

- (i) Recruiting children under the age of fifteen years into armed forces or groups; or
- (ii) Allowing them to take part in hostilities.

Option 4

No paragraph *(t)*.

* * *

¹⁹ This option seeks to incorporate the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility.

The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, the use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

OPTION 1

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

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) Taking of hostages;

(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

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

(a) *Option 1*

Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities;

Option 2

No paragraph (a).

(b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(c) *Option 1*

Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

Option 2

Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected,

provided they are not being used at the time for military purposes;

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

(e) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(f) *Option 1*

Forcing children under the age of fifteen years to take direct part in hostilities;

Option 2

Recruiting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

Option 3

(i) Recruiting children under the age of fifteen years into armed forces or groups; or

(ii) Allowing them to take part in hostilities;

Option 4

No paragraph (f).

(g) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) Killing or wounding treacherously a combatant adversary;

(i) Declaring that no quarter will be given;

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

(k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l) *Option 1*

No provision on prohibited weapons.

Option 2

A reference to arms, in the light of the discussions on paragraph B (o).

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

OPTION II

Insert the following provisions in section D:

- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment;
- Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated;
- Slavery and the slave trade in all their forms;

OPTION III

Delete the opening clause of sections C and D.

OPTION IV

Delete section D.

OPTION V

Delete sections C and D.

Elsewhere in the Statute:

Option 1

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.²⁰

Option 2

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.¹¹

Option 3

No provision on threshold.

Article Y

(relating to the part of the Statute dealing with the definition of crimes)

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.

NB: Article Y could constitute a separate article or could be placed in article 5 (Crimes within the jurisdiction of the Court). Paragraph 3 of article 21 (*Nullum crimen sine lege*) and article 20 (Applicable law) deal with related issues.

Crimes against humanity

1. For the purpose of the present Statute, a “crime against humanity” means any of the following acts when committed

[as part of a widespread [and] [or] systematic commission of such acts against any population]:

[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]:

NB: In case the second alternative is retained, its relationship with paragraph 1 (h) should be considered.

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) [Detention or] [imprisonment] [deprivation of liberty] [in flagrant violation of international law] [in violation of fundamental legal norms];²¹
- (f) Torture;
- (g) Rape or other sexual abuse [of comparable gravity,] or enforced prostitution;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or

²⁰ The view was expressed that the substance and placement of this proposal should be considered.

²¹ It was suggested that this subparagraph does not include freedom of speech and that it includes the unilateral blockade of populations.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

religious [or gender] [or other similar] grounds²² [and in connection with other crimes within the jurisdiction of the Court];

(i) Enforced disappearance of persons;²³

(j) Other inhumane acts [of a similar character] [intentionally] causing [great suffering,] or serious injury to body or to mental or physical health.²⁴

[2. For the purpose of paragraph 1:

(a) "Extermination" includes the [wilful, intentional] infliction of conditions of life calculated to bring about the destruction of part of a population;

(b) "Deportation or forcible transfer of population" means the movement of [persons] [populations] from the area in which the [persons] [populations] are [lawfully present] [present] [resident] [under national or international law] [for a purpose contrary to international law] [without legitimate and compelling reasons] [without lawful justification];

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

["Torture" as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984];

(d) "Persecution" means the wilful and severe deprivation of fundamental rights contrary to international law [carried out with the intent to persecute on specified grounds];

(e) ["Enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, thereby placing them outside the protection of the law].

*25

²² This also includes, for example, social, economic and mental or physical disability grounds.

²³ It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.

²⁴ It was suggested that the inclusion of this paragraph should be subject to further clarification. It was also suggested that the list of acts should include institutionalized discrimination.

²⁵ The Preparatory Committee considered the following three crimes (crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs and psychotropic substances) without prejudice to a final decision on their inclusion in the Statute. The Preparatory Committee also discussed these three crimes only in a general manner and did not have time to examine them as thoroughly as the other crimes.

[Crimes of terrorism

For the purposes of the present Statute, "crimes of terrorism" means:

(1) Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;

(2) An offence under the following Conventions:

(a) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

(b) Convention for the Suppression of Unlawful Seizure of Aircraft;

(c) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

(d) International Convention against the Taking of Hostages;

(e) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

(f) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf;

(3) An offence involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property.]

[Crimes against United Nations and associated personnel

1. For the purpose of the present Statute, "crimes against United Nations and associated personnel" means any of the following acts [when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate]:

(a) Murder, kidnapping or other attack upon the person or liberty of any such personnel;

(b) Violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which

any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.]

[²⁶*Crimes involving the illicit traffic in narcotic drugs and psychotropic substances*

For the purposes of the present Statute, “crimes involving the illicit traffic in narcotic drugs and psychotropic substances” means any of the following acts committed on a large scale and in a transboundary context:

- (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in subparagraph (i) above;
- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the annex to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- (v) The organization, management or financing of any of the offences enumerated in subparagraphs (i), (ii), (iii) or (iv) above;
- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of

participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his or her actions;

- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences.

NB: The Court’s jurisdiction with regard to these crimes will only apply to States parties to the Statute which have accepted the jurisdiction of the Court with respect to those crimes. Refer to article 9, option 1, paragraph 2, or option 2, paragraph 1.]

Article 6

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if:

[(a) The [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10] [acting under Chapter VII of the Charter];]

(b) A complaint is lodged by a State Party [two State Parties] [or a non-State Party] in accordance with article 11;

[(c) The matter is brought by the Prosecutor, in accordance with article 12.]

[2. [In the case of paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [only if the States which have jurisdiction over the case in question have accepted the jurisdiction of the Court in accordance with article 9 and] [if national jurisdiction is either not available or ineffective] [in accordance with article 15] or if [an interested State] [interested States] [those States] have deferred the matter to the Court.]

²⁶ These brackets close at the end of the article.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[²⁷ Article 7

Preconditions to the exercise of jurisdiction

Opening clause of paragraph 1

*Option 1*²⁸

[In the case of article 6, paragraphs 1 (b) [and (c)],] The Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted [the exercise of] the jurisdiction of the Court over the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] in accordance with article 9:

Option 2

[In the case of article 6, paragraphs 1 (b) [and (c)],] the Court [may exercise its] [shall have] jurisdiction [over a person] if the following State(s) has/have accepted the exercise of the jurisdiction of the Court with respect to a case in question which is the subject of a complaint lodged by a State:

[(a) [The State that has custody of the suspect with respect to the crime ("custodial State")] [the State on whose territory the person is resident at the time the complaint is lodged] [in accordance with international law];]

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

[(c) If applicable, the State that has requested, under an international agreement, the custodial State to surrender a suspect for the purposes of prosecution, [unless the request is rejected];]

[(d) The State of which the victim is a national;]

[(e) The State of which the [accused] [suspect] of the crime is a national;]

[2. If a State whose acceptance is required for the exercise of the jurisdiction by the Court rejects such acceptance, that State shall so inform the Court [giving reasons thereof].]²⁹

[3. Notwithstanding paragraph 1, if a State whose acceptance is required has not indicated whether it gives such acceptance or not within a period of (...), then the Court [may] [may not] exercise its jurisdiction accordingly.]²⁹

[4. When a State that is not a Party to the Statute has an interest in the acts mentioned in the complaint, this State may,

by an express declaration deposited with the Registrar of the Court, agree that the Court shall exercise jurisdiction in respect of the acts specified in the declaration.]]

[³⁰ Article 8³¹

Temporal jurisdiction

1. The Court has jurisdiction only in respect of crimes committed after the date of entry into force of this Statute.

[When a State becomes a Party to this Statute after its entry into force, the Court cannot be seized in respect of crimes committed by its nationals or on its territory or against its nationals, unless those crimes have been committed after the deposit by that State of its instrument of ratification or accession.]

[2. The Court has no jurisdiction in respect of crimes for which, even if they have been committed after the entry into force of this Statute, the Security Council, acting under Chapter VII of the Charter of the United Nations, has decided before the entry into force of this Statute to establish an ad hoc international criminal tribunal. The Security Council may, however, decide otherwise.]]

NB: There is an interrelationship between this article and article 22 (Non-retroactivity).

[³² Article 9

Acceptance of the jurisdiction of the Court

*Option 1*³³

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 5, paragraphs [(a) to (d), or any combination thereof].

2. With regard to the crimes referred to in article 5 other than those mentioned in paragraph 1, a State Party to this Statute may declare:

(a) At the time it expresses its consent to be bound by the Statute; or

(b) At a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

²⁷ These brackets close at the end of article 7.

²⁸ Options are not put in brackets because they are alternatives supported by only some delegations. Some other delegations suggested the deletion of one or more of the options or have suggested other changes within the options.

²⁹ This paragraph is relevant only to option 2 for the opening clause of paragraph 1.

³⁰ These brackets close at the end of article 8.

³¹ The issues raised in this article deserve further reflection as to its place in the Statute.

³² These brackets close at the end of paragraph 5 of this article.

³³ Options 1 and 2 are not mutually exclusive and could be combined in such a way that option 1 may be used in respect of some crimes and option 2 in respect of other crimes.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

3. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

Option 2

1. A State Party to this Statute may:

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

(b) At a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 5, paragraphs (a) to (e), or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in article 5, paragraphs (a) to (e),] committed during a particular period of time.³⁴

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six months notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.³⁴

4. If under article 7 the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 9 of the Statute.]

[5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]

Further option

Acceptance of the jurisdiction of the Court:

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5, [paragraphs (a) to (d)].

[2. A State that is not a Party to this Statute may, by declaration lodged with the Registrar, accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5. The accepting State shall then

cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

[³⁵Article 10

[[Action by] [Role of] *The Security Council*] [Relationship between the Security Council and the International Criminal Court]

1. [Notwithstanding article 6, [7] [and [9], the Court has jurisdiction in accordance with this Statute with respect to crimes [referred to] [specified] in article 5 [as a consequence of the referral of] [on the basis of a [formal] decision to refer] a [matter] [situation] in which one or more crimes appear to have been committed to [the Prosecutor of] the Court by the Security Council [acting under Chapter VII of the Charter of the United Nations] [in accordance with the terms of such referral].

2. [Notification of] [A letter from the President of the Security Council conveying] the Security Council decision to the Prosecutor of the Court shall be accompanied by all supporting material available to the Council.]

3. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed.]

4. Option 1

[A complaint of or directly related to [an act] [a crime] of aggression [referred to in article 5] may [not] be brought [under this Statute] unless the Security Council has [first] [determined] [formally decided] that the act of a State that is the subject of the complaint, [is] [is not] an act of aggression [in accordance with Chapter VII of the Charter of the United Nations].

Option 2

[The determination [under Article 39 of the Charter of the United Nations] of the Security Council that a State has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.]

5. [A referral of a matter to the Court or] [A determination] [A formal decision] by the Security Council [under paragraph 4 above] shall not be interpreted as in any way affecting the independence of the Court in its determination of the criminal responsibility of the person concerned.

6. [A complaint of or directly related to an act of aggression brought under this Statute and the findings of the Court in such cases is without prejudice to the powers of the Security Council under Chapter VII of the Charter.]

³⁴ This paragraph may also apply to option 1.

³⁵ These brackets close at the end of option 2 for paragraph 7.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[³⁶⁷. Option 1

No prosecution may be commenced under this Statute arising from a [dispute or] situation [[pertaining to international peace and security or an act of aggression] which [is being dealt with] [actively] by the Security Council] [as a threat to or breach of the peace or an act of aggression] [under Chapter VII of the Charter], [where the Security Council has decided that there is a threat to or breach of the peace and for which it is exercising its functions under Chapter VII of the Charter of the United Nations], [unless the Security Council otherwise decides] [without the prior consent of the Security Council].

Option 2

1. [Subject to paragraph 4 of this article], no prosecution may be commenced [or proceeded with] under this Statute [for a period of twelve months] where the Security Council has [decided that there is a threat to or breach of the peace or an act of aggression and], acting under Chapter VII of the Charter of the United Nations, [given a direction] [taken a [formal and specific] decision] to that effect.

2. [Notification] [A formal decision of the Security Council to the effect] that the Security Council is continuing to act may be renewed at intervals of twelve months [by a subsequent decision].]

3. [Should no action be taken by the Security Council in accordance with Chapter VII of the Charter of the United Nations within a reasonable time, the Court may exercise its jurisdiction in respect of the situation referred to in paragraph 1 of this article.]]

Article 11³⁷ Complaint by State

1. Option 1

[[A State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948] [A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime]] may lodge a complaint [referring a [matter] [situation] in which one or more crimes within the jurisdiction of the Court appear to have been committed to] [with] the Prosecutor [alleging that [a crime of genocide] [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed] [and requesting that the Prosecutor investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.]]

Option 2

[A State Party [which accepts the jurisdiction of the Court under article 9 with respect to a crime] [that has a direct interest] listed under (a) to (d) below may lodge a complaint with the Prosecutor alleging that [such a crime] [a crime under article 5, paragraphs [(a) to (d), or any combination thereof]] appears to have been committed:

(a) A State on the territory of which the act [or omission] in question occurred;

(b) A State of custody;

(c) A State of the nationality of a suspect;

(d) A State of the nationality of victims.]

[2. A State Party, which, for a crime under article 5, paragraph (e), has accepted the jurisdiction of the Court pursuant to article 9 and is a party to the treaty concerned may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.]³⁸

[3. As far as possible, a complaint shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.]³⁹

[4. The Prosecutor shall notify the Security Council of all complaints lodged under article 11.]

[Article 12⁴⁰ Prosecutor

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]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5, paragraphs (a) to (d), from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]]⁴¹

NB: The terms “sufficient basis” used in this article (if retained) and “reasonable basis” used in article 54, paragraph 1, should be harmonized.

³⁶ These brackets close at the end of paragraph 3 of option 2.

³⁷ This article was moved here from part 5.

³⁸ This provision is without any prejudice to the position of delegations with regard to “treaty crimes”.

³⁹ Further discussion on the content of a complaint may be necessary in the context of matters dealing with procedures.

⁴⁰ This article was moved here from part 5.

⁴¹ The procedure to be followed by the Prosecutor in relation to this article may be discussed further.

*[Article 13
Information submitted to the Prosecutor*

1. Upon receipt of information relating to the commission of a crime under article 5, submitted by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, non-governmental organizations, victims or their representatives or other sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules.

2. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction and admissibility of the case pursuant to article 17.

The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

3. If, after the preliminary examination referred to in paragraph 1, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.]

Further option for articles 6, 7, 10 and 11⁴²

*[Article 6
Exercise of jurisdiction*

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

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

[(b) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12]; or

(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].]

*[Article 7
Acceptance of jurisdiction*

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

2. Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation], the Court may exercise its jurisdiction with respect to a crime referred to in article 5 provided that [one of] the following States [are Parties] [is Party] to the Statute or [has] [have] accepted the jurisdiction of the Court with respect to the crime in question in accordance with paragraph 3 below:

[(a) The State that has custody of the suspect with respect to the crime (“custodial State”)] [the State of the nationality of the suspect];

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

3. If the acceptance of a State that is not a Party to this Statute is required under paragraph 2 above, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9 of this Statute.]

*[Article 10
Role of the Security Council*

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

2. No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council[, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to

⁴² It was mentioned that, although the approach taken in this option merited consideration, strong reservations were expressed with regard to the references to the Security Council; the view was also expressed that the Court should not exercise jurisdiction unless States parties gave their express consent.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

that effect; that request may be renewed by the Council under the same conditions.]

[Article 11

Referral of a situation by a State

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

Article 14

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

NB: This article seems to be unnecessary in view of a similar text in paragraph 1 of article 17 (Challenges to the jurisdiction of the Court or the admissibility of a case) and could therefore be deleted.

Article 15

*Issues of admissibility*⁴³

The following draft text represents the results of informal consultations on article 15 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

1. Having regard to paragraph 3 of the Preamble,⁴⁴ 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;

*⁴⁵

(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,⁴⁶ and a trial by the Court is not permitted under paragraph 2 of article 18;⁴⁷

**⁴⁸

(d) The case is not of sufficient gravity to justify further action by the Court.⁴⁹

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 proceedings⁵⁰ 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;

⁴⁵ The proposal on extradition or international cooperation is not included in the text, subject to the determination of whether the relevant State would be able to present arguments in the procedure on admissibility.

NB: In the context of this footnote, see also paragraph 2 of article 17 (Challenges to the jurisdiction of the Court or the admissibility of a case).

⁴⁶ If the Security Council can refer situations to the Court or the Prosecutor can initiate investigations, then the appropriate wording may be considered.

⁴⁷ It was noted that article 15 should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 18, as currently worded, did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in the light of further revisions to article 18 to determine whether the reference to article 18 was sufficient or whether additional language was needed in article 15 to address these situations.

⁴⁸ Some delegations preferred the inclusion of the following subparagraph: "The accused is not liable under article 92 (Rule of speciality) to be prosecuted before or punished by the Court".

NB: In the light of the text of article 92 (Rule of speciality), consideration should be given as to whether this footnote is still necessary).

⁴⁹ Some delegations believed that this subparagraph should be included here in the Statute or deleted.

: term "proceedings" covers both investigations and prosecutions.

⁴³ The present text of article 15 is without prejudice to the question of whether complementarity-related admissibility requirements of this article may be waived by the State or States concerned.

⁴⁴ Suggestions were made that the principle of complementarity should be further clarified either in this article or elsewhere in the Statute.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(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.

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

“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.”

[Article 16

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by public announcement and by notification to all States Parties.

2. Within [] days of the public announcement of such referral, a State may inform the Court that it is investigating its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State’s investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State’s national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor’s determination. The Prosecutor’s deferral to the State’s investigation shall be open for review by the Prosecutor [six months] [one year] after the date of deferral.

3. A preliminary ruling of the Pre-Trial Chamber confirming the Prosecutor’s determination may be appealed to the Appeals Chamber by the State concerned. If the preliminary ruling is appealed by the State, [two thirds] [all] of the judges of the Appeals Chamber must confirm that ruling before the Prosecutor may commence the investigation and seek indictments.

4. When the Prosecutor has deferred an investigation pursuant to paragraph 2, the Prosecutor may request that the

State concerned report periodically on the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

5. That a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge admissibility of a case under article 17⁵¹ [or to withhold its consent to the exercise of jurisdiction under article 7].]

Article 17

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

1. At all stages of the proceedings, the Court (a) shall satisfy itself as to its jurisdiction over a case and (b) may, on its own motion, determine the admissibility of the case pursuant to article 15.⁵²

2. Challenges to the admissibility of the case, pursuant to article 15, or challenges to the jurisdiction of the Court may be made by:

(a) An accused [or a suspect];⁵³

(b) [A State] [[An interested] State Party] which has jurisdiction over the crime on the ground that it is investigating or prosecuting the case or has investigated or prosecuted⁵⁴

[a State [State Party] of nationality of a person referred to in paragraph 2 (a) [on the ground that it is investigating or prosecuting the case or has investigated or prosecuted]]

[and a State [State Party] which has received a request for cooperation];

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility.

In proceedings with respect to jurisdiction or admissibility, those having submitted the case pursuant to article 6,⁵⁵ [those non-States Parties which have jurisdiction over the crimes]⁵⁶ as well as victims, may also submit observations to the Court.

⁵¹ Article 17, paragraph 5, should be revised to require a vote by two thirds of the judges of the Appeals Chamber to decide that a case is admissible.

⁵² In the light of the wording to be adopted for article 17, several draft provisions of the Statute may have to be re-examined, including article 54, paragraph 6, and article 58, paragraph 2 (b).

⁵³ The term “suspect” includes a person who is the subject to an investigation. Another option is to limit the right to challenge to a suspect arrested on the basis of a pre-indictment arrest warrant.

⁵⁴ The final wording of this subparagraph will depend on the content of article 15.

⁵⁵ The final wording (States, Security Council, Prosecutor) will depend on the content of article 6.

⁵⁶ This provision would apply to the option where only States parties can challenge the jurisdiction of the Court or the admissibility of a case.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

3.⁵⁷ The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2.

The challenge must take place prior to or at the commencement of the trial.

In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court as provided in the preceding subparagraph, may only be based on article 15, paragraph 1 (c).⁵⁸

4. A State referred to in paragraph 2 (b) of the present article shall make a challenge at the earliest opportunity.⁵⁹

5. Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.⁶⁰

[6. If the Court has decided that a case is inadmissible pursuant to article 15, the Prosecutor may, at any time, submit a request for a review of the decision, on the grounds that conditions required under article 15 to render the case inadmissible no longer exist or that new facts arose.]

Article 18 *Ne bis in idem*

1. Except as provided in this Statute,⁶¹ no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried before another court for a crime⁶² referred to in article 5 for which that person has already been convicted or acquitted by the Court.

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

...⁶⁴

(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 and impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

...⁶⁵

* * *

An alternative approach, which needs further discussion, is that the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows:

“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.”

[Article 19⁶⁶

Without prejudice to article 18, a person who has been tried by another court for conduct also proscribed under article 5 may be tried by the Court if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty.]

⁵⁷ It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

⁵⁸ The final wording of this subparagraph will depend on the content of article 15.

⁵⁹ The question arises as to what consequences, if any, should flow from the failure of a State to make a timely challenge.

⁶⁰ The question concerning the suspension of the trial proceeding in case of appeal should be addressed in the Rules of Procedure and Evidence.

⁶¹ The phrase “Except as provided in this Statute” should be reviewed in the light of the final text of article 83.

⁶² It was noted that further consideration might be necessary on whether this paragraph should apply to conduct constituting a crime or a similar notion.

⁶³ Further consideration might be necessary in the light of the final text of article 15.

⁶⁴ It was noted that further consideration might be necessary on whether there should be additional exceptions to the principle of *ne bis in idem*, such as failure to take account of the grave nature of the crime, at either the trial or the sentencing stage.

⁶⁵ The principle in article 77 that the Court may deduct time previously served in connection with conduct underlying the crime should be reviewed, as it was pointed out that the Court should, in principle, be obliged to deduct any such time.

⁶⁶ It was noted that further consideration of this article, in particular its content and placement, is needed.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Article 20 Applicable law

1. The Court shall apply:

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

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

(c)⁶⁷ *Option 1*

Failing that, general principles of law derived by the Court from national laws of legal systems of the world [, where those national laws are not inconsistent with this Statute and with international law and internationally recognized norms and standards].

Option 2

Failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

- (i) The national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;
- (ii) If the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or
- (iii) If the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

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

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

social origin, wealth, birth or other status, or on any other similar criteria.⁶⁸

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21 *Nullum crimen sine lege*

1. Provided that this Statute is applicable in accordance with article 6, 7, 8, 9 or 10 a person shall not be criminally responsible under this Statute:

(a) In the case of a prosecution with respect to a crime referred to in article 5, paragraphs [(a) to (d)], unless the conduct in question constitutes a crime that is defined in this Statute;

(b) In the case of a prosecution with respect to a crime referred to in article [5, paragraph (e)], unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy.]

3. Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

Article 22 *Non-retroactivity*

1. Provided that this Statute is applicable in accordance with article 21, a person shall not be criminally responsible under this Statute for conduct committed prior to its entry into force.

[2. If the law as it appeared at the commission of the crime is amended prior to the final judgement in the case, the most lenient law shall be applied.]⁶⁹

Article 23 *Individual criminal responsibility*

1. The Court shall have jurisdiction over natural persons pursuant to the present Statute.

⁶⁸ It was generally agreed that consistency with internationally recognized human rights would require that interpretation by the Court be consistent with the principle of *nullum crimen sine lege*. A view was also expressed that this should be explicitly stated in this article or be made clearer in article 21. For example, article 21, paragraph 2, could be reformulated as follows:

“The provisions of article 5 shall be strictly construed and shall not be extended by analogy to, or be interpreted to proscribe, conduct not clearly criminal under it.”

⁶⁹ This provision raises issues relating to non-retroactivity, amendment of the Statute and penalties. Accordingly, further consideration of this issue is required.

⁶⁷ There was broad support for option 1. Some delegations, however, favoured the approach taken in option 2.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

[3. Criminal responsibility is individual and cannot go beyond the person and the person's possessions.]⁷⁰

4. The fact that the present Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5. The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.]⁷¹

NB: In the context of paragraphs 5 and 6, see also article 76 (Penalties applicable to legal persons) and article 99 (Enforcement of fines and forfeiture measures).

7. [Subject to the provisions of articles 25, 28 and 29,] a person is criminally responsible and liable for punishment for a crime defined [in article 5] [in this Statute] if that person:

(a) Commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

[(c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 25;]

(d) [With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists in the commission [or attempted commission] of that crime, including providing the means for its commission,⁷²

(e) Either:

(i) [Intentionally] [participates in planning] [plans] to commit such a crime which in fact occurs or is attempted; or

[(ii) Agrees with another person or persons that such a crime be committed and an overt act in furtherance of the agreement is committed by any of these persons that manifests their intent [and such a crime in fact occurs or is attempted];]^{73, 74}

(f) [Directly and publicly] incites the commission of [such a crime] [genocide] [which in fact occurs], [with the intent that such crime be committed];

(g)⁷⁵ [With the intent to commit such a crime,] attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions.⁷⁶

NB: This article should be re-examined as to the references to the mental element in view of article 29 (Mens rea (mental elements)).

Article 24

Irrelevance of official position

1. This Statute shall be applied to all persons without any discrimination whatsoever: official capacity, either as Head of State or Government, or as a member of a Government or parliament, or as an elected representative, or as a government official, shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [per se] constitute a ground for reduction of the sentence.

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or

⁷⁰ This proposal deals mainly with the limits of civil liability and should be further discussed in connection with penalties, forfeiture and compensation to victims of crimes.

⁷¹ There is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute. Many delegations are strongly opposed, whereas some strongly favour its inclusion. Others have an open mind. Some delegations hold the view that providing for only the civil or administrative responsibility/liability of legal persons could provide a middle ground. This avenue, however, has not been thoroughly discussed. Some delegations, who favour the inclusion of legal persons, hold the view that this expression should be extended to organizations lacking legal status.

⁷² It was pointed out that the commentary to the ILC Draft Code of Crimes against the Peace and Security of Mankind (*Official Records of the General Assembly, Fifty-first Session, Supplement No 10* and corrigendum (A/51/10 and Corr.1, p. 24, para. (12))) implicitly also includes aiding, abetting or assisting ex post facto. This presumption was questioned in the context of the International Criminal Court. If aiding, etc., ex post facto were deemed necessary to be criminalized, an explicit provision would be needed.

⁷³ In addition to the two types of conduct described in paragraph (e), there is a third type of criminal association that may be considered. One formulation of this third category would be to refer to the conduct of a person who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization".

⁷⁴ The inclusion of this subparagraph gave rise to divergent views.

⁷⁵ Questions pertaining to voluntary abandonment or repentance should be further discussed in connection with grounds for excluding criminal responsibility.

⁷⁶ A view was expressed that it would be preferable that issues connected with attempt be taken up in a separate article rather than in the framework of individual responsibility. In that view, the article on individual responsibility should only refer to the way in which the person takes part in the commission of a crime, regardless of whether it deals with a completed crime or an attempted crime.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.⁷⁷

Article 25

Responsibility of [commanders] [superiors]⁷⁸ for acts of [forces under their command] [subordinates]⁷⁹

[In addition to other forms of responsibility for crimes under this Statute, a [commander] [superior] is criminally responsible] [A [commander] [superior] is not relieved of responsibility]⁸⁰ for crimes under this Statute committed by [forces] [subordinates] under his or her command [or authority] and effective control as a result of the [commander's] [superior's] failure to exercise properly this control where:

(a) The [commander] [superior] either knew, or [owing to the widespread commission of the offences] [owing to the circumstances at the time] should have known, that the [forces] [subordinates] were committing or intending to commit such crimes; and

(b) The [commander] [superior] failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof].

Article 26

Age of responsibility

NB: In the context of this article, see also subparagraph (a) of article 75 (Applicable penalties).

Proposal 1

1. A person under the age of [twelve, thirteen, fourteen, sixteen, eighteen] at the time of the commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute [, unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

[2. A person who is between the ages of [sixteen] and [twenty-one] at the time of the [alleged] commission of a crime shall be evaluated [by the Court] as to his or her maturity to determine whether the person is responsible under this Statute.]

⁷⁷ Further discussion of paragraph 2 would be required in connection with international judicial cooperation.

⁷⁸ Most delegations were in favour of extending the principle of command responsibility to any superior.

⁷⁹ One delegation held the view that this principle should be dealt with in connection with the definitions of the crimes.

⁸⁰ The alternatives highlight the question of whether command responsibility is a form of criminal responsibility in addition to others or whether it is a principle that commanders are not immune for the acts of their subordinates.

Proposal 2

[Persons aged 13 to 18 years at the time of the facts shall be criminally responsible but their prosecution, trial and sentence and the regime under which they serve their sentence may give rise to the application of special modalities specified in the Statute.]⁸¹

Article 27

Statute of limitations

Proposal 1

[1. The period of limitations shall be completed upon the lapse of xx years for the offence of ..., and yy years for the offence of ...

2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State that has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned.]

Proposal 2

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court.]

Proposal 3

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court; but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, owing to the lapse of time, a person would be denied a fair trial.]

⁸¹ Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights) prohibit the punishment of minors.

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 of proposal 1 in respect of both of the age groups mentioned.

A question was raised as to what the criteria of the evaluation process would be, and whether this should be left for the Court to develop in supplementary rules or by jurisprudence.

It was observed that, in its article 1, the Convention on the Rights of the Child defines as a child every human being younger than eighteen years of age and that, in its article 37, it lays down a series of limitations as regards the applicable penalties, ruling out the death penalty and life imprisonment without parole.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Proposal 4

[Crimes not subject to limitation]

The crimes referred to in article 5, paragraphs (a), (b) and (d), shall not be subject to limitation.

Crimes subject to limitation

1. Proceedings before the Court in respect of the crimes referred to in article 5, paragraph (c), shall be subject to a period of limitation of 10 full years from the date on which the crime was committed, provided that during this period no prosecution has been brought.

2. If a prosecution has been initiated during this period, either before the Court or in a State competent to bring a prosecution under its internal law, the proceedings before the Court shall not be subject to limitation until 10 full years have elapsed from the date of the most recent prosecution.]

Proposal 5

[1. The statute of limitations as established hereunder shall extinguish the criminal prosecution and the punishment.

2. The statute of limitations will be [] years and shall commence to run as follows:

(a) In case of instantaneous crime, from the moment of its perpetration;

(b) In case of attempt, from the moment the last act of execution was performed or the due conduct was omitted;

(c) In case of permanent crime, from the moment of the cessation of the criminal conduct.

3. The statute of limitations may be interrupted by the actions taken in the investigation of the crime and its perpetrators. If those actions were stopped, the statute of limitations will run again as of the day the last act of investigation was carried out.

4. The statute of limitations for definitive sanctions will run as of the moment the condemned person escaped and will be interrupted with its detention.]

NB: The proposals under this article have not been consolidated.

[Article 28

Actus reus (act and/or omission)

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime can constitute either an act or an omission, or a combination thereof.

2. Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself

or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where:

(a) The omission is specified in the definition of the crime under this Statute; or

(b) In the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute⁸² to avoid the result of such crime [or creates a particular risk or danger that subsequently leads to the commission of such crime].⁸³

[3. A person is only criminally responsible under this Statute for committing a crime if the harm required for the commission of the crime is caused by and [accountable] [attributable] to his or her act or omission.]^{84,85}

Article 29

Mens rea (mental elements)

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent and knowledge.

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

(a) In relation to conduct, that person means to engage in the act [or omission];

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means to be aware that a circumstance exists or a consequence will occur.

[4.^{86, 87} For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be

⁸² Some delegations questioned whether the source of this obligation is wider than the Statute.

⁸³ Some delegations had concerns about including this clause which referred to the creation of a risk. Other delegations thought that, in the context of the offences of the Statute, breach of an obligation under the Statute to avoid the result of a crime was sufficient.

⁸⁴ Some delegations thought that a provision on causation was not necessary.

⁸⁵ These brackets reflect the view expressed that, although much progress has been made on the definition of omission, the question of whether omission should be inserted in the Statute depends upon the final drafting of this article.

⁸⁶ Further discussion is needed on this paragraph.

⁸⁷ A view was expressed to the effect that there was no reason for rejecting the concept of commission of an offence also through negligence, in which case the offender shall be liable only when so prescribed by the Statute.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

(a) The person is aware of a risk that the circumstance exists or that the consequence will occur;

(b) The person is aware that the risk is highly unreasonable to take;

[and]

[(c) The person is indifferent to the possibility that the circumstance exists or that the consequence will occur.]]

NB: The inclusion of the notion of recklessness should be re-examined in view of the definition of crimes.

Article 30⁸⁸ Mistake of fact⁸⁹ or of law⁹⁰

Option 1

Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment.

Option 2

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime [charged provided that said mistake is not inconsistent with the nature of the crime or its elements] [, and provided that the circumstances he reasonably believed to be true would have been lawful].

2. Mistake of law may not be cited as a ground for excluding criminal responsibility [, except where specifically provided for in this Statute].⁹⁰

Article 31 Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct.⁹¹

⁸⁸ There were widely divergent views on this article.

⁸⁹ Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea.

⁹⁰ Some delegations felt that paragraph 2 of option 2 still left some ambiguity, and an alternative approach could read as follows:

"Mistake of law as to whether a particular type of conduct is a crime under this Statute, or whether a crime is within the jurisdiction of the Court, is not a ground for excluding criminal responsibility. However, a [reasonable] mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime."

⁹¹ The link between the opening clause of paragraph 1 and paragraph 2 may need to be further considered.

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

[(b) The person is in a state of [involuntary] intoxication [by alcohol, drugs or other means] that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law; [provided, however, that if the person has voluntarily become intoxicated [[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]],⁹² the person shall remain criminally responsible;]

(c) The person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent ...⁹³ use of force] [immediate ...⁹³ threat of force] [impending ...⁹³ use of force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];

(d) [The person reasonably believes that]⁹⁴ there is a threat of [imminent] death or serious bodily harm against that person or another person [or against his or her liberty] [or property or property interests] and the person acts reasonably to avoid this threat, provided that the person's action⁹⁵ [causes] [was not intended to cause] [n]either death [n]or a greater harm

⁹² There are two approaches to the question of voluntary intoxication: If it is decided that voluntary intoxication should in no case be an acceptable ground for excluding criminal responsibility, the text within brackets "[with the pre-existing intent to commit the crime] [or knowing that the circumstances would arise that led him or her to commit the crime and that those circumstances could have that effect]" would have to be deleted. In that case, however, provision should be made for mitigation of punishment with regard to persons who were not able to form a specific intent, where required, towards the crime committed due to their intoxication. If this text were to be retained, the ground for excluding criminal responsibility would apply in all cases of voluntary intoxication except for those in which the person became intoxicated in order to commit the crime in an intoxicated condition (*actio libera in causa*). This would probably lead to a great number of war crimes and crimes against humanity going unpunished.

⁹³ Ellipsis inserted so as not to repeat "[unlawful] [and] [unjustified]" in all three alternatives.

⁹⁴ This should be considered together with article 30.

⁹⁵ A proposal was made to replace the rest of the first sentence by "is under the circumstances not reasonably more excessive than the threat or perceived threat".

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

than the one sought to be avoided;⁹⁶ [however, if the person has [knowingly] [recklessly] exposed him or herself to a situation which was likely to lead to the threat, the person shall remain responsible];

(e) [The person reasonably believes that there are]⁹⁷ [there are] [the person necessarily acts in response to] circumstances beyond that person's control which constitute a [threat of [imminent] death or serious bodily harm] [danger] to that person or another person [or property or property rights]⁹⁸ and the person acts reasonably to avoid the [threat] [danger], [provided that the person intended to prevent a greater harm [and did not intend to cause] [and did not cause] death]⁹⁹ and provided that there exists no other way to avoid such threat].

2. The Court may¹⁰⁰ determine the applicability of the grounds for exclusion of criminal responsibility [listed in paragraph 1] [permitted by this Statute] [to the case before it].¹⁰¹

Article 32

Superior orders and prescription of law

1. The fact that a person's conduct was pursuant to an order of a Government or of a superior [whether military or civilian] shall [not] relieve the person of criminal responsibility [[if] [unless] the order [was known to be unlawful or] appeared to be manifestly unlawful].¹⁰²

[2. The perpetrator of or an accomplice in a crime of genocide [or a crime against humanity] [or a ...] shall not be exempted from criminal responsibility on the sole ground that the person's conduct was pursuant to an order of a Government or a superior, or pursuant to national legislation or regulations.]^{103, 104}

⁹⁶ A proposal was made to replace "provided that the person's action [causes] [was not intended to cause] [neither death [n]or a greater harm than the one sought to be avoided]" with "employing means which are not disproportionate to the risk faced".

⁹⁷ This should be considered together with article 30.

⁹⁸ It was suggested that a mere reference to the law of necessity would suffice in place of the first part of the sentence.

⁹⁹ This applies more to a military situation.

¹⁰⁰ The issue of the extent to which the facts underlying these grounds, for excluding criminal responsibility, if not sufficient to exclude criminal responsibility, should instead be considered in mitigation of punishment will be dealt with in part 7.

¹⁰¹ The link between the opening clause of paragraph 1 and paragraph 2 may need to be reconsidered.

¹⁰² An unlawful or manifestly unlawful order must be understood as an order in conflict with the rules of international law applicable in armed conflict.

¹⁰³ This paragraph should be considered together with article 31, paragraph 2.

¹⁰⁴ For the question of mitigating circumstances, see part 7.

[Article 33]¹⁰⁵

[Possible grounds for excluding criminal responsibility specifically referring to war crimes]

...

Article 34

Other grounds for excluding criminal responsibility

1. At trial the Court may consider a ground for excluding criminal responsibility not specifically enumerated in this part if the ground:

(a) Is recognized [in general principles of criminal law common to civilized nations] [in the State with the most significant contacts to the crime] with respect to the type of conduct charged; and

(b) Deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute.

2. The procedure for asserting such a ground for excluding criminal responsibility shall be set forth in the Rules of Procedure and Evidence.¹⁰⁶

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 35

Organs of the Court

The Court consists of the following organs:

(a) A Presidency;

(b) An Appeals Chamber, Trial Chambers and [a Pre-Trial Chamber] [Pre-Trial Chambers];

(c) The Office of the Prosecutor;

(d) A Registry.

Article 36

Judges serving on a full-time basis

The judges composing the Presidency¹⁰⁷ shall serve on a full-time basis as soon as they are elected. [The judges composing [the] [a] Pre-Trial Chamber shall serve on a full-time basis [once the Court¹⁰⁸ is seized of a matter] [when required in the view of the President].] [On the recommendation

¹⁰⁵ It was questioned whether such grounds as military necessity could be dealt with in connection with the definition of war crimes.

¹⁰⁶ This article needs to be further considered together with article 31, paragraph 2, and article 20.

¹⁰⁷ The view was expressed that reference should be made here to the "President" rather than the "Presidency".

¹⁰⁸ Delegations agreed that this reference to "the Court" means the whole Court, as set out in article 35.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

of the Presidency, the States Parties] [The Presidency] may [by a two-thirds majority] decide that the workload of the Court requires that the judges [composing any of the other Chambers] should serve on a full-time [or part-time] basis.

Article 37

Qualification and election of judges

1. Subject to the provisions in paragraph 2, there shall be [...] judges of the Court.

[There shall be no fewer than [...] ¹⁰⁹judges from each geographical group as established by the General Assembly of the United Nations.]

2. (a) The President, acting on behalf of the Court, [as well as any State Party] may propose an increase [or decrease] in the number of judges, indicating the reasons why this is considered necessary and appropriate. Any such proposal shall be submitted to the Registrar, who shall promptly circulate it to all States Parties;¹¹⁰

(b) Any such proposal shall then be considered at a meeting of States Parties to be convened in accordance with article [...].¹¹¹ The adoption and entry into force of any such proposal shall require a [two-thirds] majority of States Parties [present and voting at that meeting];¹¹²

(c) The election of additional judges shall then take place at the next session of the Assembly of States Parties. [Any decrease in the number of judges shall however only be given effect as and when the terms of office of the relevant number of existing judges end.]¹¹³

3. The judges of the Court shall:

(a) Be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]

(b) Have:

(i) [At least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]

(ii) Recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] [; and]

(c) Possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].

4. *Option 1*

Each [State Party] [national group appointed for the purpose by a State [Party]] may nominate for election not more than three persons [, all of whom must be nationals of different [States] [States Parties].] [who possess the qualification(s) referred to in paragraph 3] [and who are willing to serve as may be required on the Court].

[The [State Party] [national group] shall indicate which of the qualifications referred to in paragraph 3 (b) the candidate possesses.]

Option 2

(a) When an election is required, the Nominating Committee shall develop a list of candidates, equal in number to the number of positions to be filled.

(b) The Nominating Committee shall be composed by the Assembly of States Parties.

(c) Once the Nominating Committee is established, the Registrar shall provide the Committee, upon request, with any necessary facilities and administrative and staff support.

5. The judges of the Court shall be elected by secret ballot by [an absolute] [a two-thirds] majority vote of the [Assembly of the [States Parties present and voting] [General Assembly of the United Nations] [and the Security Council] from a list of persons nominated in accordance with paragraph 4.¹¹⁴

[[Two thirds] [One half] of the States Parties shall constitute a quorum at the meeting of the Assembly of States Parties for this purpose.]

[In the event that a sufficient number of judges is not elected, the Nominating Committee shall provide a further list of candidates and there shall be another election.]¹¹⁵

6. No two judges may be nationals of the same State.

[7. [A sufficient number of the judges to constitute the Pre-Trial Chamber and Trial Chambers] [[Two thirds] [A majority] of the judges] shall be elected from among candidates having criminal [trial] [law] experience.]

¹⁰⁹ The number is dependent on the total number of judges.

¹¹⁰ The relationship between this provision and the provisions on amendments to the Statute needs to be borne in mind.

¹¹¹ The article dealing with the convening of regular and extraordinary meetings of the Assembly of States Parties.

¹¹² Consideration could be given to the quorum required for extraordinary meetings of the Assembly of States Parties in the appropriate article dealing with the convening of such meetings.

¹¹³ This provision is conditional upon the acceptance of the words "or decrease" in paragraph 2 (a).

¹¹⁴ Matters relating to the mode by which votes would be cast and the compilation and announcement of results could be dealt with by the Rules of Procedure and Evidence.

¹¹⁵ This provision is linked to option 2 for paragraph 4.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

8. [States Parties] [The General Assembly of the United Nations]¹¹⁶ shall, in the election of the judges, [bear in mind] [take into account the need for]:

(a) The representation of the principal legal systems of the world;

[(b) The representation of the main forms of civilization;]

(c) Equitable geographical distribution;

[(d) Gender balance;]

[(e) The need, within the membership of the Court, for expertise on issues related to sexual and gender violence, violence against children and other similar matters].

[9. A judge may not be over the age of 65 at the time of election.]

10. Judges shall hold office for a term of [five] [nine] years and [are eligible for re-election [for a further term of five years]] [, subject to article 38, paragraph 2, are not eligible for re-election]. At the first election, one third of the judges chosen by lot shall serve for a term of [three] years [and are eligible for re-election]; one third of the judges chosen by lot shall serve for a term of [six] years; and the remainder shall serve for a term of [nine] years.¹¹⁷

11. Notwithstanding paragraph 10, a judge shall continue in office in order to complete any case the hearing of which has commenced.

Article 38 Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 37.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term[, and [if that period is less than three years] is eligible for re-election for a further term].

Article 39 The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier. They shall be eligible for re-election only once.

2. 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.

3. The President and the First and Second Vice-Presidents shall constitute the Presidency, which shall be responsible for:

(a) The due administration of the Court [, including the supervision and direction of the Registrar and staff of the Registry and the Court,]¹¹⁸ with the exception of the Office of the Prosecutor; and

(b) The other functions conferred on it by this Statute.

[4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern including, for example, the functioning of the Registry and security arrangements for defendants, witnesses and the Court.]

Article 40 Chambers

1. The Appeals Chamber [shall be established as soon as possible after the election of the judges. It] shall consist of [three] [five] [seven] judges to be elected by an absolute majority of the judges of the Court.¹¹⁹ [At least one third of the judges must possess the qualifications set out in paragraph 3 (b) [(i)] [(ii)] of article 37.]

2. Judges of the Appeals Chamber shall serve [for a period of three years [and may be re-elected]] [until the end of their terms of office as judges of the Court]. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. The Presidency shall assign judges who are not members of the Appeals Chamber to Trial Chambers and [Pre-Trial Chambers] [the Pre-Trial Chamber] in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].¹²⁰

[4. Judges of the Pre-Trial Chamber or the Trial Chambers, as the case may be, shall serve in their respective Chambers for a period of three years. They may, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.]

¹¹⁸ Detailed administrative arrangements on, for example, consultation with the Prosecutor for specific matters of mutual concern, could be dealt with in the Rules.

¹¹⁹ Consideration needs to be given to whether the members of the Presidency of the Court should be members of the Appeals Chamber.

¹²⁰ Mechanisms that could be adopted for this purpose could include the assignment of judges to specific Chambers by lot, the rotation of judges, judges assigned to specific Chambers for a fixed term or fixed teams of judges with a team assigned to be the Trial Chamber and another team assigned to be the Pre-Trial Chamber for a given case.

¹¹⁶ These options reflect the different entities which may elect the judges.

¹¹⁷ The need for staggering in the event of a change of number of judges can be addressed in the Rules of Procedure and Evidence.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

5. A Trial Chamber shall consist of [three] [five] judges. [[At least one of] [A majority of] [All] the judges must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

6. [A] [The] Pre-Trial Chamber shall consist of [one judge] [three judges] and shall perform such pre-trial functions as are assigned to it by this Statute. [The number of judges may be [increased to three] [reduced to one]¹²¹ in accordance with the Rules of Procedure and Evidence]. [[The judge] [At least two judges] must possess the qualifications set out in paragraph 3 (b) (i) of article 37.]

[7. At the time a Chamber is constituted, alternate judges [may] [shall] be nominated by the Presidency to attend the proceedings of that Chamber and, provided that an alternate judge has been present throughout the proceedings, that judge may act as a member of that Chamber in the event that a judge of that Chamber dies, is disqualified or otherwise becomes unavailable during the course of the proceedings.]¹²²

Article 41 Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges serving on a full-time basis shall not engage in any other occupation of a professional nature.

4. Any doubt on the points raised in paragraphs 2 and 3 shall be decided by an absolute majority of the judges of the Court. Where any question concerns an individual judge, that judge shall not take part in the decision.

Article 42 Excusing and disqualification of judges

1. The Presidency may at the request of a judge excuse that judge from the exercise of a function under this Statute, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].

2. Judges shall not participate in any case in which their impartiality might reasonably be doubted on any ground. A judge shall be excluded from a case in accordance with this paragraph if, *inter alia*, he or she has previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or is a

¹²¹ These options are linked to the earlier provision on the number of judges for the Chamber.

¹²² This paragraph needs to be harmonized with paragraph 1 of article 72 and other provisions, if any, dealing with alternate judges for judicial proceedings other than trial proceedings.

national of a complainant State, [of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

3. The Prosecutor [or] the accused [or an interested State] may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges of the Court.¹²³ The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43 The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [complaints] [or] [referrals] [or any substantiated information related to the alleged commission of a crime under the jurisdiction of the Court], for examining them and for conducting investigations and prosecutions before the Court. A member of the Office of the Prosecutor shall not seek or act on instructions from any external source.

2. The Office of the Prosecutor shall be headed by the Prosecutor. [Without prejudice to article 47, the] [The] Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities [and represent different legal systems]. They shall [be available to] serve on a full-time basis.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, be highly competent in and have [at least ten years'] [extensive] practical experience in the prosecution [or trial]¹²⁴ of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor [and the Deputy Prosecutors] shall be elected by secret ballot by an absolute majority of the States Parties.¹²⁵ [The Deputy Prosecutors shall be appointed by the

¹²³ Some delegations expressed the view that questions of disqualification should be decided by an absolute majority of the members of the Chamber concerned.

¹²⁴ Most delegations thought that both prosecutorial and judicial experience in criminal trials should be regarded as practical experience in that sense, but as some delegations felt that prosecutorial experience should be of paramount importance, the reference to "trial experience" was kept in brackets.

¹²⁵ There ought to be a procedure for the Assembly to have a list of candidates rather than to have nominations put to the election directly, but it was felt that this was a matter for the rules of the Assembly.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Prosecutor.¹²⁶] Unless a shorter term is otherwise decided on at the time of their election [or appointment], they shall hold office for a term of [five] [seven] [nine] years and are [not] eligible for re-election. The Prosecutor and Deputy Prosecutors may not be over 65 years of age at the time of election [or appointment].

5. The Prosecutor and Deputy Prosecutors shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. [When serving on a full-time basis, they] [They] shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at his or her request from acting in a particular case.

7. [Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground.]¹²⁷ They shall be excluded from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level [, or are a national of a complainant State[, of the State on whose territory the offence is alleged to have been committed] or of a State of which the accused is a national].

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by [the Presidency] [the Appeals Chamber] [the Judges of the Court]. The accused may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this paragraph. The Prosecutor or Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

[9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.]¹²⁸

[10. The Office of the Prosecutor shall be responsible for providing protective measures to witnesses to be called by the Prosecution. The Office of the Prosecutor shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.]¹²⁹

Article 44 The Registry

1. Subject to article 43, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.

2. [The judges] [The States Parties] by an absolute majority by secret ballot shall elect a Registrar, who [, under the authority of the President of the Court,] shall be the principal administrative officer of the Court. They may [in the same manner elect] [appoint] a Deputy Registrar if the need arises.

3. The Registrar shall hold office for a term of [five] [nine] years, is [not] eligible for re-election [once] and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on by an absolute majority of the judges, and may be [elected] [appointed] on the basis that the Deputy Registrar is willing to serve as required. [Their term shall end in all cases when they reach 65 years of age.] The Registrar and the Deputy Registrar shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

[4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide counselling and other assistance to victims, [defence]¹³⁰ witnesses, their family members and others at risk on account of testimony given by such witnesses and shall advise the organs of the Court on appropriate measures of protection and other matters affecting the rights and the well-being of such persons. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.]¹³¹

Article 45 Staff

1. The Registrar and the Prosecutor shall appoint such qualified staff of their respective offices, including investigators in case of the Prosecutor, as may be required.

2. In the employment of the staff, the Registrar and the Prosecutor shall ensure the highest standards of efficiency, competence and integrity and shall have regard to the criteria set forth in article 37, paragraph 8.

3. The staff regulations, which shall apply to the staff of all organs of the Court, shall be proposed by the Registrar with the agreement of the Presidency and the Prosecutor. Such regulations shall be circulated to the States Parties for comment,

¹²⁶ If this option is kept, there should be some system of involvement for the States parties, either by way of drawing up a list for the candidates or by having the possibility of objection to an appointment by a certain number of States parties.

¹²⁷ Views were expressed that the reasons for doubts should be set out specifically.

¹²⁸ Many delegations preferred this to be in the Rules of Procedure and Evidence.

¹²⁹ Such staff could be available in the Victims and Witnesses Unit under article 44, paragraph 4, but some delegations felt that there was a need for such staff in the Office of the Prosecutor as well. Some delegations felt that at least the first sentence was already covered in article 68.

¹³⁰ Some delegations were of the view that there should be a separate unit for prosecution witnesses in the Office of the Prosecutor, as reflected in the bracketed language in article 43, paragraph 10: others were of the view that there should be only one unit located in the Registry.

¹³¹ The relationship with paragraph 5 of article 68 was considered. Views were expressed that parts of paragraph 4 should appear in article 68.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

before they take effect. The Registrar shall take into account the comments made by States Parties.¹³²

[4. Any State Party, intergovernmental organization [or non-governmental organization] may offer to detail personnel to assist with the work of any of the organs of the Court and to be considered for such work. The Prosecutor may accept any such offer for the Office of the Prosecutor. In any other case, the Presidency, in consultation with the Registrar, may accept the offer.]¹³³

Article 46 Solemn undertaking

Before first exercising their functions under the present Statute, judges, the Prosecutor, Deputy Prosecutors, the Registrar and the Deputy Registrar shall make a public and solemn undertaking to do so impartially and conscientiously.

Article 47¹³⁴ Removal from office

1. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who is found to have committed serious misconduct or a serious breach of his or her duties under this Statute [or the [Rules of Procedure and Evidence] [Regulations of the Court]], or to be unable to exercise the functions required by this Statute,¹³⁵ shall cease to hold office if a decision to this effect is made in accordance with paragraph 2.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) In the case of a judge, by an [absolute] [two-thirds] majority of the States Parties further to a recommendation adopted by a two-thirds majority of the other judges of the Court;

(b) In the case of the Prosecutor [or a Deputy Prosecutor], by an absolute majority of the States Parties;

[(c) In the case of a Deputy Prosecutor, by the Prosecutor or by an absolute majority of the States Parties;]

[(c)] [(d)] In the case of the Registrar or Deputy Registrar, by a majority vote of the [judges] [or the] [States Parties].

3. The judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability otherwise to hold office is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court], but shall not otherwise participate in the consideration of the matter.

Article 48 Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 47, paragraph 1, shall be subject to disciplinary measures, in accordance with the [Rules of Procedure and Evidence] [Regulations of the Court].¹³⁶

Article 49 Privileges and immunities

1. The judges, the Prosecutor, [the Deputy Prosecutors,] [the Registrar] [and the Deputy Registrar] shall [, when engaged in the business of the Court,] enjoy diplomatic privileges and immunities.

2. The [Deputy Prosecutors,] [the Registrar,] [the Deputy Registrar] [and] staff of the Office of the Prosecutor and the Registry shall enjoy the privileges, immunities and facilities necessary for the performance of their functions [in accordance with the Rules of Procedure and Evidence].

3. Counsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court. [In particular and without prejudice to article 70, they shall, in respect of the words spoken or written and acts done by them in the discharge of their functions, be immune from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer discharging their functions.]¹³⁷

¹³² Some delegations wanted an approval procedure for the States parties to be set out in the Statute, whereas other delegations felt that circulation should be just for information.

¹³³ Some delegations felt that this was already covered under the part dealing with cooperation or that it should be addressed in that part.

¹³⁴ Several delegations expressed the view that a separate article is required in the Statute to deal with the general issue of expiry of terms of office. It was suggested that such an article should be drafted along the following lines:

"The term of office of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar ends upon the expiry of their term of office, death, resignation or removal from office in accordance with article 47."

¹³⁵ A number of delegations expressed the view that a separate procedure for removal of office in the case of an inability to exercise the functions required (through, for example, long-term illness or disability) should be set out in the Regulations of the Court.

¹³⁶ Several delegations expressed the view that this provision relating to disciplinary measures should be contained in the Rules.

¹³⁷ Some delegations felt that the principle set out in the first sentence was sufficient for the Statute and that any elaboration of that principle could be left for the Rules of Procedure and Evidence or the Host Country Agreement. Views were also expressed that this paragraph should be placed in article 68.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

4. The privileges and immunities of:

(a) [A judge] [the members of the Presidency] and the Prosecutor may be waived by an absolute majority of the judges;

[(b) The other judges may be waived by the Presidency;]

(c) The Registrar may be waived by the Presidency;

(d) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor; and

(e) The Deputy Registrar and staff of the Registry may be waived by the Registrar.¹³⁸

Article 50

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties [in the Rules of Procedure and Evidence]. These salaries and allowances may not be decreased during their terms of office.

Article 51

Working languages

1. The working languages of the Court shall be English and French, pursuant to the Rules of Procedure and Evidence.

2. The Court shall, at the request of any Party, authorize a language other than English or French to be used by that Party.

Article 52

*Rules of Procedure and Evidence*¹³⁹

1. [Option 1

The Rules of Procedure and Evidence, including an elaboration of the elements of offences that must be proven, annexed at _____, shall be an integral part of this Statute.]

[Option 2

The Rules of Procedure and Evidence shall enter into force [upon adoption by the Assembly of States Parties by [an absolute majority] [a two-thirds majority of those present and voting]] [together with this Statute]. They shall be consistent with the Statute.]

¹³⁸ A view was expressed that the President should be given the power to waive the privileges and immunities of the staff of the Registry and that the Prosecutor's privileges and immunities should be waived by the Deputy Prosecutors.

¹³⁹ References to the Rules in the Statute will have to be revisited and adjusted to the language used in this article (see also footnote 140 below).

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

[(c) The Prosecutor].

They shall enter into force upon adoption by the Assembly of States Parties [by a [...] majority]. Any modification shall be consistent with this Statute.

[3. In urgent cases, the judges may by [consensus] [a two-thirds majority] draw up a rule to be applied provisionally until the Assembly of States Parties adopts, amends or rejects it.]

Article 53

*Regulations of the Court*¹⁴⁰

1. As far as provided in this Statute or the Rules of Procedure and Evidence or otherwise necessary for the routine functioning of the Court, the judges shall by [a two-thirds] [an absolute] majority adopt the Regulations of the Court. The Regulations of the Court shall be consistent with the Statute and the Rules of Procedure and Evidence. [In the event of conflict, the Statute or the Rules of Procedure and Evidence shall prevail.]

2. The Prosecutor [and the Registrar] shall be consulted in the elaboration of the Regulations and any amendments thereto. [The Regulations of the Court and any amendments thereto shall be circulated to the States Parties for comment. The judges shall take into account the comments made by States Parties.]

3. The Regulations and any amendments thereto shall take effect immediately upon adoption by the judges, unless otherwise decided by the judges, and shall remain in effect unless a majority of States Parties objects to them.¹⁴¹

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Investigation of alleged crimes

1. On receiving a complaint [or upon notification of a decision of the Security Council referred to in article 10, paragraph 1,] [or ex officio upon any other substantiated information], the Prosecutor shall [subject to paragraphs 2 and 3] initiate an investigation unless the Prosecutor concludes that there is no reasonable basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber].

¹⁴⁰ It was suggested that these provisions might be called "Rules of the Court" so as to enable a reference to the "Rules" in the Statute to refer to either of the sets of provisions, as appropriate.

¹⁴¹ Some delegations wanted the procedure for objections to be clarified in the Rules of Procedure and Evidence.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

NB: The term “reasonable basis” used in paragraph 1 is also used in the criteria listed in paragraph 2 (b) (i). If the latter is retained, a broader term might be necessary in paragraph 1 in order to cover all the criteria listed under paragraph 2.

[2. Prior to initiating an investigation the Prosecutor shall:

(a) [Notify the States Parties of any complaint [or any decision of the Security Council referred to in article 10, paragraph 1], and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission; and]

(b) Determine whether:

(i) The complaint provides or is likely to provide a reasonable basis [in law or on the facts] for proceeding with a prosecution under this Statute; and

(ii) The case is or would be admissible under article 15; and

[(ii bis) A prosecution under this Statute would be [in the interests of justice] [taking into account the gravity of the offences] [and the interests of victims];

(iii) [An investigation would be consistent with the terms of any relevant Security Council decision]; and

(iv) To seek a preliminary ruling from the Court regarding the Court’s jurisdiction if the case could later be challenged under article 17.]

[3. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a), until the final ruling of the Court.]

4. The Prosecutor may:¹⁴²

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect documentary and other evidence [documents, records and articles of evidence];

(c) *Option 1*

Conduct on-site investigations;

Option 2

(i) Except as provided for in this paragraph, when evidence is in the territory of a State, the Prosecutor shall, as necessary, seek the cooperation of that State in order to obtain that evidence. The Prosecutor may conduct investigations on the territory of a State only:

a. [With the consent of its competent authorities] [upon notification of and where necessary with the consent of its competent authorities] [in accordance with Part 9] [subject to the waiver by the competent authorities of the requirement of consent];

[b. When the Pre-Trial Chamber is satisfied that competent authorities to whom a request for assistance under Part 9 can be transmitted are not available [or not functioning].]

[(ii) In the case of paragraph (i)b. above, [such investigations] [investigations of a non-compulsory nature¹⁴³] shall be conducted with the [concurrence] [approval] of the Pre-Trial Chamber [which shall have regard to the views of [interested States]]. [Notification shall be given to the State in question, in particular for the purpose of the State obtaining an extension of the period for execution of a relevant request for judicial assistance.]

[(iii) In the case of paragraph (i)b. above, the Prosecutor may use compulsory measures for collecting evidence (such as search and seizure and compelling the attendance of witnesses) based upon a valid warrant issued by the Pre-Trial Chamber.]

(d) Take necessary measures to ensure the confidentiality of information or the protection of any person [, including victims];

(e) The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in so doing, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the

¹⁴² It was proposed that the following text be included as the first line of article 54, paragraph 4:

“When evidence is in the territory of a State Party whose competent authority is functioning properly, the Prosecutor shall request, as necessary, the Pre-Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 of this Statute.”

¹⁴³ This set of brackets will apply if subparagraph (iii) is accepted.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children;]

NB: See also paragraph 2 of article 68 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]).

(f) As appropriate, seek the cooperation of any State or of the United Nations, [or of any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

[(g) Where documents or information have been obtained by the Prosecutor upon a condition as to their confidentiality, which are, or are intended to be, used solely for the purposes of generating new evidence, agree that such documents or information will not be disclosed at any stage of the proceedings unless the provider of the information consents.]

NB: This subparagraph, as well as paragraphs 10 (d) and (f) of article 58 (Commencement of prosecution), paragraph 2 of article 61 (Notification of the indictment), paragraph 2 of article 67 (Rights of the accused), paragraph 9 of article 68 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]), article 71 (Sensitive national security information), and paragraphs 2 and 6 of article 90 (Other forms of cooperation [and judicial and legal [mutual] assistance]) all relate to confidentiality and they should be examined with a view to avoiding any duplication or contradiction.

[(h) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to secure the cooperation or assistance of a State or person in the investigation.]

NB: In the final drafting of paragraph 4, attention should be given to harmonizing the use of the words “shall” and “may”.

5. The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, issue such subpoenas [, orders] and warrants as may be required for the purposes of an investigation, including a warrant under article 59, paragraph 1, for the pre-indictment arrest of a suspect.

6. If, upon investigation and having regard, inter alia, to the matters referred to in article 15, the Prosecutor concludes that [a case is inadmissible under article 15 or] there is [not a sufficient basis for a prosecution] [no prima facie case] under this Statute [or a prosecution would not be in the interests of justice] [taking into account the interests of victims] and decides not to file an indictment, the Prosecutor shall so inform the [Presidency] [Pre-Trial Chamber], as well as the complainant

State [or the Security Council, in a case to which article 10, paragraph 1, applies], giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

[7. A decision referred to in paragraph 6 based on considerations of the interests of justice shall only become effective upon its having been confirmed by the [Presidency] [Pre-Trial Chamber] under paragraph 8 of this article.]

8. At the request of a complainant State [or, in a case to which article 10, paragraph 1, applies, at the request of the Security Council,] the [Presidency] [Pre-Trial Chamber] [shall] [may] review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision [but it may do so only once] [: provided that the Prosecutor, any suspect and the complainant State [or the Security Council (as the case may be)] shall be informed of such review proceedings or confirmation proceedings within the contemplation of paragraph 6 of this article which involves a decision based on considerations of the interests of justice and shall be entitled to submit his/her/their/its viewpoints with regard thereto, which viewpoints shall be considered by the [Presidency] [Pre-Trial Chamber] in coming to its decision].

[When new information is brought to his or her attention regarding the facts in respect of which he or she decided not to initiate an investigation or not to institute proceedings, the Prosecutor may reconsider his or her decision.]

[9. After a determination to initiate an investigation in accordance with article 54, paragraph 4, and prior to the commencement of a trial, a State requested by the Prosecutor to carry out investigations or a State on the territory of which the Prosecutor intends to conduct investigations may challenge the decision of the Prosecutor to initiate an investigation before the Pre-Trial Chamber on the grounds of lack of sufficient basis for a prosecution under this Statute.]

10. A person suspected of a crime under this Statute shall have the right:

(a) Prior to being questioned, to be informed that the person is a suspect [, of the conduct that the person is alleged to have committed which may constitute a crime under this Statute] and of the rights under (b) to (d) hereafter;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have [at all times] [in connection with questioning] the [prompt] [competent] legal assistance of the person's choosing; [or, if the person does not have legal assistance, to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the person lacks sufficient means to pay for such assistance];

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[(d) To be questioned in the presence of counsel unless the suspect has voluntarily waived his or her right to counsel;]

(e) Not to be compelled to testify or to confess guilt nor to be subjected to any form of coercion, duress or threat;

(f) If questioned in a language other than [a language the person understands and speaks] [his or her own language], to have, free of any cost, the assistance of a competent interpreter and a translation of any document on which the person is to be questioned;

(g) Not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.

[11. Evidence obtained during questioning in violation of these rights shall under no circumstances be used in the trial unless they are favourable to the suspect.]¹⁴⁴

[12. (a) The Prosecutor shall fully respect the rights of suspects under the Statute and the Rules of Procedure and Evidence.

(b) [To establish the truth the Prosecutor shall [ex officio] extend the investigation to cover all facts and evidence that are relevant to an assessment of the charge and to the legal consequences that may follow. The Prosecutor shall investigate equally incriminating and exonerating circumstances.]

(c) [If the Prosecutor concludes that there is a basis for prosecution under this Statute, he shall, in accordance with the Rules of Procedure and Evidence, investigate the case by seeking the cooperation of the States concerned or by himself, and such investigation shall be conducted in conformity with international law and fully respecting the sovereignty of the States concerned.]]¹⁴⁵

[13. (a) A person suspected of committing a crime within the meaning of this Statute:

- (i) Shall, as soon as he is involved in an investigation or prosecuted under this Statute, be entitled to collect all of the evidence that he deems necessary for his defence;
- (ii) May either collect this evidence himself or request the Pre-Trial Chamber of the Court to accomplish certain acts, seeking, where necessary, cooperation from any State Party.

The Pre-Trial Chamber may reject the request.

(b) If the suspect elects to collect the evidence himself in accordance with this paragraph, he may apply to the

[Presidency] [Pre-Trial Chamber] for the following orders and subpoenas: [list to be inserted]]

NB: In view of the length of the article, consideration may be given to placing some of its elements in a separate article. The drafting of this article might need revision in the light of the decisions to be taken in respect of article 57 (Functions of the Pre-Trial Chamber in relation with investigation).

[Article 55

Information on national investigations or proceedings

1. [A State Party shall promptly inform the Prosecutor] [At any time, a State Party may inform the Prosecutor] [Where the Court has jurisdiction over a crime pursuant to articles 6 and 7, the Court may request a State Party to inform it] about national investigations or proceedings as soon as it considers that any such investigations or proceedings involve the commission of a crime within the jurisdiction of the Court. Such information shall, at the request of the State Party concerned, be confidential and shall include a concise statement of the circumstances of the alleged crime, the status of the investigation or proceeding concerned and, where possible, the identity and whereabouts of any suspect or accused.

The Prosecutor may subsequently request the State Party to provide additional information about the national investigations or proceedings.

2. The Prosecutor may, after examining the information received from a State Party under paragraph 1 and having regard to the matters referred to in article 15, decide to initiate an investigation pursuant to articles 12 and 54. For that purpose, he may seek a ruling from the Pre-Trial Chamber in accordance with article 17.]

[Article 56

*Deferral of an investigation by the Prosecutor*¹⁴⁶

1. In the event that the Prosecutor, having regard to the matters referred to in article 15, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. Such information shall, at the request of the State concerned, be confidential.

2. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.]

¹⁴⁴ This paragraph will be discussed in connection with article 69.

¹⁴⁵ This paragraph will be discussed in connection with article 43.

¹⁴⁶ A view was expressed that article 56 could be examined in the context of article 54.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[Article 57]¹⁴⁷ *Functions of the Pre-Trial Chamber in relation with investigation*¹⁴⁸

1. [Where the Prosecutor intends to take an investigative action which may] [When the Prosecutor considers an investigation to] present a unique opportunity, which may not be available subsequently for the purposes of a trial, to take testimony or a statement from a witness, or to examine, collect or test evidence, [the Prosecutor shall] [, if the suspect/accused has not been identified or is not available] inform the Pre-Trial Chamber; and] the Pre-Trial Chamber, on the request of the Prosecutor, [or a suspect,] [or on its own initiative,] may take such measures as may be necessary to assure the efficiency and integrity of the proceedings, and in particular to protect the rights of the defence.

2. These measures may include the power:

(a) To make [orders] [recommendations] [orders and recommendations] regarding procedures to be followed;

(b) To direct that a record be made of the proceedings;

(c) To appoint an expert to assist;

(d) To authorize counsel for a suspect to assist, or where suspects have not been identified or have not designated counsel, appoint a lawyer to attend and represent the interest of the defence;

(e) To name one of its members [or an available judge of the Court]:

(i) To observe and make [orders] [recommendations] [orders and recommendations]

regarding the collection and preservation of evidence or the questioning of persons;

(ii) To decide on questions of law; or

(iii) To take such other actions as may be necessary to collect or preserve evidence [favourable to the defence] [relevant to the case].

Option: [When in the course of a proceeding a unique opportunity presents itself to collect evidence, the Pre-Trial Chamber may, at the request of the Prosecutor or of the suspect, name one of its members or an available judge of the Court to take necessary measures to collect or preserve evidence, while respecting the rights of the defence.]

3. [If any [order] [recommendation] [order and recommendation] of the Pre-Trial Chamber is breached or is not complied with, the Pre-Trial Chamber may:

(a) Reject the admissibility of any evidence obtained as a result or consequence of such a breach or non-compliance; or

(b) Consider such breach or non-compliance in respect of whether any weight should be attached to any evidence obtained as a result or consequence of such breach or non-compliance.]

Article 58 *Commencement of prosecution*

1. If upon investigation [in the course of an investigation] the Prosecutor, having regard to the matters referred to in article 15, concludes that [the case is admissible, and] [a case does exist against one or more persons named,] [there is a prima facie case] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial,] [which the accused could be called on to answer and that is desirable in the interests of justice that the case should proceed], the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged in respect of each of the persons referred to, their name and particulars, a statement of the allegations of fact against them, and the characterization of these facts within the jurisdiction of the Court and shall be accompanied by [relevant] [sufficient] evidence collected by the Prosecutor for the purposes of confirmation [of the indictment] by the [Presidency] [Pre-Trial Chamber].

2. The [Presidency] [Pre-Trial Chamber] shall examine the indictment, any amendment and any supporting material and determine whether:

(a) [A prima facie case exists] [there is sufficient evidence that could justify a conviction of a suspect, if the evidence were not contradicted at trial] [there is strong evidence

¹⁴⁷ Article 57 was tabled by some 15 interested delegations at the August 1997 meeting of the Preparatory Committee. It was written de novo and did not derive from any particular delegation's proposal.

The proposal 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 defence.

Some delegations believed that the authority of the Pre-Trial Chamber set out in the proposal should be exercised only to collect and preserve evidence for the defence. In relation to the Prosecutor's investigation, the Pre-Trial Chamber should only intervene for the purpose of checking on the lawfulness of the Prosecutor's conduct.

The alternative options reflect differing views as to the balance to be struck between the need to ensure the Prosecutor's independence and the desirability of conferring a limited role on the Pre-Trial Chamber.

If this proposal is adopted, it seems likely that other proposals in relation to article 54 could be deleted or may need revision. Consideration would need to be given to article 54, paragraphs 1, 4 (a), (b), (c), (f) and (h), 5, 6, 7, 8, 9 and 13.

¹⁴⁸ The powers contemplated by this draft provision include the power for the Pre-Trial Chamber to seek judicial assistance from a State.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

against the accused] with respect to a crime within the jurisdiction of the Court; and

(b) Having regard, inter alia, to the matters referred to in article 15, the case should on the information available be heard by the Court [if the Court has not yet ruled on this issue];

[(c) It is desirable in the interests of justice that the case should proceed;]

If so, it shall [by majority/consensus] confirm the indictment and establish a trial chamber in accordance with article 40 [, and inform the Presidency].]

[3. Any State concerned may challenge the decision of the Prosecutor to file an indictment before the Pre-Trial Chamber on grounds of inconsistency with this Statute.]

[4. After the filing of an indictment, the Pre-Trial Chamber shall [in any case] [if the accused is in custody or has been judicially released by the Court pending trial] notify the indictment to the accused, [set a deadline prior to the confirmation hearing, until which the Prosecutor and the defence may add new evidence [for purposes of such confirmation hearing]], and set a date for the review of the indictment. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his/her counsel, subject to the provisions of paragraph 8. In the hearing, the accused shall be allowed to object to the indictment and criticize the material on which it is based.

Following the hearing, the Pre-Trial Chamber may:

(a) Confirm the indictment in its entirety;

(b) Confirm only part of the indictment [and amend it], by giving a different qualification to the facts;

[(c) Order further investigation];

(d) Refuse to confirm the indictment.

When it confirms the indictment in its entirety or in part, the Pre-Trial Chamber shall commit the accused to the Trial Chamber for trial on the indictment as confirmed. Confirmation of the indictment shall uphold the warrants issued earlier, except if the Court decides otherwise.]

5. If, after any adjournment that may be necessary to allow additional material to be produced, the [Presidency] [Pre-Trial Chamber] decides not to confirm the indictment, it shall so inform the complainant State [or, in a case to which article 10, paragraph 1, applies, the Security Council].

[If it does not confirm the indictment, all the warrants issued prior to the decision of non-confirmation shall cease immediately to have effect.]

[6. The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing a new indictment based on the acts underlying that count if supported by additional evidence.]

[7. *Option 1*

The [Presidency] [Pre-Trial Chamber] may [, on its own or] at the request of the Prosecutor amend the indictment [, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence] [after hearing the accused, provided that the Trial Chamber is satisfied that the accused is not prejudiced in his rights to defend himself].]

Option 2

Prior to the confirmation of the indictment by the Pre-Trial Chamber, the Prosecutor may amend or withdraw the indictment. [The accused shall be informed of the withdrawal as well as of any amendment. In the event of withdrawal, the Pre-Trial Chamber may, under the provisions provided for in article 54, ask the Prosecutor to reconsider his/her decision.]

After the confirmation of the indictment, the Prosecutor may amend the indictment only with the permission of the Pre-Trial Chamber, and after notice to the accused. If the Prosecutor is seeking to add additional charges or to substitute more serious charges for those in the confirmed indictment, the new or amended charges must be confirmed by the Pre-Trial Chamber in accordance with the procedures for confirmation of the indictment set out in paragraph [...].

After the commencement of the trial, the Prosecutor may withdraw the indictment or certain charges within the indictment only with the permission of the Trial Chamber].

[In case of withdrawal of the indictment after the confirmation thereof, new prosecution may be instituted for the same offence only based upon a newly discovered material evidence which was not available to the Prosecutor at the time of the withdrawal in the interest of the defence.]

NB: Consideration may be given to limiting paragraph 7 to the main principles regarding amendment and withdrawal of the indictment while addressing the details in the Rules of Procedure and Evidence.

[8.¹⁴⁹ When one or more of the accused has fled or cannot be found, and when all reasonable steps have been taken to inform the accused, the Pre-Trial Chamber may still hold a hearing in order to examine whether it shall confirm the indictment. In that case, the accused cannot be represented by counsel.

When it confirms the indictment, in its entirety or in part, against an accused who has fled or cannot be found, the Pre-Trial Chamber shall issue a warrant to search for, arrest and transfer the accused, which is tantamount to committing him to the Trial Chamber for trial.]

¹⁴⁹ The Preparatory Committee decided to defer the consideration of article 58, paragraph 8, for such time as article 63 is considered.

[9. Anyone who has [personally] suffered [direct] injury caused by a crime submitted to the Court, [the legal representatives of victims, victims' relatives, successors and assigns,] may inform the [Prosecutor] [and the] [Pre-Trial Chamber] in writing of the acts having caused injury to him/her/them and the nature and amount of the losses which he/she/they has/have sustained.

When it confirms the indictment, in its entirety or in part, the Pre-Trial Chamber may order provisional measures which may be necessary [in order to enable a Trial Chamber, upon a subsequent conviction,] to compensate the victim designated in the above paragraph. For that purpose, the Pre-Trial Chamber shall seek the cooperation of the interested States.

Such provisions shall also apply when the accused has fled or cannot be found.]

NB: Paragraph 9 should be reviewed in the light of article 73 (Reparations to victims).

10. The [Presidency] [Pre-Trial Chamber] [Trial Chamber] may make any further orders required for the conduct of the trial, including an order:

(a) Determining the language or languages to be used during the trial;

(b) *Option 1*

Requiring the disclosure to the defence [of the relevant evidence that the defence requests] within a sufficient time before the trial to enable the preparation of the defence, of [relevant] documentary or other evidence available to the Prosecutor [, whether or not the Prosecutor intends to rely on that evidence] [which the Prosecutor intends to rely upon]; [if the Prosecutor fails to comply with an order under this subparagraph, the evidence in question will be inadmissible at the trial;]

Option 2

Save in respect of documents or information referred to in article 54, paragraph 4 (g), and subject to subparagraph (f) below, requiring the disclosure to the defence of documents or information which are either considered [material] [relevant] to the preparation of the defence, or are intended for use by the Prosecutor at trial or were obtained from the accused;¹⁵⁰

(c) Providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

¹⁵⁰ [Quaere: Definition of "relevant" for the Rules of Procedure and Evidence?]

(d) Providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection of the accused, victims and witnesses and of confidential information;

(e) Providing [, at the request of either party or a State, or at the instance of the Court on its own volition,] for the protection and privacy of victims and witnesses;

(f) Providing, at the request of either party or a State, or at the instance of the Court of its own volition, for the non-disclosure or protection of documents or information provided by a State the disclosure of which would [endanger] [prejudice] the national security or national defence interests of a State in accordance with criteria to be specified in rules made pursuant to this Statute.]

NB: Subparagraphs (d), (e) and (f) of paragraph 10 could be consolidated further.

Article 59

Arrest

1. At any time after an investigation has been initiated, the [Presidency] [Pre-Trial Chamber] may at the request of the Prosecutor issue a warrant for the pre-indictment arrest of a suspect if there are reasonable grounds^{151, 152} to believe that:

(a) The suspect has committed a crime within the jurisdiction of the Court; and

(b) Taking the suspect into custody is necessary to ensure that the suspect does not:

(i) Fail to appear for trial;

(ii) [Interfere with or destroy evidence;]¹⁵³

(iii) [Intimidate] [influence] witnesses or victims;]

(iv) Engage in collusion with accomplices;] or

(v) [Continue to commit a crime within the jurisdiction of the Court.]¹⁵⁴

[The Pre-Trial Chamber may also issue a warrant of judicial supervision in order to place a person under restrictions of liberty other than arrest.]¹⁵⁵

¹⁵¹ The term "reasonable grounds" was understood to embody objective criteria.

¹⁵² Some delegations preferred other terms such as "serious reasons".

¹⁵³ Some delegations suggested that subparagraphs (ii), (iii) and (iv) could be merged under a more general formulation such as "obstructing or endangering the investigation or the court proceedings".

¹⁵⁴ Some delegations favoured addressing situations in which the accused may be harmed or at risk. Other delegations stated that the accused could be adequately protected under article 68.

¹⁵⁵ It was suggested that this provision could be deleted because it is addressed in article 60, paragraph 6.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.]¹⁵⁶

2. (a) The warrant for the pre-indictment arrest shall be deemed to have lapsed and the request for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the arrest, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

(b) In the case of a State Party which has notified the Court under article 88, paragraph 2, that it can surrender pre-indictment, the warrant for the pre-indictment arrest of a suspect shall be deemed to have been withdrawn if [the indictment has not been confirmed] [a post-indictment warrant has not been served] within [30] [60] [90] days of the surrender, or in exceptional circumstances such longer time up to a total of [60] [90] days as the [Presidency] [Pre-Trial Chamber] may allow.

If the Prosecutor decides not to indict the suspect or the [Presidency] [Pre-Trial Chamber] decides not to [confirm the indictment] [not to issue a post-indictment warrant], the Prosecutor shall immediately advise the custodial State of that fact.¹⁵⁷

3. "Opening clause":

Option 1

[In the case where no pre-indictment warrant has been obtained,] [Prior to the confirmation hearing,] [As soon as practicable] [after the confirmation of the indictment], the Prosecutor shall seek from the [Presidency] [Pre-Trial Chamber] a [post-indictment] warrant for the arrest and transfer of the accused. The [Presidency] [Pre-Trial Chamber] shall issue such a warrant unless it is satisfied that:

Option 2

Upon confirmation of the indictment, a warrant for the arrest of the accused shall be issued by the Pre-Trial Chamber, unless, having heard the views of the Prosecutor, it is satisfied that:

(a) The accused will voluntarily appear for trial and none of the other factors in paragraph 1 (b) are present]; or

(b) There are special circumstances making it unnecessary for the time being to issue the warrant.

¹⁵⁶ It was suggested that this provision could be moved to article 54, paragraph 10.

¹⁵⁷ It was suggested that the questions of release and re-arrest could be addressed in another provision of this Statute.

4. The Court¹⁵⁸ shall transmit the warrant to any State where the person may be located, along with a request for the provisional arrest, or arrest and [surrender, transfer, extradition] of the person under Part 9.

5. [Pre-indictment and post-indictment warrants may also be issued when the accused is a fugitive. In this case, the post-indictment warrant issued by the Pre-Trial Chamber shall have the effect of an international warrant and shall be disseminated by all appropriate means. When the accused is apprehended, the authorities shall proceed as provided for in Part 9.]

6. [A post-indictment warrant shall remain in effect until the date of the judgement. The effects of the warrant delivered by the Pre-Trial Chamber shall not be interrupted by the actions challenging the submission of cases to the Court.]

Article 60

Pre-trial detention or release

1. [The States [Parties] [in which the person is located] [and in which the crime was committed] shall be notified of a warrant issued by the Pre-Trial Chamber.] The State that has received a pre- or post-indictment warrant and a request for the arrest of a person under article 59, paragraph 5, shall immediately [in accordance with its laws]¹⁵⁹ [[and] in accordance with the provisions of Part 9 of this Statute] take steps to arrest the suspect [on the basis of the warrant issued by the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request].¹⁶⁰

[2. The Prosecutor may, with the consent of the Pre-Trial Chamber, execute a warrant for arrest by himself or herself only in cases where the competent authority of the State Party concerned may not be available or may be ineffective.]¹⁶¹

3. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person and the person has been arrested

¹⁵⁸ The term "Court" is understood to include its constituent organs, including the Prosecutor, as defined in article 35.

¹⁵⁹ Under article 59, paragraph 5, a warrant for pre-indictment arrest is forwarded to the State in which the individual sought may be located, along with a request for provisional arrest or transfer/surrender under part 9. If part 9 specifies the extent to which national laws apply to requests for provisional arrest or transfer/surrender, it will be unnecessary to treat this issue here as well.

¹⁶⁰ The issue of whether a State can decline to arrest and detain a person, pending resolution of a challenge under article 17, could be dealt with in that article.

¹⁶¹ This provision raises a host of issues, including under what conditions the Prosecutor should be able to exercise such authority, whether the Prosecutor would have adequate resources to do so, and whether such issues should be addressed elsewhere in the Statute.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

in accordance with the proper process and that the person's rights have been respected.

4. The person shall have the right to apply to [the competent judicial authority in the custodial State] [the Pre-Trial Chamber] for interim release pending [surrender] [transfer] [extradition] [in accordance with its national law]. [The custodial State shall take into account the views of the Prosecutor [and Court] on interim release.]

NB: The term "Court", if retained in this paragraph, should be clarified.

5. After the [decision to] [surrender] [transfer] [extradite] to the Court, the person may apply to the [Presidency] [Pre-Trial Chamber] for interim release pending trial.

6. The person shall be detained unless the [Presidency] [Pre-Trial Chamber] is satisfied that the person will voluntarily appear for trial and none of the other factors in article 59, paragraph 1 (b), are present. If it decides to release the person, it may do so with or without conditions [or may issue a warrant of judicial supervision restricting the person's liberty other than by arrest]. [The [Presidency] [Pre-Trial Chamber] shall also, on its own initiative, review its ruling periodically. If satisfied that changed circumstances require that the ruling be modified, it may order any measure provided for in paragraph 5.]

NB: Reference to "any measure provided for in paragraph 5" should be revised in the light of the current language of paragraph 5.

7. (a) The [Presidency] [Pre-Trial Chamber] may, either of its own initiative or at the request of the person concerned or the Prosecutor, modify its ruling as to detention [judicial supervision] or conditional release in effect at that time.

[(b) The person may be detained prior to trial for a maximum of one year; however, this period may be extended up to an additional year by the [Presidency] [Pre-Trial Chamber] if the Prosecutor can demonstrate that he or she will be ready for trial within that period and can show good cause for the delay.]

(c) The person and the Prosecutor may appeal the [Presidency's] [Pre-Trial Chamber's] determination regarding release or detention to the Appeals Chamber.

8. If necessary, the [Presidency] [Pre-Trial Chamber] may issue a warrant of arrest to secure the presence of an accused who has been released.

9. A person arrested may apply to the [Presidency] [Pre-Trial Chamber] for a determination of the lawfulness under this Statute of any arrest warrant or order of detention issued by the Court. If the [Presidency] [Pre-Trial Chamber] decides that the arrest or detention was unlawful under the Statute, it shall

order the release of the person, [and may award compensation] [in accordance with article ...].¹⁶²

10. [A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held, or if necessary in the host State.] [Once ordered [surrendered] [transferred] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible, and shall be held in an appropriate place of detention in the host State or other State in which the trial is to be held.]

Article 61¹⁶³

Notification of the indictment

NB: It might be necessary to broaden the title of this article to cover the whole of its content.

1. The [Prosecutor] [Registrar] shall ensure, where necessary with the cooperation of national authorities, that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, [in a language that the accused understands] [in his own language]:

(a) In the case of the pre-indictment arrest of a suspect, [a statement of the grounds for the arrest] [the warrant of arrest or restriction of liberty];

(b) In any other case, the confirmed indictment;

(c) A statement of the [accused's] [arrested person's] rights under [article 54 or 67 of] this Statute and the Rules [, as applicable].

2. An indictment shall be made public, except in the following situations:

(a) The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or in the case of joint accused, on all the accused. In exercising its discretion, the [Presidency] [Pre-Trial Chamber] shall take account of all relevant factors, including the potential for pre-arrest flight of an accused, destruction of evidence and harm to victims or witnesses if the indictment is made public;

¹⁶² This paragraph should be reviewed in the light of the text of article 84.

¹⁶³ The wording of this article might be modified in the light of the decisions to be taken as regards the question of hearing of the confirmation of an indictment.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(b)¹⁶⁴ The [Presidency] [Pre-Trial Chamber] may, at the request of the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.]

3. In any case to which paragraph 1 (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

4. If, 60¹⁶⁵ days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 59, paragraph 3, or for some reason the requirements of paragraph 1 cannot be complied with, the [Presidency] [Pre-Trial Chamber] [the Registrar] [may] [shall] on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

[5. [The accused] [Anyone suspected of committing a crime within the meaning of this Statute] shall be entitled:

(a) To be informed promptly of the nature and cause of the charge against him or her [and be questioned in a language which he understands, and, to this end, to have the free assistance of a competent interpreter, and to be provided free of charge with a translation of the documents on the basis of which he is being questioned or that show why a measure infringing upon his liberty or property has been proposed];

(b) [To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel;] [to be assisted promptly by a lawyer of his own choosing, or, if he does not have sufficient means to pay for one, by a lawyer appointed by the [Pre-Trial Chamber of the] Court;]

(c) [Before being questioned, or when a measure infringing upon his liberty or property has been proposed and brought to his attention, to be fully informed of the charges against him and the rights to which he is entitled under paragraph 1 of this article.]]

¹⁶⁴ The contents of this subparagraph could become the subject matter of the provision being negotiated on questions of confidentiality, disclosure and protection of information.

¹⁶⁵ The matter concerning a specific deadline may be more appropriate for the rules of procedure.

Further option for articles 58 to 61^{166, 167}

Article 58

*Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear*¹⁶⁸

1. At any time after an investigation has been initiated, the Pre-Trial Chamber may, at the application of the Prosecutor, issue a warrant for the arrest for a person if:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) It appears that the arrest of the person is necessary to assure the person's appearance at trial, to assure that the person does not obstruct or endanger the investigation or the court proceedings, [or to prevent the person from continuing to commit a crime within the jurisdiction of the Court].

2. The application shall specify:

(a) The name of the person or persons, and any other relevant identifying information;

(b) The specific crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which form reasonable grounds to believe the person committed those crimes; and

¹⁶⁶ The proposal represents a simplified and somewhat restructured text for articles 58 to 61. This simplified version of these articles has been achieved as a result of the adoption of the framework outlined in document A/AC.249/1998/WG.4/DP.36 and the withdrawal or abbreviation by many delegations of their proposals currently contained in document A/AC.249/1998/L.13. This reflects a decision by many of the authors to move away from national positions towards a single, straightforward procedural approach, acceptable to delegations representing different national legal systems.

The proposal does not attempt to resolve issues such as the trigger mechanism or powers of the Prosecutor. Similarly, it does not attempt to incorporate at this time procedures relating to challenges to admissibility or jurisdiction.

The purpose of the proposed text, if delegations agree, is to provide a basis for a more focused and efficient discussion in Rome of the procedural stages addressed in the above articles 58 to 61.

¹⁶⁷ A view was expressed that the proposal for articles 58 to 61 under this option omits procedures of a substantive nature which have been included in the text of the same articles above.

¹⁶⁸ Provisions in the option for article 59 presented above (“[No person shall be subjected to arbitrary arrest or detention. Nor shall any person be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the rules of the Court.]”) should be moved to article 54.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(e) The reason why the Prosecutor believes the arrest of the person is necessary.

3. The Pre-Trial Chamber shall examine the application and the evidence or other information submitted by the Prosecutor and, if satisfied that there are reasonable grounds to believe that the person named committed the crimes alleged and that the arrest of the person appears necessary, shall issue a warrant for the arrest of the person. The warrant of arrest shall identify the person to be arrested and the crimes for which the person's arrest is sought, and shall contain a concise statement of the facts which are alleged to constitute those crimes. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

4. Based on the arrest warrant, the Court may request the provisional arrest, or the arrest and [surrender][extradition] of the person under Part 9.

[5. Prior to the [surrender][extradition] of the person, the Prosecutor may request that the Pre-Trial Chamber amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe the person committed the modified or additional crimes.]¹⁶⁹

6. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to assure the person's appearance, it shall issue the summons for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person. [The Pre-Trial Chamber may request the State that serves the summons to place the person under restrictions of liberty, if permitted by the law of that State.]¹⁷⁰

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and [surrender][extradition] shall

immediately take steps to arrest the suspect in accordance with its laws and the provisions of Part 9.¹⁷¹

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected.

3. The person arrested shall have the right to apply for interim release pending [surrender][extradition] to [the Pre-Trial Chamber][the competent judicial authority in the custodial State in accordance with its national law. The custodial State shall take into account the views of the Prosecutor and the Court regarding the interim release.]

[4. Pending a decision on [surrender][extradition], a person may apply to the Pre-Trial Chamber for a determination of the lawfulness under this Statute of any arrest warrant issued by the Court. If the Pre-Trial Chamber decides that the arrest warrant was unlawful under the Statute, it shall order the release of the person.]¹⁷²

5. Once ordered to be [surrendered][extradited] by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the [surrender][extradition] of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. However, the person shall be detained unless the Pre-Trial Chamber is satisfied that the person, if released, will appear for trial, will not obstruct or endanger the investigation or the Court's proceedings[, or will not continue to commit crimes within the jurisdiction of the Court]. If it decides to release the person, the Pre-Trial Chamber may do so with or without conditions, including conditions restricting the person's liberty.

¹⁶⁹ Such a provision may be necessary, particularly if a strict rule of specialty were adopted.

¹⁷⁰ The question of whether the Pre-Trial Chamber shall have the possibility to request the State that serves the summons to place the person under restrictions of liberty, despite the fact that it found that a summons is sufficient to assure the person's appearance, will have to be examined.

¹⁷¹ It is contemplated that, in unusual circumstances, for example of grave illness, the State might, if permitted by its law, place the person under judicial supervision rather than arrest the person and take him into custody.

¹⁷² Serious questions were raised about the grounds on which such a challenge would be based and whether this provision was needed at all in the light of the procedures for judicial review of the arrest warrant and judicial confirmation of the charges for trial.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or accused.¹⁷³ Upon such review, it may modify its ruling as to detention, release, or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall assure that a person is not detained for an unreasonable period prior to trial due to unexcusable delay by the Prosecutor. If such delay has occurred, the Court shall consider releasing the person pursuant to conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released.

Article 61

*Confirmation of the charges before trial*¹⁷⁴

1. Within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel[, unless:

(a) The person has waived his right to be present; or

(b) The person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held, in which case the person shall not be represented by counsel].

2. A reasonable time before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information for purposes of the hearing as may be appropriate under the Statute and the Rules.

3. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any proposed charges. The accused shall be given reasonable notice before the hearing of any amendment or withdrawal of proposed charges.

4. At the hearing, the Prosecutor shall have the burden of presenting, for each charge on which he seeks trial, sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

5. At the hearing, the accused person may object to the proposed charges, criticize the evidence presented by the Prosecutor and present evidence on his or her own behalf.

6. The Pre-Trial Chamber shall determine whether, considering the presentations by both the Prosecutor and the accused, there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.¹⁷⁵ Based on its determinations, the Pre-Trial Chamber may:¹⁷⁶

(a) Confirm those proposed charges as to which it has determined there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Refuse to confirm those proposed charges as to which it has determined there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a proposed charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.¹⁷⁷

7. After the charges are confirmed and before the trial has begun, the Prosecutor may amend the charges, but only with the permission of the Pre-Trial Chamber and after notice to the accused. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may withdraw the charges only with the permission of the Trial Chamber.

8. A previously issued warrant shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

¹⁷³ A view was expressed that there should be a specific time limit in the Statute within which the Pre-Trial Chamber must review a detention decision.

¹⁷⁴ Paragraph 9 of the option for article 58 presented above referred to the power of the Pre-Trial Chamber to order provisional measures to preserve the Court's ability to order compensation to victims. It is suggested that this concept be moved to article 57, paragraph 2, and be among the general powers of the Pre-Trial Chamber and not only exercisable at the time of confirmation.

¹⁷⁵ A decision needs to be made whether any hearing on admissibility will be held separately, or whether admissibility issues raised by the accused should also be considered at this hearing.

¹⁷⁶ The question remains whether the decisions of the Pre-Trial Chamber on confirmation of the charges should be unanimous or by majority vote.

¹⁷⁷ Amending the charge may have implications under a rule of speciality provision.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

PART 6. THE TRIAL

Article 62 Place of trial

1. Unless otherwise decided in accordance with paragraph 2, the place of the trial will be the seat of the Court.
2. The [Presidency] [Assembly of the States Parties] may authorize the Court to exercise its functions at a place other than its seat [where it will ensure the efficient conduct of the trial and is in the interest of justice] [or] [when trial by the members of the Court is likely to make the proceedings simpler and less costly].
 3. [(a) The Presidency of the Court shall make inquiries with the State Party that appears likely to receive the Court.
 - [(b) After the State Party likely to receive the Court has agreed, the decision [under the preceding paragraph] to hold a session away from the Court's seat shall be taken by the Assembly of the States Parties, which shall be informed either by one of its members, the Presidency, the Prosecutor or the Assembly of the Judges of the Court.]
 4. [With the express agreement of the State Party receiving the Court], the privileges, immunities and facilities provided for in _____ shall continue to be effective when the Court holds a session pursuant to paragraph 2.
 5. [The provisions of this article shall also apply to non-States Parties which, after inquiries by the Presidency, state that they agree to receive the Court and to grant the privileges, immunities and facilities provided for in _____.]

NB: Some of the issues raised in the proposals may be dealt with in the Rules of Procedure and Evidence.

Article 63 Trial in presence of the accused

Comment: There appear, in essence, to be three options regarding trials in absentia which have emerged to date, in addition to the ILC draft (see *Official Records of the General Assembly, Fifty-first session, Supplement No. 22 A (A/51/22)*). The ILC text and the proposed options are set out below.

NB: The ILC text as such could be deleted since it seems to have been superseded by the options that were developed as a consequence of the discussions in the Preparatory Committee.

ILC draft

1. As a general rule, the accused should be present during the trial.
2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) The accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) The accused is continuing to disrupt the trial; or

(c) The accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) That all reasonable steps have been taken to inform the accused of the charge; and

(b) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

4.¹⁷⁸ In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) Recording the evidence;

(b) Considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) Issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) The record of evidence before the Indictment Chamber shall be admissible;

(b) Any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

* * *

Option 1

The trial shall not be held if the accused is not present.¹⁷⁹

Option 2

General rule

1. As a general rule, the accused shall be present during the trial.

¹⁷⁸ The questions addressed in paragraphs 4 and 5 may be better dealt with in the context of the pre-trial proceedings.

¹⁷⁹ Option 1 prohibits trial in absentia without any exception; like option 2, it would deal with procedures needed to preserve evidence for trial as a matter separate from trial in absentia.

Exceptions

2. In exceptional circumstances, the Trial Chamber may order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial thereafter:

- (a) Has escaped from lawful custody or has broken bail; or
- [(b) Is continuing to disrupt the trial.]¹⁸⁰

Rights of the accused

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular that the accused is legally represented, if necessary by a lawyer appointed by the Court.¹⁸¹

*Proceedings to preserve evidence*¹⁸²

*Subsequent trial*¹⁸³

Option 3

1. As a general rule, the accused should be present during the trial.

2. In exceptional circumstances, the Trial Chamber may, in the interests of justice [at the request of the Prosecutor] [*proprio motu* or at the request of one of the parties] order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

- (a) Requests to be excused from appearing for reasons of serious ill-health;
- (b) Disrupts the trial;
- (c) Does not appear on the day of the hearing;
- (d) Under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court; or

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this

¹⁸⁰ Some proponents of option 2 do not agree that this should necessarily be a basis for a trial in absentia.

¹⁸¹ This provision follows paragraph 3 of the ILC draft, except that it omits subparagraph (a), regarding steps to inform the accused of the charges. This is unnecessary under this option since a trial in absentia is permitted only if the accused was present at the commencement of the trial, a stage at which the indictment is to be read out.

¹⁸² There is no separate proposal to preserve evidence for trial. This could be dealt with as part of pre-trial proceedings, and would not necessarily be confined to situations where the accused is absent.

¹⁸³ Under this option, there would be no second trial following a trial in absentia.

paragraph shall be communicated to the accused and may be appealed.

3. The Trial Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

- (a) That all reasonable steps have been taken to inform the accused of the charge; and
- (b) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, [at the request of the Prosecutor] [*proprio motu* or at the request of one of the parties], order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.

Option 4

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.

2.¹⁸⁴ The Trial Chamber shall, if it makes an order under (paragraph 2), ensure that the rights of the accused under this Statute are respected, and in particular:

- (a) That all reasonable steps have been taken to inform the accused of the charge; and
- (b) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

¹⁸⁴ This is paragraph 3 of the ILC text, which requires consequential adjustments to be harmonized with the text of this option.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Article 64

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

- (a) Have the indictment read;
- (b) Ensure that articles 58, paragraph 10 (b), and 61 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;
- (c) Satisfy itself that the other rights of the accused under this Statute and the Rules have been respected;
- (d) Allow the accused to enter a plea of not guilty or to make an admission of guilt before the Trial Chamber [and should the accused fail to do so, enter a plea of not guilty on his or her behalf].

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[3. The President of the Trial Chamber shall control and direct the hearing, and decide upon the manner by which evidence shall be produced by the parties. In all circumstances, the President shall have the duty to remain impartial.]

NB: It was suggested that the beginning of the paragraph should refer to the person presiding over the Trial Chamber.

4. The Trial Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

5. The trial shall be held in public, unless the Trial Chamber determines that certain proceedings be in closed session in accordance with article 68, or for the purpose of protecting confidential or sensitive information which is to be given in evidence. The deliberations of the Court shall remain confidential.

6. The Trial Chamber shall, subject to this Statute and the Rules of Procedure and Evidence, have, *inter alia*, the power on the application of a party or of its own motion to:

- (a) Issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;
- (b) Exercise the same powers as the Pre-Trial Chamber regarding measures that restrict the liberty of a person;
- (c) Terminate or modify any warrants issued by the Pre-Trial Chamber;
- (d) Rule on any preliminary motions.

NB: See the last sentence of paragraph 5 of article 17 (Challenges to the jurisdiction of the Court or the admissibility of a case) for any possible inconsistency with paragraph 6 (d) and article 81.

(b) Require the attendance and testimony of witnesses, and the production of documents and other evidentiary materials by obtaining, if necessary, the assistance of States as provided in this Statute;

[(b bis) Order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;]

(c) Rule on the admissibility or relevance of evidence;

(d) Protect confidential information; and

(e) Maintain order in the course of a hearing.

The provisions of article 58, paragraph 10 (f), will apply *mutatis mutandis* for the purposes of orders sought under subparagraph (d) above.

7. [The Trial Chamber may refer pre-trial issues under this article to the Pre-Trial Chamber for resolution.]

8. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 64, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) The admission of guilt is [firmly] supported by the facts of the case that are contained in:

(i) The indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) Any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

which the admission of guilt relates, and [may] [shall] convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made [and shall [may] remit the case to another Trial Chamber].

5. Discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused, or the penalty to be imposed shall not be legally binding on the Chamber.¹⁸⁵

Article 66 *Presumption of innocence*

Everyone shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.¹⁸⁶

Article 67 *Rights of the accused*

1. In the determination of any charge under this Statute, the accused is entitled [, in addition to any rights afforded to a suspect under this Statute,] to a public hearing, having regard to [article 64 and] article 68, and to a fair hearing by an independent and impartial tribunal, and to the following minimum guarantees in full equality:¹⁸⁷

(a) To be informed promptly and in detail, [in a language that the accused understands] [in his own language], of the nature, cause and content of the charge;

(b) To have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;¹⁸⁸

(c) To be tried without [undue] [unreasonable] delay and to enjoy a speedy trial;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, including where the person is unable to secure counsel, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution; [In addition the accused shall also be entitled to present any other evidence;]

(f) If any of the proceedings or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

[[h) To make an unsworn statement in his or her defence, if desired] [to declare in his or her defence, but [need] [shall] not take an oath to speak the truth]];

(i) To request the Pre-Trial Chamber or, after the commencement of the trial, the Trial Chamber to seek the cooperation of a State Party pursuant to Part 9 [7] of this Statute to collect evidence for him/her;]

(j) No reverse onus or duty of rebuttal shall be imposed on the accused.]

NB: See also paragraph 2 of article 68 (Protection of the [accused], victims and witnesses [and their participation in the proceedings]) for any possible inconsistency with paragraph 1.

2. [Exculpatory evidence] [Evidence which shows or tends to show the innocence] [or mitigate the guilt] of the accused or may affect the credibility of prosecution evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be [made available] [disclosed] to the defence. In case of doubt as to the application of this paragraph or as to the

¹⁸⁵ Concerns were expressed about this paragraph and it was suggested that its formulation should continue to be examined.

¹⁸⁶ Reservations were expressed regarding the phrases "in accordance with law" and "beyond a reasonable doubt".

¹⁸⁷ A proposal was made that the wording of subparagraphs (a) to (g) of paragraph 3 of article 14 of the International Covenant on Civil and Political Rights should be used as such.

¹⁸⁸ The question of privileged communications could be addressed in the context of article 69.

admissibility of the evidence, the Trial Chamber shall decide. [The provisions of article 58, paragraph 10 (f), will apply mutatis mutandis for the purposes of a decision made under this paragraph.]

[3. The right of all persons to be secure in their homes and to secure their papers and effects against entries, searches and seizures shall not be impaired by the Court except upon warrant issued by the [Court] [Pre-Trial Chamber], on the request of the Prosecutor, in accordance with Part 9 or the Rules of the Court, for adequate cause and particularly describing the place to be searched and things to be seized, or except on such grounds and in accordance with such procedures as are established by the Rules of the Court.]

[4. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, without due process of law.]¹⁸⁹

Article 68

Protection of the [accused], victims and witnesses [and their participation in the proceedings]

1. The Court shall take the necessary measures available to it to protect the accused, victims and witnesses. Notwithstanding the principle of public hearings, the Court may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means. [In camera hearings are mandatory when they are requested by an accused who was a minor at the time of the commission of the acts or by a victim of sexual violence.]

2. [The Prosecutor shall, in ensuring the effective investigation and prosecution of crimes, respect and take appropriate measures to protect the privacy, physical and psychological well-being, dignity and security of victims and witnesses, having regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, whether the crime involves sexual or gender violence. These measures will be consistent with the rights of the accused.]

NB: See also paragraph 4 (e) of article 54 (Investigation of alleged crimes).

3. The Court shall take such measures as are necessary to ensure the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, at all stages of the process, including, but not limited to, victims and witnesses of sexual and gender violence. However, these measures [may not] [shall not] be [inconsistent with] [prejudicial to] the rights of the accused.

4. [The Court [shall] [may] permit the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which is consistent with the rights of the accused and a fair and impartial trial.]

[5. The Victims and Witnesses Unit, established under article 44 of this Statute, shall provide counselling and other assistance to victims and witnesses and advise the Prosecutor and the Court on appropriate measures of protection and other matters affecting their rights. These measures may extend to family members and others at risk on account of testimony given by such witnesses.]

NB: See article 44, paragraph 4.

[6. Notwithstanding paragraph 1 of article 58, if disclosure of any evidence and/or any of the particulars referred to in that paragraph will probably lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for purposes of these proceedings, withhold such particulars and submit a summary of such evidence. Such a summary shall, for purposes of any later trial proceedings before the Court, be deemed to form part of the particulars of the indictment.]

[7. The rules of procedure shall include provisions giving effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

[8. Legal representatives of victims of crimes have the right to participate in the proceedings with a view to presenting additional evidence needed to establish the basis of criminal responsibility as a foundation for their right to pursue civil compensation.]

NB: This paragraph should be reviewed in the light of the text of article 73 (Reparations to victims).

9. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with [or as excepted by] the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.¹⁹⁰

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth

¹⁸⁹ The rights addressed in paragraphs 3 and 4, which are of a general nature, should perhaps be located in another part of the Statute. In addition, paragraph 4 could be reformulated.

¹⁹⁰ Many delegations were of the view that it would be more appropriate to deal with the subject matter of this paragraph in the Rules of Procedure and Evidence.

in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.¹⁹¹ These measures shall not be [prejudicial to] [inconsistent with] the rights of the accused.

3. The Court has the authority to call all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Rules of Procedure and Evidence.¹⁹²

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.¹⁹³

6. Evidence obtained by means of a violation of this Statute¹⁹⁴ or internationally recognized human rights [or other relevant rules of international law], and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.

7. [With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases.]¹⁹⁵

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on [, but may have regard to,] the application of the State's national law.

¹⁹¹ A proposal was made that the Rules of Procedure and Evidence could permit the use of video or audio technology when the witness is not able to attend the Court due to illness, injury, age or other justifiable reason.

¹⁹² A proposal was made, supported by a number of delegations, to add the following paragraph to the Statute: "The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias." Other delegations supported a proposal that the Statute or Rules of Procedure and Evidence also make reference to the exclusion of evidence of prior sexual conduct of a witness, evidence protected by the lawyer-client privilege, as well as other grounds of exclusion. It was finally proposed that these matters should be addressed in the Rules of Procedure and Evidence, as opposed to in the Statute. Many delegations also felt that the Rules should provide sufficient flexibility to enable the Court to rule on the relevance and admissibility of evidence where no other rule provides guidance on the standards to be applied.

¹⁹³ It was questioned whether this provision was strictly necessary.

¹⁹⁴ The question as to whether a violation of the Rules of Procedure and Evidence should also be considered in the context of the application of article 69, paragraph 5, or whether such violation should be addressed by a separate provision in the Statute or Rules of Procedure and Evidence, needs to be determined in the context of the consideration of articles 20 and 52.

¹⁹⁵ Such a provision might better be discussed in the context of article 66, 67 or 31.

Article 70

Offences or acts against the integrity of the Court

1. The Court shall have jurisdiction over the following offences and acts against its integrity when committed intentionally, as defined below:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

Option 1

[(c) Obstructing or disrupting the conduct of the Court's proceedings by disorderly or offensive conduct;]

[(d) Disobeying an order made by or under the authority of the Court in connection with the conduct of its proceedings;]

Option 2

[The Court may, by [fine] or other sanction, punish misbehaviour of persons committed during its proceedings, to the extent provided for in the Rules.]

(e) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(f) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(g) Retaliating against an official of the Court on account of duties performed by that or another official.

2. The offences referred to in the present article shall be tried before a Chamber other than the Chamber in which the alleged offences were committed in accordance with the Rules of Procedure and Evidence.

3. The Court may, in the event of conviction, impose a term of imprisonment not exceeding [x months/years] [or a fine, or both].

NB: It is not contemplated that all the provisions of the Statute and Rules, whether substantive or procedural, regarding the Court's exercise of jurisdiction over article 5 crimes would apply equally to these offences. Further work to clarify this issue will be essential. Moreover, similar thought must be given to States parties' obligation to surrender persons charged with these offences, especially when the State party is pursuing prosecution itself.

[Article 71

Sensitive national security information

NB: This title is suggested.

Option 1

1. Any person requested to give information or evidence to the Court may refuse to do so on the ground that they are of a confidential nature and that their disclosure would seriously prejudice the national defence or security interest of the State Party concerned.

2. The Court may ask the State Party concerned whether it confirms that the disclosure of this information or evidence would seriously prejudice its national defence or security interest.

If the State so confirms, the provisions of article 90, paragraph 2 (c), and article (article 71, option 3, paragraph 2) apply.

Option 2

1. This article applies in any case [falling within the scope of articles [54, paragraph 4 (g),] 58, paragraph 10 (d) and (f), 67, paragraph 2; 68, paragraph 9; 71 and 90, paragraph 2] where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests.

2. If, in the opinion of a State, disclosure of documents or information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor or the Defence (as the case may be), to seek to resolve the matter by cooperative means. In appropriate circumstances, this may include the possibility of seeking a determination of the Court as to:

(a) Whether the request might be modified or clarified;

(b) The relevance of the information or documents sought;

(c) Whether there might be agreement on the conditions under which disclosure might be given by providing summaries or redactions, by the use of in camera and/or ex parte proceedings or by means of other protective measures permissible under this Statute or the Rules.

3. Without prejudice to article 54, paragraph 4 (g), the Pre-Trial Chamber or the Trial Chamber shall not make a determination that disclosure should be made except in accordance with the provisions set out below.

4. The Court may hold a hearing for the purposes of hearing the State's representations on non-disclosure. If so,

notice to the State will be given in accordance with the Rules.¹⁹⁶ The Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and ex parte hearings, and may make other special arrangements, including, as appropriate:

- Designating a single judge to examine documents or hear submissions;
- Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;
- Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and
- Ordering that no transcripts be made of such proceedings, and that documents not required by the Pre-Trial Chamber or Trial Chamber be returned directly to the State without being deposited or filed in the Registry of the Court.

5. The Pre-Trial Chamber or Trial Chamber shall not make a determination to which this article applies unless:

(a) It is clear from the State's actions that it is not acting in good faith towards the Court; and, in determining the State's bona fides, the Pre-Trial Chamber or Trial Chamber shall have regard to the following factors:

- (i) Whether efforts have been made to secure the State's assistance through cooperative means and without recourse to measures of compulsion;
- (ii) Whether the State has expressly refused to cooperate;
- (iii) Whether there is clear evidence that the State does not intend to cooperate either because there has been excessive delay in complying with a request for assistance or because there are other circumstances clearly indicating an absence of good faith on its part;

¹⁹⁶ The provisions on notice to States might read as follows:

"(a) Subject to subparagraph (b) below, a determination will not be made unless [x days'] notice of the matter has been given to the State concerned and that State has been given an opportunity to make representations to the Court;

(b) If, having regard to all the circumstances, the Pre-Trial Chamber or the Trial Chamber decides that there are substantial reasons for not giving the State notice of the matter, a determination to which this article applies shall not take effect until [x] days after it has been served on that State and the State has been given the opportunity to make representations to the Court."

(b) The information or evidence is relevant to an issue before the Court and is necessary for the efficient and fair conduct of the proceedings; and

(c) Having regard to the State's claim that its national security interests would be prejudiced by disclosure, the Pre-Trial Chamber or the Trial Chamber is satisfied that the claim is manifestly without foundation.

6. Where a State makes a claim falling within paragraph 2 (c) above, it shall submit a reasoned case, orally or in writing, in support of its claim that its national security interests would be so prejudiced.

Option 3

1. Article 90, paragraph 2, option 2, subparagraphs (c) and (d), which now permits a State Party to deny assistance where "execution of the request would seriously prejudice its national security, *ordre public* or other essential interests" or where "the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence]", would be deleted and replaced by a narrower formulation for subparagraph (c), to read as follows:

Article 90, paragraph 2 (c)

"A State Party may deny a request for assistance, in whole or in part, only if:

"...

"(c) Having complied with the provisions of article [see new article below], it determines that there are no conditions under which it can comply with the request, including request for information or evidence arising under article 71 (option 1), without seriously prejudicing its national security interests."

2. A new article, perhaps following current article 90, would set out procedures to be followed before a State Party could deny assistance on national security grounds:

"Article []

"1. If a State Party receives a request for information or evidence from the Prosecutor or the Court, the disclosure of which would, in the opinion of the State, seriously prejudice its national security interests, the State shall without delay notify the Prosecutor or the Court of its concerns and request consultations to determine whether there are means whereby its concerns may be addressed, which may include, among other things, the following:

"(a) Modification or clarification of the request;

"(b) A determination by the Pre-Trial or Trial Chamber regarding the relevance of the information or evidence sought;

"(c) Obtaining the information or evidence from a different source or in a different form; or

"(d) Agreement on conditions under which the assistance could be provided, including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera and/or ex parte proceedings, or other protective measures permissible under the Statute and the Rules.

"2. For purposes of hearing the State's concerns regarding disclosure or facilitating consultations to address those concerns, the Pre-Trial Chamber or Trial Chamber shall, if so requested by the State, hold in camera and/or ex parte hearings, and make other special arrangements, as appropriate.

"3. If, following such consultations, the Prosecutor or Court reaffirms the request for the information or evidence and the State determines there are no means or conditions under which it could provide that information or evidence without serious prejudice to its national security interests, it shall so notify the Prosecutor or the Court of its determination and the specific reasons therefor, unless a specific description of the reasons would itself necessarily result in such a serious prejudice to the State's national security interests.

"4. If a State has complied with the provisions of paragraphs 1 and 3, it may then deny the request for assistance under article 90, paragraph 2 (c).

"5. If the Court is of the view that information or evidence sought from a State is important to the resolution of a critical issue in the case and that the State has manifestly acted in bad faith in denying a request for that information or evidence under article 90, paragraph 2 (c), the Court shall communicate its views to the Assembly of States Parties, and, in an appropriate case, to the Security Council, for such further action as may be necessary and appropriate."

Article 72

Quorum and judgement

1. A quorum consists of [at least four] [all] members of the Trial Chamber. The judgement shall be given only by judges who have been present at each stage of the trial before the Trial Chamber and throughout its deliberations.

[All of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations, provided, however, that the trial or deliberation may proceed with four judges, if one, for a good cause, is unable to attend.]

2. The Trial Chamber's judgement shall be based on its evaluation of the evidence and the entire proceedings. The

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

judgement shall not exceed the facts and circumstances described in the indictment or its amendment, if any.¹⁹⁷ The Court may base its judgement only on evidence submitted and discussed before it at the trial.

3. *Option 1*

The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.

Option 2

All judges must concur in a decision as to conviction and at least three judges must concur as to the sentence to be imposed.

4. If the required majority for a decision as to conviction or the sentence to be imposed cannot be reached, the opinion which is more favourable to the accused shall prevail.¹⁹⁸

5. The deliberations of the Trial Chamber shall remain secret.

6. The judgement shall be in writing and shall contain a full and reasoned statement of the findings on the evidence and conclusions. [It shall be the sole judgement issued.] [It may contain dissenting opinions [, one dissent covering all dissenting opinions].] The judgement or a summary thereof shall be delivered in open court.

[Article 73

Reparations to victims

1. The Court [shall] [may] establish principles relating to reparations to, or in respect of,¹⁹⁹ victims, including restitution, compensation and [compensation for the purposes of] rehabilitation. The Court may, upon request, [or upon its own motion if the interests of justice so require,] determine, in its judgement, the scope and extent of any damage, loss and injury to, or in respect of, victims.

2. In accordance with the principles established by the Court:

(a) The Court may make an order directly against a convicted person for an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.²⁰⁰ [An award by way of compensation may comprise:

- (i) An exemplary element;
- (ii) A compensatory element;
- (iii) Both.]

[Where appropriate, the Court may order that the award for reparations be made into the trust fund provided for in article 79];

(b) [The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State];

- [- If the convicted person is unable to do so himself/herself; [and
- If the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]];

(c) [In any case other than those referred to in subparagraph (b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].

3. In exercising its power under the present article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1.²⁰¹

4. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims [, other interested persons] or interested States.

5. Victims or their successors or assigns may seek enforcement of an order [or judgement] under the present article by competent national authorities. In this regard, they may ask the Court to seek enforcement of the orders [or judgement] under [Part 9 and] Part 10 of the Statute. [To that end, States Parties shall take the necessary measures to assist them].

¹⁹⁷ It was suggested that this sentence could be included in the Rules of Procedure and Evidence.

¹⁹⁸ This paragraph would only be necessary if majority decisions are allowed and a quorum could consist of an even number of judges.

¹⁹⁹ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victim's families and successors (in French, "ayants droit"). For the purposes of defining "victims" and "reparations", reference may be made to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17, annex).

²⁰⁰ It was suggested that since, under the present article, the national courts could render a decision with respect to reparations in conflict with an order of the Court, there should, in the interests of legal certainty, be safeguards to prevent any such conflict.

²⁰¹ As regards the reference to article 90 and to part 10 of the Statute in general, the view was expressed that it would be necessary to clarify whether the property and assets referred to in that article includes both crime and non-crime related property and assets.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

6. Nothing in the present article shall be interpreted as prejudicing the rights of victims [not covered by the judgement of the Court] under national or international law.

7. [Victims or any person acting on their behalf, the convicted person [or any interested State] [or other interested persons] may appeal against judgement under this article, in accordance [with [Part 8 of the Statute and] the Rules].

8. [Rules necessary to give effect to the provisions of the present article shall be made in accordance with article 52].]

NB: The following provision has been considered by the Preparatory Committee and it was deemed that it would be appropriate for the Rules: “The judgement of the Court under this article will be transmitted by the Registrar to the competent authorities of the State or States with which the convicted person appears to have direct connection by reason of either nationality, domicile or habitual residence or by virtue of the location of the convicted person’s assets and property or with which the victim has such connection”.

Article 74 *Sentencing*

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence.

2. Except where article 65 applies, the Trial Chamber may on its own motion, and shall at the request of the Prosecutor or the accused, made before the completion of the trial, hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the Rules.

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the hearing referred to in paragraph 2.

4. The sentence shall be pronounced in public [and in the presence of the accused].²⁰²

PART 7. PENALTIES

Article 75 *Applicable penalties*

The Court may impose on a person convicted under this Statute [one or more of the following penalties] [the following penalty]:

²⁰² The bracketed portion of the text requires further consideration in the light of the decision to be taken concerning trials in absentia.

(a)²⁰³ [A term of life imprisonment or imprisonment for a specified number of years;]

[A maximum term of imprisonment of [30] years;]

[A definite term of imprisonment between [20] and [40] years [, unless this is reduced according to the provisions of this Statute]²⁰⁴;]

[The Court may attach to the sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of Part 10 of the Statute].]

[In the case of a convicted person under the age of 18 years at the time of the commission of the crime, a specified term of imprisonment of no more than 20 years];

[When imposing a penalty on a person under the age of 18 years [at the time of the commission of the crime], the Court shall determine the appropriate measures to ensure the rehabilitation of the offender]²⁰⁵

NB: The two preceding paragraphs should be harmonized with article 26 (Age of responsibility).

[(b) A fine [in addition to a sentence of imprisonment on conviction of a crime under article 5]],²⁰⁶

[(c) (i) [[Disqualification from seeking public office for the person’s term of imprisonment and any further period of time that may be imposed] [in the modality and to the extent that the

²⁰³ To meet the concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, it was suggested that part 10, article 100, should provide a mandatory mechanism by which the prisoner’s sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

²⁰⁴ The view was expressed that, if such a provision providing for minimum sentencing is included, there should be a reference to factors that may reduce the minimum sentence. In such a case, the list of relevant factors should be exhaustive. It was suggested that among those factors could be the following: (i) diminished mental capacity that falls short of exclusion of criminal responsibility; (ii) the age of the convicted person; (iii) as appropriate, duress; and (iv) the subsequent conduct of the convicted person.

²⁰⁵ The following proposals were made which should be treated either under age of responsibility or the jurisdiction of the Court:

“[The Court shall have no jurisdiction over those who were under the age of 18 years at the time they are alleged to have committed a crime which would otherwise come within the jurisdiction of the Court] [, however, under exceptional circumstances, the Court may exercise jurisdiction and impose a penalty on a person aged 16 to 18 years, provided it has determined that the person was capable of understanding the unlawfulness of his or her conduct at the time the crime was committed].”

²⁰⁶ Some delegations held the view that such a provision would give rise to difficult issues of enforcement.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

penalty could be imposed in accordance with the laws of the State in which such a penalty is to be enforced];²⁰⁷

- (ii) A forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct, without prejudice to the rights of bona fide third parties. [When the whole or part of the [instrumentalities of crime or] proceeds, property, assets mentioned in ... cannot be forfeited, a sum of money equivalent thereto may be collected.];²⁰⁸

[(d) Appropriate forms of reparation]

[[without prejudice to the obligation on every State to provide reparation in respect of conduct engaging the responsibility of the State]²⁰⁹ [or reparation through any other international arrangement], appropriate forms of reparation [, [including] [such as] restitution, compensation and rehabilitation]].²¹⁰

NB: If retained, subparagraph (d) should be examined in the context of the discussions on article 73 (Reparations to victims).

[(e) (Death penalty)]

Option 1

[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.]

Option 2

No provision on death penalty.

²⁰⁷ The terms in this provision should be brought into line with similar terms used elsewhere in this Statute once those provisions are finalized.

²⁰⁸ It was suggested that forfeiture not be included as a penalty, but instead be included as a mechanism which the Court would request States to use with regard to execution of an order for reparations. According to this view, a provision on forfeiture could be considered as a separate paragraph of this article or elsewhere in the Statute.

²⁰⁹ It was suggested that there was no need for such a clause relating to State responsibility, since it was already dealt with in the context of rules on individual criminal responsibility.

²¹⁰ A number of delegations suggested that the Statute should address the issue of reparations to victims and their families. Opinions were divided as to whether this issue should be dealt with in the context of penalties. It was suggested that it could usefully be dealt with within the framework of the Working Group on Procedural Matters. It was also noted that the issue of reparations had a bearing on rules of enforcement in part 10. A number of delegations expressed the view that there might be merit in dealing with these issues in a unified way focusing on all the issues related to compensation.

[Article 76^{211,212}

Penalties applicable to legal persons

A legal person shall incur one or more of the following penalties:

- (i) Fines;
- [(ii) Dissolution;]
- [(iii) Prohibition, for such period as determined by the Court, of the exercise of activities of any kind;]
- [(iv) Closure, for such a period as determined by the Court, of the premises used in the commission of the crime;]
- [(v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;²¹³ [and]
- [(vi) Appropriate forms of reparation.]²¹⁴

NB: Subparagraph (vi) should be examined in the context of reparation to victims.

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.²¹⁵

²¹¹ Inclusion of a provision on such penalties would depend on the outcome of considerations in the context of individual criminal responsibility for legal persons.

²¹² It was suggested that such provisions may give rise to issues of enforcement in the context of part 10.

²¹³ See footnote 208 concerning forfeiture for natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

²¹⁴ See footnote 208 concerning reparation in the context of natural persons. There may be merit in adopting a unified approach in both provisions, including all relevant qualifications.

²¹⁵ It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person had been convicted of more than one crime, the Court shall:

Option 1

[pronounce a single sentence of imprisonment [not exceeding the maximum sentence prescribed for the gravest crime] [, increased by half]]

Option 2

[indicate whether multiple sentences of imprisonment shall be served consecutively or concurrently.]

[*Article 78*²¹⁶

Applicable national legal standards

Option 1

In determining the length of a term of imprisonment or the amount of a fine to be imposed, [or property to be forfeited,] the Court [may have regard to the penalties provided for by law of] [shall impose the highest penalty provided for by the law of either]:

(a) [The State of which the convicted person is a national];

(b) [The State where the crime was committed;] [or]

(c) [The State which had custody of and jurisdiction over the accused.]

[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.]

Option 2

No provision on national legal standards.²¹⁷

[*Article 79*²¹⁸

Fines [and assets] collected by the Court

Fines [and assets] collected by the Court may be transferred, by order of the Court, to one or more of the following:

[(a) [As a matter of priority,] a trust fund [established by the Secretary-General of the United Nations] or [administered by the Court] for the benefit of victims of the crime [and their families];]

[(b) A State the nationals of which were the victims of the crime;]

[(c) The Registrar, to defray the costs of the trial.]]

NB: This article should be examined in the context of reparations to victims.

PART 8. APPEAL AND REVIEW

Article 80

Appeal against judgement or sentence

1. A [decision] [conviction] under article 72 may be appealed, in accordance with the Rules of Procedure and Evidence, as provided for below:

(a) The Prosecutor may make such an appeal on the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make such an appeal on the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

[(c) The Prosecutor shall not be entitled to appeal against the conviction but he or she shall be entitled to draw the attention of the Appeals Chamber to a point of law, which in his or her opinion requires interpretation or clarification.]

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of [significant] disproportion between the crime and the sentence;

(b) If on an appeal against sentence, the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82.

²¹⁶ It was suggested that this issue should be dealt with only in the context of article 20 on applicable national laws. Another suggestion was to move this issue to article 77, paragraph 1. Moreover, the view was held that this kind of provision should be avoided altogether.

²¹⁷ Consideration could be given to inserting an express provision to this effect.

²¹⁸ It was suggested that there may be options other than (a) and (b) as to the manner in which fines or assets collected by the Court could be distributed to victims.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under article 80, paragraph 2 (a).

[3. *Option 1*

The Prosecutor or the convicted person may, in accordance with the Rules of Procedure and Evidence, appeal [to the Appeals Chamber] against a decision rendered in absentia under article 63.

Option 2

The Prosecutor or the convicted person may not appeal against a decision rendered in absentia under article 63 except that an appeal against judgement given on the merits in the absence of the accused shall be allowed if the accused accepts the judgement or was represented during the trial before the Trial Chamber by Defence Counsel appointed by the accused.]

4. (1) Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

When his time in custody exceeds the sentence of imprisonment imposed, he shall be released, but if the Prosecutor is also appealing, his release may be subject to the conditions under (2) below.

(2) In case of an acquittal, the accused shall be released immediately, subject to the following:

(a) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(b) A decision by the Trial Chamber under (a) above may be appealed in accordance with the Rules of Procedure and Evidence.

5. Subject to the provisions of paragraph 4 (1), execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 81

*Appeal against interlocutory decisions*²¹⁹

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) An order granting or denying release of the defendant on bail;

[(c) An order that confirms or denies, wholly or in part, the indictment;]

[(d) An order of exclusion of evidence;]

[(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.]

2. An interlocutory appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the Rules.

Article 82

*Proceedings on appeal*²²⁰

1. For the purposes of proceedings under articles 80 and 82, the Appeals Chamber also has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, judgement or sentence, or that the decision, judgement or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision, judgement or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine and to report back accordingly, or may itself call evidence to determine the issue. When the decision has been appealed only by the accused, it cannot be amended to his or her detriment.

[Those defences shall be admissible only if already raised in the Trial Chamber or if resulting from the proceedings in that Chamber.]

3. If in an appeal against sentence the Chamber finds that the sentence is [significantly] disproportionate to the crime, it may vary the sentence in accordance with Part 7.²²¹

4. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court. [[Six] [Four] judges constitute a quorum.] [The judges shall attempt to achieve unanimity in their judgement, failing which it shall be taken by a majority of the judges.]

²¹⁹ Further consideration should be given to the question of what decisions could be appealed under this article.

²²⁰ In part 10 the question of what constitutes a final decision or judgement will be discussed.

²²¹ To be revised in conjunction with article 81.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

The judgement shall state the reasons on which it is based. [If the judgement does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.]

5. The Appeals Chamber may deliver its judgement in the absence of the accused.

Article 83

Revision of conviction or sentence

Option 1 (two-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to the [Presidency] [Appeals Chamber] to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proven at trial it likely would have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in a conviction or in its confirmation has committed in that case a serious breach of his or her duties;

[(d) The conduct upon which the conviction was based no longer constitutes a crime under the Statute or the sentence being served exceeds the maximum penalty currently provided in the Statute;]

[(e) The Court[, or where applicable, the court of a State Party,] rendered a decision that necessarily also invalidates the judgement in this case.]

[2. The Prosecutor may apply for revision of a final judgement of acquittal on the grounds that, within five years after pronouncement of the final judgement, new evidence of the kind referred to in paragraph 1 (a) or 1 (b) is discovered [or the acquitted person has confessed guilt with respect to the crime concerned].]

3. The [Presidency] [Appeals Chamber] shall reject the application if it considers it to be unfounded. If it determines that there is a [significant possibility] [probability] that the application is meritorious, it:

[may, as appropriate:

- (a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) [Refer the matter to the Appeals Chamber]²²² [retain jurisdiction over the matter]²²³

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.]

[OR

[shall annul the conviction and refer the accused to a Chamber at the same level as, but having composition different from, that of the Chamber that handed down the annulled decision.]

[4. The decision of the Presidency or of a Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

Option 2 (one-step process)

1. The convicted person or, after death, the person's spouse, [successors or assigns] [children, relatives or any persons having express instructions] [, the State of the person's nationality], or the Prosecutor on the person's behalf, may apply to [the original or, if unavailable or if relief is sought on the basis of paragraph 1 (c), another] [a] Trial Chamber to revise the final judgement of conviction or sentence on the grounds that:

1. (a) – (e) [same as in option 1]

2. [same as in option 1]

3. The Chamber shall hear the parties in the manner set forth in the Rules of Procedure and Evidence. It shall reject the application if it considers it to be unfounded. If it agrees with the application, it may, as appropriate:

(a) Enter a corrected judgement;

(b) Order a new trial; or

(c) Refer the matter to the Appeals Chamber.

[4. The decision of the Trial Chamber disposing of the application may be appealed by either party to the Appeals Chamber.]

[Article 84

Compensation to a suspect/accused/convicted person

1. Anyone who has been subject to arrest or detention in violation of the Statute, [the Rules] or internationally recognized human rights law shall have a right to compensation from the Court, in accordance with the Rules.

²²² This bracketed text would be used if the Presidency makes the initial review of the application for revision.

²²³ This bracketed text would be used if the Appeals Chamber makes the initial review of the application for revision.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

2. When a person has, by a final decision, been convicted of a criminal offence, and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated in accordance with the Rules, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

[3. The Court may also award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision to release him because of insufficient charges against him or because of a final decision of acquittal.]

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE²²⁴

NB: Consideration should be given to interchanging parts 9 and 10.

Article 85

General obligation to cooperate

States Parties shall, in accordance with the provisions of this [Part] [Statute], fully cooperate with the Court²²⁵ in its investigation and prosecution of crimes under this Statute. States Parties shall so cooperate without [undue] delay.

Article 86²²⁶

[Requests for cooperation: general provisions]

1. *Authorities competent to make and receive requests/Channels for communication of requests*

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be

²²⁴ Articles 86, 88, 89 and 90 contain virtually identical provisions, some of which should be harmonized.

²²⁵ "Court" throughout this part is understood to include its constituent organs, including the Prosecutor, as defined in article 35. Such a provision could be inserted elsewhere in the Statute.

NB: See the NB on article 35 (Organs of the Court).

²²⁶ It was suggested that the provisions of article 88, paragraph 4, and article 90, paragraph 8, concerning the protection of witnesses and victims should be combined in a single paragraph in article 86, which would read:

"The Court may withhold, in accordance with article 68, from the requested State [or a State making a request to the Court under article 90, paragraph 7], specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available to a State under this Part shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses or their families."

It was also suggested that the content of such a provision should be considered further.

transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Such designation and subsequent changes shall be done in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. *Language of requests*²²⁷

Requests for cooperation [and supporting documents] shall be [either] in [an official language of the requested State [unless otherwise agreed]] [or in] [one of the working languages reflected in article 51, in accordance with the choice made by that State upon ratification, accession or approval].

[The legal effect of such request shall not be diminished if any supporting document is not in such working language provided that a brief summary of any such document in that working language is also submitted.]

3. *Confidentiality of requests from the Court*

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. *Cooperation by non-States Parties*²²⁸

[(a) The Court may [call on] [invite] any State not party to this Statute to provide assistance under this Part on the basis of [comity,] an ad hoc arrangement, an agreement with such State [or any other appropriate basis].]

[(b) Where a State not party to this Statute [which has entered into an ad hoc arrangement or an agreement with the Court],²²⁹ fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the General Assembly of States Parties]²³⁰ [or] [the United Nations General Assembly] [or, where the Security Council referred the matter to the Court,] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].²³¹]

²²⁷ The language to be used by States in their replies to the Court is dealt with under article 91.

²²⁸ It was suggested that the issue of non-States parties should be addressed in a separate article 85.

²²⁹ It was suggested that a reference to subparagraph (a) would cover this concern.

²³⁰ It was suggested that the referral be made to a standing committee of the General Assembly of States Parties. This issue needs to be further addressed in part 4.

²³¹ The question of "necessary measures" has to be further examined.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

5. *Cooperation of intergovernmental organizations*

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

6.²³² *States Parties' failure to cooperate [comply]*

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to [the Assembly of States Parties]²³³ [or] [the General Assembly of the United Nations] [or, where the Security Council referred the matter to the Court] [to the Security Council] [so that necessary measures may be taken to enable the Court to exercise its jurisdiction].²³⁴

NB: In view of the length of the article, the headings of the paragraphs are retained pending a decision on the text of the article. Consideration may be given to dividing the article into three as follows:

- Paragraphs 1 to 3;
- Paragraphs 4 and 5;
- Paragraph 6.

Article 87

[Surrender] [Transfer] [Extradition] of persons²³⁵ to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part [and the procedure under their national law], comply with requests for arrest and [surrender] [transfer] [extradition] without [undue] delay.

[2. The national law of a requested State shall govern the [conditions] [procedure] for granting or denying a request for [surrender] [transfer] [extradition] [except as otherwise provided in this Part].]

3. [Option 1: No grounds for refusal.]

²³² It was suggested that this paragraph should be inserted in article 85.

²³³ It was suggested that the referral be made to a standing committee of the Council of States Parties. This issue needs to be further addressed in the organization of the Court.

²³⁴ The question of "necessary measures" has to be further examined.

²³⁵ The term "persons" is understood to include "suspects", "accused" and "convicted persons". [The term "suspect" means a person who is the subject of a pre-indictment arrest warrant.]

[Option 2: State Party may deny a request for [surrender] [transfer] [extradition] only if:²³⁶

(a) With respect to a crime under [article 5, subparagraphs (b) through (e)] [article 5, subparagraph (e)], it has not accepted the jurisdiction of the Court;

[(b) The person is a national of the requested State;]²³⁷

(c) The person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 15];

[(d) The information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 88, paragraph 1 (c);]

(e) Compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.²³⁸

NB: The options in this subparagraph are not clear.

[4. If a request for [surrender] [transfer] [extradition] is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]

5. *Application to the Court to set aside [surrender] [transfer] [extradition]*

A State Party [having received a request under paragraph 1 may, in accordance with the Rules of Procedure and Evidence²³⁹] [may, in [...] days of receiving a request under paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 15 and 18]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

²³⁶ There is no agreement on the list of grounds contained in this option.

²³⁷ It was suggested that even if a person is a national of the requested State, this does not prevent that State from [transferring] [surrendering] [extraditing] the person to the Court if the latter guarantees that the national in question shall be returned to the requested State to serve the sentence pronounced by the Court (cf. article 94, paragraph 1).

²³⁸ It was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence.

²³⁹ Questions dealing with the consequences of lapse of time will be addressed in the Rules of Procedure and Evidence.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

6. *Parallel requests from the Court and State(s)*

Option 1

(a) A State Party [which has accepted the jurisdiction of the Court] [, if it is a party to the treaty covered by [article 5, paragraph (e),] with respect to the crime,] shall [, as far as possible,] give priority to a request from the Court under paragraph 1 over requests for extradition from other States [Parties].

(b) If the requested State also receives a request from a non-State Party to which it is bound by an extradition agreement for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

- (i) The respective dates of the requests;
- (ii) If the offences are different, the nature and gravity of the offences;
- (iii) The interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and
- (iv) The possibility of subsequent [surrender] [transfer] [extradition] or extradition between the Court and the State requesting extradition.

Option 2

(a) If the requested State also receives a request from a [State] [State Party] [to which it is bound by an extradition agreement] for the extradition of the same person, either for the same offence or for a different offence for which the Court is seeking the person's [surrender] [transfer] [extradition], the appropriate authority of the requested State shall determine whether to [surrender] [transfer] [extradite] the person to the Court or to extradite the person to the State. In making its decision the requested State shall consider all relevant factors, including but not limited to:

- (i) Whether the extradition request was made pursuant to a treaty;
- (ii) The respective dates of the requests;
- (iii) If the offences are different, the nature and gravity of the offences;
- (iv) The interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence; and

(v) The possibility of subsequent [surrender] [transfer] or extradition between the Court and the State requesting extradition.

(b) The requested State may not, however, deny a request for the [surrender] [transfer] [extradition] made under this article in deference to another State's request for extradition of the same person for the same offence if the State requesting extradition is a State Party and the Court has ruled the case before it is admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.

Option 3

(a) Subject to subparagraph (b), a State Party [shall] [may] accord priority to a request by a State over a request by the Court for the extradition, transfer or surrender of a person to the requesting State under the provisions of any existing bilateral or multilateral agreement.

(b) A State Party shall however accord priority to requests from the Court over a request by a State where the Court has [positively] determined pursuant to article 15 that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition, transfer or surrender is sought.

[7. Proceeding in requested State

Where the law of the requested State so requires, the person whose [surrender] [transfer] [extradition] is sought shall be entitled to challenge the request for arrest and [surrender] [transfer] [extradition] in the court of the requested State on [only] the following grounds:

[(a) Lack of jurisdiction of the Court;]

[(b) *Ne bis in idem*; or]

[(c) The evidence submitted in support of the request does not meet the evidentiary requirements of the requested State as set forth in article 88, paragraph 1 (b) (v) and (c) (ii).]

8. Delayed or temporary [surrender] [transfer] [extradition]

If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which [surrender] [transfer] [extradition] to the Court is sought, the requested State, after making its decision to grant the request, may:

(a) Temporarily [surrender] [transfer] [extradite] the person to the Court and in that case, the Court shall return the person to that State after the completion of the trial or as otherwise agreed; or

(b) [With the consent of the [Court] [Pre-Trial Chamber] which shall rule after having heard the Prosecutor] postpone the [surrender] [transfer] [extradition] of the person

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

until the completion or abandonment of the prosecution [or completion of service of the sentence].²⁴⁰

[9. *Extradite or prosecute obligation*²⁴¹

(a) In the case of a crime to which article 5, subparagraph (e), applies, the requested State [, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime,] shall, where it decides not to [surrender] [transfer] [extradite] the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case [through proceedings in accordance with national laws] to its competent authorities for the purpose of prosecution.

[(b) In any other case, the requested State Party shall [consider whether it can], in accordance with its legal procedures, take steps to arrest and [surrender] [transfer] [extradite] the accused to the Court, or [whether it should take steps to extradite the accused to a State having requested extradition or [at the request of the Court] refer the case to its competent authorities for the purpose of prosecution;]

[(c) The [surrender] [transfer] [extradition] of an accused to the Court will constitute, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or that the case be referred to the competent authorities of the requested State for the purpose of prosecution.]]

[10. *Provision of evidence irrespective of [surrender] [transfer] [extradition]*

[To the extent permitted under the law of the requested State and] without prejudice to the rights of third parties, all items found in the requested State [that have been acquired as a result of the alleged crime or] that may be required as evidence shall, upon request, be transmitted to the Court [if the [surrender] [transfer] [extradition] is granted on conditions to be determined by the Court] [even if the [surrender] [transfer] [extradition] of the person cannot be carried out]. [Any rights which third parties may have acquired in the said items shall be preserved where these rights exist. The property shall be returned without charge to the requested State as soon as possible after the trial.]]

NB: It would be more appropriate to deal with the issues raised in this paragraph in the context of article 90 (Other forms of cooperation [and judicial and legal

[mutual] assistance)). Consideration may be given to dealing with some of the details in this paragraph in the Rules of Procedure and Evidence.

11. *Transit of [surrendered] [transferred] [extradited] person*²⁴²

(a) A State Party shall authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

[(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.]

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

12. *Costs*

The costs associated with the [surrender] [transfer] [extradition] of a person shall be borne by the [Court] [requested State] [Court or the requested State depending upon where the cost concerned arises].

NB: In view of the length of the article, the headings of the paragraphs are retained. Consideration may be given to dividing the article into shorter articles, without prejudice to their retention, as follows:

- Paragraphs 1 and 2;
- Paragraphs 3 and 4;
- Paragraph 5;
- Paragraph 6;
- Paragraph 7;
- Paragraph 8;
- Paragraph 9;

²⁴⁰ If it is agreed that consent of the Court will be required for postponement, then the last set of brackets can be removed.

²⁴¹ The text of paragraph 9 (a) and (b) applies if there is a consent regime. If the Court has jurisdiction over core crimes and there is no consent regime, these provisions could be deleted.

²⁴² It has been suggested that this or other provisions could form the basis for a separate article. In addition, some felt that a number of details set forth in this text would be more appropriately regulated in the Rules of Procedure and Evidence.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

- Paragraph 10;
- Paragraph 11;
- Paragraph 12.

Article 88

Contents of request for [surrender] [transfer] [extradition]²⁴³

1. A request for arrest and [surrender] [transfer] [extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record,²⁴⁴ provided that a request shall be confirmed [if necessary] through the channel provided for in article 86. The request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) In the case of a request for pre-indictment arrest and [surrender] [transfer] [extradition]:

- (i) A copy of the warrant for arrest;²⁴⁵
- (ii) A statement of the reasons to believe the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to seek an indictment within [90] days;
- (iii) A brief summary of the [essential] facts of the case;
- (iv) A statement as to why pre-indictment arrest is urgent and necessary;²⁴⁶
- (v) [Such documents, statements, or other types of information regarding the commission of the offence and the person's role therein, which may be required by the laws of the requested State;] [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties with other States;]

(c) In the case of a request for post-indictment arrest and [surrender] [transfer] [extradition]:

- (i) A copy of the warrant of arrest and indictment;

[(ii) Such documents, statements, or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];]

(d) In the case of a request for the arrest and [surrender] [transfer] [extradition] of a person already convicted:²⁴⁷

- (i) A copy of any warrant of arrest for that person;
- (ii) A copy of the judgement of conviction;
- (iii) Information to demonstrate that the person sought is the one referred to in the judgement of conviction;
- (iv) [If the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

2. A State Party shall notify the Court at the time of ratification, accession or approval whether it can [surrender] [transfer] [extradite] on the basis of a pre-indictment warrant and the information specified in paragraph 1 (b) or it can only [surrender] [transfer] [extradite] following [confirmation of indictment] [issuance of a post-indictment warrant] on the basis of the information in paragraph 1 (c).

[3. Where the requested State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, for such period as may be necessary to enable the Court to provide the additional information requested.] If the additional information is not provided within the reasonable time limit fixed by the requested State, the person may be released.]

[4. The Court may in accordance with article 68 withhold from the requested State specific information about any victims, potential witnesses and their families if it considers that it is necessary to ensure their safety or physical or psychological well-being. Any information that is made available under this article shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.]²⁴⁸

²⁴³ Portions of this article might also be provided for in the Rules of Procedure and Evidence rather than in the Statute.

²⁴⁴ Issues relating to the security of this type of transmission will have to be discussed.

²⁴⁵ The question of authentication of a warrant of arrest will be dealt with in the Rules of Procedure and Evidence.

²⁴⁶ Article 59 covers pre-indictment arrest, while this paragraph also addresses the form of a request for pre-indictment arrest. The text of these two provisions must be examined together to ensure that there are no inconsistencies or duplications.

²⁴⁷ It was suggested that this subparagraph is an enforcement-of-sentence issue to be treated in part 10.

²⁴⁸ This paragraph could also be included in article 86.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

NB: This provision is similar to the text of paragraph 3 in article 89 (Provisional arrest) and paragraph 8 (b) of article 90 (Other forms of cooperation [and judicial and legal [mutual] assistance]). Consideration may be given to combining them in a single article.

Article 89 *Provisional arrest*²⁴⁹

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 88.

2. The request for provisional arrest shall [be made by any medium capable of delivering a written record and shall] contain:

- (i) A description of the person sought and information regarding the probable location of such person;
- (ii) A brief statement of the essential facts of the case, including, if possible, the time and location of the offence;
- (iii) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and, if applicable, a description of the specific offence or offences with which the person has been charged or for which he has been convicted; and
- (iv) A statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

3. The Court may withhold from the requested State specific information about any victims, potential witnesses and their families or close associates if it considers that it is necessary to ensure their safety or well-being. Any information that is provided under this article to the requested State shall be provided in a manner that protects the safety or well-being of any victims, potential witnesses and their families or close associates.

NB: See the NB to paragraph 4 of article 88 (Contents of request for [surrender] [transfer] [extradition]).

4. A person who is provisionally arrested may be discharged from custody upon the expiration of []²⁵⁰ days from

²⁴⁹ ILC draft article 52, paragraph 1 (a), addresses provisional arrest, as well as search and seizure and other measures pertaining to mutual assistance. In order to present all proposals in a clear fashion, the present document treats provisional arrest in this article and the other matters in article 90.

²⁵⁰ Some delegations have proposed a 30-day period, some a 40-day period and some a 60-day time period.

the date of provisional arrest if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 88. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.²⁵¹

5. The fact that the person sought has been discharged from custody pursuant to paragraph 4 shall not prejudice the subsequent rearrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 90 *Other forms of cooperation [and judicial and legal [mutual] assistance]*²⁵²

1. States Parties shall, in accordance with the provisions of this Part [and their national [procedural] law], comply with requests for assistance by the Court for:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;
- (c) The questioning of any suspect or accused;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the appearance of persons before the Court;
- [(f) The temporary transfer of persons in custody, with their consent [which cannot be withdrawn], in order to provide testimony [or other assistance] to the Court;]
- [(g) The conduct of on-site investigations and inspections²⁵³ [with the consent of the requested State];]
- [(h) The conduct of proceedings of the Court in its territory with the consent of the requested State;]²⁵⁴
- (i) The execution of searches and seizures;

²⁵¹ It was suggested that the simplified surrender procedure should be the object of a separate paragraph, since it applies to both the provisional arrest stage and after a full surrender request has been submitted.

This paragraph could also be included in article 86.

²⁵² This issue has to be revisited after the title of part 9 is confirmed.

²⁵³ This issue is also addressed in article 54, paragraph 4 (c).

²⁵⁴ The relationship between subparagraphs (g) and (h) and article 91, paragraph 4, needs to be examined.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(j) The provision of records and documents, including official records and documents;

(k) The protection of victims and witnesses and the integrity of evidence;

(l) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;²⁵⁵ and

(m) Any other types of assistance [not prohibited by the law of the requested State].

[2. *Grounds for refusal*

Option 1

A State Party shall not deny a request for assistance from the Court.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:²⁵⁶

(a) With respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)], it has not accepted the jurisdiction of the Court;

(b) The authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) Execution of the request would seriously prejudice its national security, *ordre public* or other essential interests;

(d) The request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(e) Execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 15];

(f) Compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

[3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

[5. If a requested State does not produce a document or disclose evidence under paragraph 2 (d) on the ground that it relates to its national defence, the Trial Chamber shall only make such inferences that relate to the guilt or innocence of the accused.]

NB: See article 71.

6. *Confidentiality*²⁵⁷

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. *Assistance by the Court*

(a) The Court [may] [shall], upon request, cooperate with and provide assistance [within its competence] to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute [or which constitute a serious crime under the national law of the requesting State];

(b)²⁵⁸ (i) The assistance provided under subparagraph (a) shall include, among others:

(1) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

²⁵⁵ The issue of whether the Court is to be vested with such powers is linked with article 75 in part 7 on penalties.

²⁵⁶ The list of possible grounds for refusal is not an agreed list.

²⁵⁷ Views have also been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.

²⁵⁸ Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

- (2) The questioning of any person detained by the Court;
- (ii) In the case of assistance under subparagraph (b) (i) (1):
 - (1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;²⁵⁹
 - (2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68²⁶⁰ [and shall require the consent of that witness or expert];

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State Party.

8. *Form and contents of the request*

(a) Requests for [judicial and legal] [mutual] assistance shall:

- (i) Be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that it shall be confirmed [, if necessary,] through the channel provided for in article 86; and
- (ii) Contain the following, as applicable:
 - (1) A brief statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;
 - (2) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - (3) A brief description of the essential facts underlying the request;
 - (4) The reasons for and details of any procedure or requirement to be followed;
 - [(5) Such information as may be required under the law of the requested State in order to execute the request;]
 - (6) Any other information relevant to the assistance being sought.

(b) The Court may withhold, in accordance with article 68, from the requested State [or a State making a request under paragraph 6] specific information about any victims, potential witnesses and their families if it considers that this is necessary to ensure their safety or physical and psychological well-being. Any information that is made available under this article to the requested State shall be provided and handled in a manner that protects the safety or physical or psychological well-being of any victims, potential witnesses and their families.

NB: See the NB to paragraph 4 of article 88 (Contents of request for [surrender] [transfer] [extradition]).

NB: Consideration may be given to dividing this article into shorter articles, without prejudice to their retention, as follows:

- Paragraph 1;
- Paragraphs 2 to 5;
- Paragraph 6;
- Paragraph 7;
- Paragraph 8.

Article 91

Execution of requests under article 90

1. Requests for assistance shall be executed in accordance with the law of the requested State [and, unless prohibited by such law, in the manner specified in the request, including following any procedures outlined therein or permitting persons specified in the request to be present at and assist in the execution process²⁶¹ [by its competent authorities]].
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.²⁶²
3. Replies from States Parties, including any accompanying documents, [may be in the language of the requested State] [shall be in accordance with article 86, paragraph 2. The Court may also request the transmission of documents in their original language].
- [4. The [Prosecutor] [Court] may [, if requested,] assist the authorities of the requested State with the execution of the request for judicial assistance [and may, with the consent of the requested State, carry out certain inquiries on its territory].]²⁶³

²⁶¹ There is a link between this provision and the empowerment provisions of paragraph 4.

²⁶² Views have been expressed that this should be addressed in the Rules of Procedure and Evidence.

²⁶³ Views have been expressed that paragraph 1 is an alternative to this paragraph.

²⁵⁹ The relationship with article 92 needs to be considered.

²⁶⁰ This relates to the provisions on the protection of victims and witnesses.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

[5. [For the purposes of paragraph 4,] the requested State shall, upon request, inform the Court of the time and place of execution of the request for assistance.]²⁶⁴

6. (a) The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State except for the following which should be borne by the Court:

- (i) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;
- (ii) Costs of translation, interpretation and transcription;
- (iii) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court; and
- (iv) The costs of any expert opinion or report requested by the Court;

(b) Where the execution of a request will result in extraordinary costs, [there shall be consultations to determine how those costs will be met] [those costs shall be met by the Court];

(c) The provisions in this paragraph shall apply with appropriate modifications to requests made to the Court for assistance.²⁶⁵

NB: Consideration may be given to whether this provision should constitute a separate article where all the provisions dealing with costs would be combined. See also paragraph 12 of article 87 ([Surrender] [Transfer] [Extradition] of persons to the Court). Consideration may also be given to dealing with some of the details relating to the costs in the Rules of Procedure and Evidence.

[7. (a) Witnesses or experts may not be compelled to testify at the seat of the Court.

[(b) If they do not wish to travel to the seat of the Court, their evidence shall be taken in the country in which they reside or in such other place as they may agree upon with the Court [in accordance with national requirements [and in compliance with international law standards]²⁶⁶].

(c) In order to guarantee the safety of witnesses and experts, any means of communication may be used to take their evidence while preserving their anonymity.²⁶⁷⁻²⁶⁸

[(d) No witness or expert who appears before the Court may be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts [or omissions] that preceded the departure of that person from the requested State.]

8. Provisions allowing a person heard or examined by the Court under article [...] to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

[Article 92 Rule of speciality

1. *Limit on other proceedings against [surrendered] [transferred] [extradited] person*

A person [surrendered] [transferred] [extradited] to the Court under this Statute shall not be:

(a) Proceeded against, punished or detained for any criminal act other than that for which the person has been [surrendered] [transferred] [extradited];

(b) [Surrendered] [transferred] [extradited] to another State in respect of any criminal act²⁶⁹

[except when he or she commits the criminal act after [extradition] [surrender] [transfer]].

2. *Limit on other uses of evidence*

Evidence provided by a State Party under this Statute shall [, if that State Party so requests,] not be used as evidence for any purpose other than that for which it was provided [unless this is necessary to preserve a right of the accused under article 67, paragraph 2].

3. *Waiver of rule by the requested State*

The Court may request the State concerned to waive the requirements of paragraph 1 or 2, for the reasons and purposes to be specified in the request. In the case of paragraph 1, this request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.]²⁷⁰

²⁶⁴ Views have been expressed that this should be addressed in the Rules.

²⁶⁵ Similar provisions may have to be inserted elsewhere to address the situation where the Court renders assistance to States or States parties.

²⁶⁶ The exact formulation will depend on the formulation adopted for article 69.

²⁶⁷ The protection of witnesses is also addressed in articles 54 and 68.

²⁶⁸ Views have been expressed on the relationship between subparagraphs (b) and (c) and article 63 on trial in the presence of the accused.

²⁶⁹ The issue of transfer, etc., from the State of enforcement of a sentence of imprisonment to a third State is addressed in article 97.

²⁷⁰ These brackets reflect the view that there should be no rule of speciality in the Statute.

NB: The headings of the paragraphs are retained pending a decision on the text of the article.

PART 10. ENFORCEMENT²⁷¹

Article 93

General obligation regarding recognition [and enforcement] of judgements

States Parties [shall] [undertake to recognize] [[and to] enforce directly on their territory] [give effect to] the judgements of the Court [, in accordance with the provisions of this Part].

[The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other forms of reparation ordered by the Court, such as restitution, compensation and rehabilitation.]²⁷²

NB: This article should also be considered in the context of the discussions on article 73 (Reparations to victims).

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

²⁷³1. *Option 1*

A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency].

Option 2

(a) A sentence of imprisonment shall be served in a State designated by the [Court] [Presidency] from a list of States which have indicated to the Court their willingness to accept sentenced persons. The State so designated shall promptly inform the [Court] [Presidency] whether it accepts the request.

(b)²⁷⁴ A State may make its consent conditional. [When a State makes its consent conditional, on the applicability of its domestic laws relating to pardon, conditional release and commutation of sentence, and on its administration

of the sentence, the consent of the Court is not required to subsequent actions by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment].

2. (a) The [Court's] [Presidency's] designation of a State under paragraph 1 shall be governed by principles of [equitable distribution] [burden sharing] to be elaborated [in the Rules.] [However, no such designation shall be made with respect to the State where or against which the crime was committed or the State of which the convicted person or the victim is a national [, unless the [Court] [Presidency] explicitly decides otherwise for reasons of social rehabilitation].]

(b) In making a designation under paragraph 1, the [Court] [Presidency] shall allow the person sentenced to provide views on any concerns as to personal security or rehabilitation. However, the consent of the person is not required for the [Court] [Presidency] to designate a particular State for enforcement of the sentence.

[(c) In making a designation under paragraph 1, the [Court] [Presidency] shall take into account reasonable compliance with international standards governing treatment of prisoners.]

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in the prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

Article 95

Enforcement of the sentence

1. [Subject to conditions it may have specified in article 94, option 2, paragraph (b)]²⁷⁵ the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

2. The Court alone shall have the right to decide any application for review of the judgement or sentence. The State of enforcement shall not impede the sentenced person from making any such application.

Article 96

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] [, and consistent with internationally recognized standards governing treatment of prisoners.]

²⁷¹ One delegation was of the view that this part deals with issues also relevant to judicial assistance and that there might be grounds for non-recognition or non-enforcement of judgements.

²⁷² There was a question whether this sort of provision should be in article 72, part 7 or in part 10.

²⁷³ The issue arises as to whether provision should be made concerning whether non-States parties should accept sentenced persons for imprisonment.

²⁷⁴ If retained, this provision will need to conform with provisions of article 100.

²⁷⁵ The text in brackets will be retained in the event of article 94, option 2, is adopted.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

2. *Option 1*

The conditions of detention shall be governed by the law of the State of enforcement and consistent with internationally recognized standards governing treatment of prisoners. [However, the [Court] [Presidency] may, on its own motion or at the request of the sentenced person, modify the conditions of detention of the sentenced person. The State of enforcement shall enforce the modified conditions of detention. The [Court] [Presidency] may also on its own motion, or at the request of the sentenced person or the State of enforcement, decide that the sentenced person be transferred to another State for the continued serving of the sentence [provided that State agrees].

Option 2

The conditions of detention shall be governed by the law of the State of enforcement, consistent with internationally recognized minimum standards, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between persons sentenced and the Court shall be unimpeded [and confidential].

Article 97

Transfer of the person upon completion of sentence

1. Unless the State of enforcement agrees to permit the prisoner to remain in its territory following completion of sentence, the prisoner shall be released into the custody of the State of the person's nationality or another State that has agreed to receive the person.

2. The costs involved in transporting the prisoner to another State under article 94 shall be borne by the Court, unless the State of enforcement or the receiving State agree otherwise.

3. [Unless prohibited by the provisions of article 92] [with the consent of the Court as provided in article 98],²⁷⁶ the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the prisoner to the State which has requested the extradition or surrender of the prisoner for purposes of trial or enforcement of a sentence.

[Article 98

*Limitation of prosecution/punishment for other offences*²⁷⁷

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or

²⁷⁶ There is a question as to whether the permissibility of re-extradition of the prisoner should be addressed in article 92 (Rule of speciality) or in article 98.

²⁷⁷ Consideration should be given to the relationship of this article to the rule of speciality, as found in article 92. This article is also related to article 87, paragraph 8, regarding temporary or delayed surrender.

punishment [or extradition to a third State] for any conduct committed prior to delivery to the State of detention, unless such prosecution or punishment [or extradition] has been approved by the [Court] [Presidency] [at the request of the State of detention].

2. The [Court] [Presidency] shall rule on the matter after having heard the prisoner.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days on the territory of the State of enforcement after having served the full sentence imposed by the Court.]

[Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall [, in accordance with their national law,] enforce fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]]²⁷⁸ as fines and forfeiture measures [and measures relating to compensation or [restitution] [reparation]] rendered by their national authorities.

[For the purpose of enforcement of fines, the [Court] [Presidency] may order the forced sale of any property of the person sentenced which is on the territory of a State Party. For the same purposes, the [Court] [Presidency] may order the forfeiture of proceeds, property and assets and instrumentalities of crimes belonging to the person sentenced.]^{279, 280}

[Decisions by the Presidency are implemented by States Parties in conformity with their domestic laws.

[The provisions of this article shall apply to legal persons.]]

2. Property, including the proceeds of the sale thereof, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be handed over to the [Court] [Presidency] [which will dispose of that property in accordance with the provisions of article 79 [paragraph 5 of article 54].]

²⁷⁸ References to fines, forfeiture, restitution or compensation, or similar terms, will depend on the range of sanctions and compensatory measures ultimately provided for in part 7 [article 76].

NB: This footnote should be reviewed in the context of the discussions on article 73 (Reparations to victims).

²⁷⁹ There is a question whether this provision concerns enforcement of sentences, or rather the powers of the Court to order particular measures relating to enforcement of fines or confiscation. If it is meant to refer to States enforcing specific orders relating to fines or confiscation, then paragraph 1 might be amended to make clear that that enforcement by States parties would include "giving effect to orders of the Court relating to enforcement of fines or forfeitures, such as the seizure of particular property or the forced sale of property of the convicted person to satisfy a fine".

²⁸⁰ There was a suggestion that this paragraph should be placed first.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Article 100²⁸¹

*Pardon,*²⁸² *parole and commutation of sentences [early release]*

Option 1

1. The prisoner may apply to the [Court] [Presidency] for a [decision on] [ruling regarding the appropriateness of] [pardon,] parole or commutation of sentence, if under a generally applicable law of the State of enforcement, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for [pardon,] parole or commutation of sentence.

Option 2

1. (a) The State of enforcement shall not release the prisoner before the expiry of the sentence as pronounced by the Court.

(b) The [Court] [Presidency] alone shall have the right to decide any application for [commutation of the sentence] [commutation of the sentence or parole] [commutation of the sentence, parole or [pardon]]. [If appropriate in the circumstances, parole may be granted after the prisoner has served:

- (i) Not less than 20 years in case of life imprisonment;
- (ii) Not less than two thirds of the term in case of imprisonment for a definite term.

Parole may be revoked when the parolee is convicted of having committed an offence while on parole, or has violated any condition of his parole.]

2. Procedures regarding an application for commutation of sentence [or parole [or pardon]] and the [Court's] [Presidency's] decision on such an application shall be governed by the Rules of Procedure and Evidence.

NB: Consideration should be given to whether this article should be placed in part 7.

[Article 101

Escape

In the event of an escape, the sentenced person shall, as soon as he has been arrested pursuant to a request of the Court

under article 88, paragraph 1 (d), be delivered to the State in which he was serving his sentence or to another place determined by the Court.]

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. The signatories of the [Statute] [Final Act] may be [observers] [members] in the Assembly.²⁸³

2. The Assembly shall:

[(a) Consider and adopt recommendations of the preparatory commission;]

(b) Provide management oversight to the Presidency, Prosecutor and Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau and take appropriate action in regard thereto;

(d) Consider and approve the budget for the Court [in consultation with the Registrar] [and rule on any financial issue];

(e) Determine whether to alter, as appropriate, the number of judges [or members of the Office of the Prosecutor or the Registry], serving on a full- or part-time basis, for such period as it shall determine;

[(f) Consider, upon recommendation [of the Court] [of the Bureau], any question relating to non-cooperation by States Parties [and non-States Parties] and take [necessary] [appropriate] measures, including referring the matter to [the Security Council] [General Assembly of the United Nations] as provided in article 86.]²⁸⁴

(g) Perform any other function or take any other action as specified in this Statute or the Rules of Procedure and Evidence [including consideration of requests for a review of these instruments] [including consideration of applications relating to pardon submitted to it.]²⁸⁵

²⁸¹ In the discussion on penalties in the Preparatory Committee, it was suggested that, to meet concerns of several delegations regarding the severity of a life sentence or a long sentence of imprisonment, article 100 should provide a mandatory mechanism by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

²⁸² A concern was expressed that pardon might involve political considerations which would not be appropriate for determination by the Court, so that the authority to decide on an application for pardon might better be vested in the Assembly of States Parties.

²⁸³ Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.

²⁸⁴ It will be necessary to ensure consistency between this provision and the content of article 86.

²⁸⁵ The final wording will depend on the outcome of the discussions on article 100. Mention was also made in this context of a possible role of the Assembly in dispute resolution.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

3. (a) The Assembly shall have a Bureau consisting of a President, a Vice-President and [18]²⁸⁶ members elected by the Assembly for three-year terms.²⁸⁷ The President of the Court, the Prosecutor and the Registrar or their representatives may, as appropriate, participate as [observers] [members] in meetings of the Bureau.²⁸⁸

(b) The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character], taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world [as far as possible].

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of [non-judicial administration] [operations] of the Court.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations [or in any other place as it may decide] once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened [by the Bureau on its own initiative or] at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions on matters of substance by consensus in the Assembly and in the Bureau. If consensus cannot be reached, decisions on matters of substance must be approved by [a two-thirds majority of those present and voting, representing the absolute majority of States Parties] [a two-thirds majority of those present and voting] [an absolute majority of States Parties] except as otherwise provided in the Statute.

6. [A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding [two full] [three] [five] years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the

failure to pay is due to conditions beyond the control of the State Party].²⁸⁹

7. The Assembly shall adopt its own Rules of Procedure.

PART 12. FINANCING OF THE COURT

Article 103

Payment of expenses of the Court

Expenses of the Court as assessed by the States Parties shall be paid from the funds of the Court, in accordance with the Statute and the Financial Regulations and Rules adopted by the States Parties.

Article 104

Funds of the Court

Option 1

The funds of the Court shall comprise assessed contributions made by States Parties.

Option 2

The expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations.²⁹⁰

Option 3

1. The funds of the Court shall include:

- (a) Assessed contributions of States Parties;
- (b) Funds provided by the United Nations.²⁹¹

2. However, during the initial phase,²⁹² the expenses of the Court shall be borne by the United Nations, subject to the approval of the General Assembly of the United Nations.

Article 105

Voluntary contributions

Without prejudice to article 104, the Court may utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the States Parties.

²⁸⁶ It was suggested that the possibility of having a procedure for increasing the number of members of the Bureau could be considered. It was also suggested that there should be more than one Vice-President.

²⁸⁷ It was suggested that the elections should be staggered. This could be dealt with in the Rules of Procedure of the Assembly.

²⁸⁸ Delegations expressed the view that this could be dealt with in the Rules of Procedure of the Assembly.

²⁸⁹ This is subject to the finalization of the provisions on financing of the Court.

²⁹⁰ This would require a decision of the General Assembly.

²⁹¹ The view was expressed that, in the case of a referral by the Security Council, the relevant expenses of the Court should be borne by the United Nations.

²⁹² The duration of the "initial phase" has to be determined.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Article 106 *Assessment of contributions*

The contributions of States [Parties] shall be assessed in accordance with an agreed scale of assessment [based upon [the scale used for the regular budget of the United Nations] [a multi-unit class system along the lines of that used in the International Telecommunication Union or the Universal Postal Union]].

Article 107 *Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 108 *Settlement of disputes*

Option 1

[Except as otherwise provided in the Statute] [, a] [A]ny dispute concerning the interpretation or application of this Statute shall be settled by the decision of the Court.

Option 2

Without prejudice to the competence of the Court concerning disputes relating to its judicial activities as is established in accordance with this Statute, any dispute between two or more States Parties relating to interpretation or application of this Statute which is not resolved through negotiations [within a reasonable time] [within ... months] shall be referred to the Assembly of States Parties which shall make recommendations on further means of settlement of the dispute.²⁹³

Option 3

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

Option 4

No article on dispute settlement.

Article 109 *Reservations*

Option 1

No reservations may be made to this Statute.

Option 2

Paragraphs 1 and 2

Option A

1. No reservations other than those made in accordance with paragraph 2 of the present article shall be permitted.

2. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

Option B

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. No paragraph 2.

3. A State which has made reservations may at any time by notification in writing to the Secretary-General withdraw all or part of its reservations.

Option A

In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State under paragraph 2, the Court shall be competent to decide the admissibility of such reservations.

Option B

No paragraph 4.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.

Option 4

No article on reservations.

Article 110 *Amendments*

1. After the expiry of [...] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to [the Secretary-General of the United Nations,] who shall promptly circulate it to all States Parties.

2. A proposed amendment to this Statute shall be considered at the next [meeting of the Assembly of States Parties] [Review Conference], provided that no consideration shall take place until three months after its circulation pursuant to paragraph 1.

²⁹³ The view was expressed that the same procedure may be used for resolving disputes relating to the admissibility of reservations.

It was also observed that a cross reference in this article should be made to article 102 (Assembly of States Parties).

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

3. *Option 1*

The adoption of an amendment at a meeting of the Assembly of States Parties shall be by consensus.

Option 2

The adoption of an amendment at a meeting of the Assembly of States Parties shall require a [two-thirds] [three-fourths] majority of [all the States Parties] [those present and voting].

4. [The Secretary-General of the United Nations] shall circulate any amendment adopted at a meeting of the Assembly of States Parties to all States Parties.

5. An amendment adopted at a meeting of the Assembly of States Parties shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by [two thirds] [three fourths] of [all the States Parties].²⁹⁴

6. Any State Party that has not ratified or accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding paragraph 1 of article 115, by giving notice no later than one year after the entry into force of such amendment.

*Article 111*²⁹⁵ *Review of the Statute*

Option 1

1. After the expiry of [...] years from the entry into force of this Statute, the meeting of the Assembly of States Parties may decide, by a two-thirds majority of [States Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. [Such a meeting shall not be held more frequently than [...] years from the previous such meeting.]

2. The provisions of article 110, paragraphs 3 to 6, shall apply to any amendment to the Statute proposed at such a meeting of the Assembly of States Parties.

Option 2

1. [Five] years after the entry into force of this Statute the Depositary shall convene a meeting of the Assembly of States Parties to review the list of crimes within the jurisdiction of the Court contained in article 5, in order to consider additions to the list. Any amendment to that effect shall be subject to paragraphs 3 and 4 of article 110 and shall enter into force with regard to those States Parties which have deposited their

instrument of acceptance on the [thirteenth] day following the deposit of the [tenth] instrument of acceptance. For each State whose instrument of acceptance is deposited after the entry into force of the amendment, the amendment shall enter into force on the [thirtieth] day after the deposit by such State of its instrument of acceptance. If an amendment has not entered into force for a State, the Court shall not exercise its jurisdiction with respect to a crime covered by the amendment when committed on the territory of that State or by its nationals. Subsequently, at the request of a State Party, the Depositary shall, upon approval by a majority of States Parties, convene a meeting of the Assembly of States Parties in order to consider additions to the list of crimes within the jurisdiction of the Court.

2. Without prejudice to paragraph 1, the meeting of the Assembly of States Parties may at any time after the entry into force of this Statute decide, by a two-thirds majority of [States Parties] [those present and voting], to convene a special meeting of the Assembly of States Parties to review the Statute. Any amendment to the Statute proposed at such a meeting of the Assembly of States Parties shall be subject to paragraphs 3 to 6 of article 110.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States [without any kind of discrimination] in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on [17 July 1998]. Thereafter, it will remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until [17 October 1998]. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts that would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

²⁹⁴ It was observed that consideration should also be given to requiring a qualified majority for amendments relating to institutional matters and to acceptance by all States parties for matters of substance.

²⁹⁵ Some delegations proposed that articles 110 and 111 be merged.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Article 114 *Entry into force*

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the [60th] day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations [provided that such instruments have been deposited by no fewer than [one] [two] [four] members from each geographical group as established by the General Assembly of the United Nations].

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the [60th] day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115 *Withdrawal*

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the financial obligations which accrued while it was a Party to this Statute. Nor shall the withdrawal affect the duty of that State to cooperate with the Court in connection with criminal investigations and proceedings commenced under this Statute prior to its termination for that State; nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.

[A State shall not be discharged by reason of its withdrawal from the obligations arising from the Statute while it was a Party to this Statute. Nor shall the withdrawal prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective.]

Article 116 *Authentic texts*

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

Part Two. Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

1. The General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At that session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. By its resolution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. In the same resolution, the General Assembly requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. Pursuant to the same resolution, the Secretary-General invited non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer:

17. The Conference elected ... as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: ...

19. The following committees were set up by the Conference:

General Committee

Chairman: ...

Members: ...

Committee of the Whole

Chairman: ...

Vice-Chairmen: ...

Rapporteur: ...

Drafting Committee

Chairman: ...

Members: ...

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

Chairman: ...

Members: The representatives of ...

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: ...

21. The Conference had before it a draft Convention on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate ...

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF. ...) and of the Committee of the Whole (A/CONF. ...) and the reports of the Committee of the Whole and the Drafting Committee (A/CONF. ...), the Conference drew up the following [Convention]:

[Rome Convention on the Establishment of an International Criminal Court]

24. The foregoing Convention, which is subject to ratification, was adopted by the Conference on ... July 1998 and opened for signature on [17 July 1998], in accordance with its provisions, until [17 October 1998] at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Convention will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the People and the Government of Italy

[Resolution on the establishment of the Preparatory Commission for the International Criminal Court]

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this seventeenth day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

Annex

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

...

The United Nations Conference on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission [as early as possible at a date to be decided by [the General Assembly of the United Nations] [the Secretary-General]] [upon signature of or accession to the Statute by ... States];²⁹⁶

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

²⁹⁶ With regard to these alternatives, a proposal was also made that the Rules of Procedure and Evidence of the Court, including an elaboration of the elements of the offences that must be proved, shall be prepared and adopted by a conference of participating States immediately following the conclusion of the present Statute. Such rules shall be consistent with the provisions of the Statute. The Statute shall be open for signature once the Rules of Procedure and Evidence have been finally adopted.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

(a) Rules of Procedure and Evidence [including elements of offences]²⁹⁷ on a priority basis;

(b) A relationship agreement between the Court and the United Nations;

(c) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

[(d) Staff regulations;]²⁹⁸

(e) Financial regulations and rules;

[(f) An agreement on the privileges and immunities of the Court;]

(g) A budget for the first financial year;

(h) The rules of procedure of the Assembly of States Parties;

5. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties. [It shall convene the first meeting of the Assembly of States Parties;]

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties;

7. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations;

8. The Secretary-General of the United Nations shall bring this resolution to the attention of the General Assembly for any necessary action.

Part Three. Draft rules of procedure for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

CHAPTER I

Representation and credentials

Rule 1. Composition of delegations

The delegation of each State participating in the Conference shall consist of a head of delegation and such other

accredited representatives, alternate representatives and advisers as may be required. Unless otherwise specified, the term "representative" in chapters I to X and XII refers to a representative of a State.

Rule 2. Alternates and advisers

The head of delegation may designate an alternate representative or an adviser to act as a representative.

Rule 3. Submission of credentials

The credentials of representatives and the names of alternate representatives and advisers shall be submitted early to the Executive Secretary and, if possible, not later than 24 hours after the opening of the Conference. Any later change in the composition of delegations shall also be submitted to the Executive Secretary. The credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs.

Rule 4. Credentials Committee

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of nine members, who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives and report to the Conference without delay.

Rule 5. Provisional participation in the Conference

Pending a decision of the Conference upon their credentials, representatives shall be entitled to participate provisionally in the Conference.

CHAPTER II

Officers

Rule 6. Elections

The Conference shall elect the following officers: a President and 31 Vice-Presidents, as well as the Chairman of the Committee of the Whole provided for in rule 48 and the Chairman of the Drafting Committee provided for in rule 49. These officers shall be elected on the basis of ensuring the representative character of the General Committee, taking into account in particular equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

Rule 7. General powers of the President

1. In addition to exercising the powers conferred upon him or her elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each meeting, direct the discussion, ensure

²⁹⁷ The view was expressed that the Preparatory Commission may decide to make use of the expertise and experience of the International Tribunals for the Former Yugoslavia and for Rwanda, particularly in drafting the Rules of Procedure and Evidence. To this end, representatives of the Tribunals may be invited to participate as observers in the work of the Commission.

²⁹⁸ This subparagraph should be in conformity with article 45 of the Statute.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

observance of these rules, accord the right to speak, promote the achievement of general agreement, put questions to the Conference for decision and announce decisions. The President shall rule on points of order and, subject to these rules, shall have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times each representative may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his or her functions, remains under the authority of the Conference.

Rule 8. Acting President

1. If the President finds it necessary to be absent from a meeting or any part thereof, he or she shall designate the Vice-President to take his or her place.

2. A Vice-President acting as President shall have the powers and duties of the President.

Rule 9. Replacement of the President

If the President is unable to perform his or her functions, a new President shall be elected.

Rule 10. Voting rights of the President

The President, or Vice-President acting as President, shall not vote in the Conference, but may appoint another member of his or her delegation to vote in his or her place.

CHAPTER III

General Committee

Rule 11. Composition

There shall be a General Committee consisting of 34 members, which shall comprise the President and Vice-Presidents, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. The President, or in his or her absence, one of the Vice-Presidents designated by him or her, shall serve as Chairman of the General Committee.

Rule 12. Substitute members

If the President or a Vice-President finds it necessary to be absent during a meeting of the General Committee, he or she may designate a member of his or her delegation to sit and vote in the Committee. In the case of absence, the Chairman of the Committee of the Whole shall designate a Vice-Chairman of that Committee as his or her substitute and the Chairman of the Drafting Committee shall designate a member of the Drafting Committee. When serving on the General Committee, a

Vice-Chairman of the Committee of the Whole or member of the Drafting Committee shall not have the right to vote if he or she is of the same delegation as another member of the General Committee.

Rule 13. Functions

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work. It shall also exercise the powers conferred upon it by rule 34.

CHAPTER IV

Secretariat

Rule 14. Duties of the Secretary-General

1. The Secretary-General of the United Nations shall be the Secretary-General of the Conference. He, or his representative, shall act in that capacity in all meetings of the Conference and its subsidiary bodies.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its subsidiary bodies.

Rule 15. Duties of the secretariat

The secretariat of the Conference shall, in accordance with these rules:

- (a) Interpret speeches made at meetings;
- (b) Receive, translate, reproduce and distribute the documents of the Conference;
- (c) Publish and circulate the official documents of the Conference;
- (d) Prepare and circulate records of public meetings;
- (e) Make and arrange for the keeping of sound recordings of meetings;
- (f) Arrange for the custody and preservation of the documents of the Conference in the archives of the United Nations; and
- (g) Generally perform all other work that the Conference may require.

Rule 16. Statements by the secretariat

The Secretary-General or any other member of the staff of the secretariat who may be designated for that purpose may, at any time, make either oral or written statements concerning any question under consideration.

CHAPTER V

Opening of the Conference

Rule 17. Temporary President

The Secretary-General shall open the first meeting of the Conference and preside until the Conference has elected its President.

Rule 18. Decisions concerning organization

The Conference shall, to the extent possible, at its first meeting:

- (a) Adopt its rules of procedure, the draft of which shall, until such adoption, be the provisional rules of procedure of the Conference;
- (b) Elect its officers and constitute its committees;
- (c) Adopt its agenda, the draft of which shall, until such adoption, be the provisional agenda of the Conference;
- (d) Decide on the organization of its work.

CHAPTER VI

Conduct of business

Rule 19. Quorum

The President may declare a meeting open and permit the debate to proceed when the representatives of at least one third of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

Rule 20. Speeches

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 21, 22 and 25 to 27, the President shall call upon speakers in the order in which they signify their desire to speak. The secretariat shall be in charge of drawing up a list of speakers.
2. Debate shall be confined to the question before the Conference and the President may call a speaker to order if his or her remarks are not relevant to the subject under discussion.
3. The Conference may limit the time allowed to each speaker and the number of times each delegation may speak on a question. Before such a decision is taken, two representatives may speak in favour of, and two against, a proposal to set such limits, after which the motion shall be immediately put to the vote. In any event, unless otherwise decided by the Conference, the President shall limit each intervention on procedural matters to three minutes. When the debate is limited and a speaker exceeds the allotted time, the President shall call him or her to order without delay.

Rule 21. Precedence

The chairman or rapporteur of a committee or the representative of a working group may be accorded precedence for the purpose of explaining the conclusions arrived at by that committee or working group.

Rule 22. Points of order

During the discussion of any matter, a representative may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

Rule 23. Closing of the list of speakers

During the course of a debate, the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

Rule 24. Right of reply

1. Notwithstanding rule 23, the President shall accord the right of reply to any representative who requests it. A representative referred to in rules 60, 61 or 62 may be granted the opportunity to make a reply.
2. Replies made pursuant to this rule shall normally be made at the end of the last meeting of the day.
3. No delegation may make more than two statements under this rule at a given meeting.
4. The first intervention in the exercise of the right of reply for any delegation at a given meeting shall be limited to five minutes and the second intervention shall be limited to three minutes.

Rule 25. Adjournment of debate

A representative may at any time move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the adjournment, after which the motion shall, subject to rule 28, be put immediately to the vote.

Rule 26. Closure of debate

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his or her wish to speak. Permission to speak on the motion shall be accorded only to two speakers opposing the closure, after which the motion shall, subject to rule 28, be put immediately to the vote.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Rule 27. Suspension or adjournment of the meeting

Subject to rule 39, a representative may at any time move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall, subject to rule 28, be put immediately to the vote.

Rule 28. Order of motions

Subject to rule 22, the motions indicated below shall have precedence in the following order over all proposals or other motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;
- (d) To close the debate on the question under discussion.

Rule 29. Basic proposal

The draft convention on the establishment of an international criminal court transmitted by the Preparatory Committee on the Establishment of an International Criminal Court shall constitute the basic proposal for consideration by the Conference.

Rule 30. Other proposals

Other proposals shall normally be submitted in writing to the Executive Secretary, who shall circulate copies to all delegations. As a general rule, no proposal shall be considered at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The president may, however, permit the consideration of amendments, even though these amendments have not been circulated or have only been circulated on the same day.

Rule 31. Withdrawal of proposals and motions

A proposal or a motion may be withdrawn by its proposer at any time before a decision on it has been taken, provided that it has not been amended. A proposal or a motion that has thus been withdrawn may be reintroduced by any representative.

Rule 32. Decisions on competence

Subject to rules 22 and 28, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal submitted to it shall be put to the vote before the matter is discussed or a decision is taken on the proposal in question.

Rule 33. Reconsideration of proposals

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on a motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be put immediately to the vote.

CHAPTER VII

Decision-taking

Rule 34. General agreement

1. The Conference shall make its best endeavours to ensure that the work of the Conference is accomplished by general agreement.
2. If, in the consideration of any matter of substance, all feasible efforts to reach general agreement have failed, the President of the Conference shall consult the General Committee and recommend the steps to be taken, which may include the matter being put to the vote.

Rule 35. Voting rights

Each State participating in the Conference shall have one vote.

Rule 36. Majority required

1. Subject to rule 34, decisions of the Conference on the adoption of the text of the Statute of the International Criminal Court as a whole shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in the Conference.
2. Subject to rule 34, decisions of the Conference on all other matters of substance shall be taken by a two-thirds majority of the representatives present and voting.
3. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.
4. If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting.
5. If a vote is equally divided, the proposal or motion shall be regarded as rejected.

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

Rule 37. Meaning of the expression "representatives present and voting"

For the purpose of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote. Representatives who abstain from voting shall be considered as not voting.

Rule 38. Method of voting

1. Except as provided in rule 45, the Conference shall normally vote by show of hands or by standing, but any representative may request a roll-call. The roll-call shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President. The name of each State shall be called in all roll-calls and its representative shall reply "yes", "no" or "abstention".

2. When the Conference votes by mechanical means, a non-recorded vote shall replace a vote by show of hands or by standing and a recorded vote shall replace a roll-call. Any representative may request a recorded vote, which shall, unless a representative requests otherwise, be taken without calling out the names of the States participating in the Conference.

Rule 39. Conduct during voting

The President shall announce the commencement of voting, after which no representative shall be permitted to intervene until the result of the vote has been announced, except on a point of order in connection with the process of voting.

Rule 40. Explanation of vote

Representatives may make brief statements, consisting solely of explanations of their votes, before the voting has commenced or after the voting has been completed. The President may limit the time to be allowed for such explanations. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon, except if it has been amended.

Rule 41. Division of proposals

A representative may move that parts of a proposal be decided on separately. If a representative objects, a decision shall be taken on the motion for division. Permission to speak on the motion shall be accorded only to two representatives in favour of and to two opposing the division. If the motion is carried, those parts of the proposal that are subsequently approved shall be put to the Conference for decision as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Rule 42. Amendments

1. A proposal is considered an amendment to another proposal if it merely adds to, deletes from or revises part of that proposal.

2. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

Rule 43. Decisions on amendments

When an amendment is moved to a proposal, the amendment shall be decided on first. When two or more amendments are moved to a proposal, the Conference shall first decide on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all the amendments have been decided on. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to a decision. If one or more amendments are adopted, a decision shall then be taken on the amended proposal.

Rule 44. Decisions on proposals

1. If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, decide on the proposals in the order in which they were submitted. The Conference may, after each decision on a proposal, decide whether to take a decision on the next proposal.

2. Revised proposals shall be decided on in the order in which the original proposals were submitted, unless the revision substantially departs from the original proposal. In that case, the original proposal shall be considered as withdrawn and the revised proposal shall be treated as a new proposal.

3. A motion requiring that no decision be taken on a proposal shall be put to a decision before a decision is taken on the proposal in question.

Rule 45. Elections

All elections shall be held by secret ballot unless otherwise decided by the Conference.

Rule 46. Elections

1. If, when one person or one delegation is to be elected, no candidate obtains in the first ballot a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest number of votes shall be taken. If in the second ballot the votes are equally divided, the President shall decide between the candidates by drawing lots.

2. In the case of a tie in the first ballot among three or more candidates obtaining the largest number of votes, a second ballot shall be held. If a tie results among more than two

B. Report of the Preparatory Committee on the Establishment of an International Criminal Court

candidates, the number shall be reduced to two by lot and the balloting, restricted to them, shall continue in accordance with the preceding paragraph.

Rule 47. Elections

1. When two or more elective places are to be filled at one time under the same conditions, those candidates, in a number not exceeding the number of such places, obtaining in the first ballot a majority of the votes of the representatives present and voting and the largest number of votes shall be elected.

2. If the number of candidates obtaining such majority is less than the number of places to be filled, additional ballots shall be held to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled, provided that, after the third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to candidates who obtained the greatest number of votes in the third unrestricted ballot, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until all the places have been filled.

CHAPTER VIII

Subsidiary bodies

Rule 48. Committee of the Whole

The Conference shall establish a Committee of the Whole. Its Bureau shall consist of a Chairman, three Vice-Chairmen and a Rapporteur.

Rule 49. Drafting Committee

1. The Conference shall establish a Drafting Committee consisting of 25 members, including its Chairman who shall be elected by the Conference in accordance with rule 6. The other 24 members of the Committee shall be appointed by the Conference on the proposal of the General Committee, taking into account equitable geographical distribution as well as the need to ensure the representation of the languages of the Conference and to enable the Drafting Committee to fulfil its functions. The Rapporteur of the Committee of the Whole participates *ex officio* without a vote, in the work of the Drafting Committee.

2. The Drafting Committee shall, without reopening substantive discussion on any matter, coordinate and refine the drafting of all texts referred to it, without altering their substance, formulate drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole and report to the Conference or to the Committee of the Whole as appropriate.

Rule 50. Other subsidiary bodies

The Committee of the Whole may set up working groups.

Rule 51. Officers

Except as otherwise provided in rule 6, each subsidiary body shall elect its own officers.

Rule 52. Officers, conduct of business and voting

The rules contained in chapters II, VI and VII (except rule 34) above and IX and X below shall be applicable, *mutatis mutandis*, to the proceedings of subsidiary bodies, except that:

(a) The Chairmen of the General, Drafting and Credentials Committees may exercise the right to vote;

(b) The Chairman of the Committee of the Whole may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken;

(c) A majority of the representatives of the General, Drafting or Credentials Committee or of any working group shall constitute a quorum;

(d) The Committee of the Whole shall make its best endeavours to ensure that its work is accomplished by general agreement. The Chairman of the Committee of the Whole shall keep the President of the Conference informed of the progress of the work of the Committee. If, in the consideration of any matter of substance, all feasible efforts to reach general agreement have failed, the Chairman of the Committee of the Whole shall consult the other members of its Bureau and recommend the steps to be taken, which may include the matter being put to the vote;

(e) Subject to subparagraph (d), decisions on matters of substance shall be taken by a three-fifths majority of the representatives present and voting, provided that such a majority includes at least one third of the States participating in the Conference. Other decisions shall be taken by a majority of the representatives present and voting, except that the reconsideration of a proposal shall require the majority established by rule 33.

CHAPTER IX

Languages and records

Rule 53. Languages of the Conference

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

Rule 54. Interpretation

1. Speeches made in a language of the Conference shall be interpreted into the other such languages.
2. A representative may speak in a language other than a language of the Conference if the delegation concerned provides for interpretation into one such language.

Rule 55. Languages of official documents

Official documents of the Conference shall be made available in the languages of the Conference.

Rule 56. Records and sound recordings of meetings

1. Summary records of the plenary meetings of the Conference and of the meetings of the Committee of the Whole shall be kept in the languages of the Conference. As a general rule, they shall be circulated as soon as possible, simultaneously in all the languages of the Conference, to all representatives, who shall inform the secretariat within five working days after the circulation of the summary record of any changes they wish to have made.
2. The secretariat shall make sound recordings of meetings of the Conference, the Committee of the Whole and the Drafting Committee. Such recordings shall be made of meetings of other committees when the body concerned so decides.

CHAPTER X

Public and private meetings

Rule 57. Plenary meetings and meetings of the Committee of the Whole

The plenary meetings of the Conference and the meetings of the Committee of the Whole shall be held in public unless the body concerned decides otherwise. All decisions taken by the plenary of the Conference at a private meeting shall be announced at an early public meeting of the plenary.

Rule 58. Meetings of other subsidiary bodies

As a general rule, meetings of other subsidiary bodies shall be held in private.

Rule 59. Communiqués on private meetings

At the close of any private meeting, the chairman of the body concerned may issue a communiqué to the press through the Executive Secretary.

CHAPTER XI

Observers

Rule 60. Representatives of organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work

Representatives designated by organizations and other entities that have received a standing invitation from the General Assembly pursuant to its relevant resolutions to participate, in the capacity of observers, in its sessions and work have the right to participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

Rule 61. Representatives of other regional intergovernmental organizations

Representatives designated by other regional intergovernmental organizations invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

Rule 62. Representatives of other international bodies

Representatives designated by other international bodies invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the Committee of the Whole and subsidiary bodies established under rule 50.

Rule 63. Representatives of non-governmental organizations

Non-governmental organizations invited to the Conference may participate in the Conference through their designated representatives as follows:

(a) By attending plenary meetings of the Conference and, unless otherwise decided by the Conference in specific situations, formal meetings of the Committee of the Whole and of subsidiary bodies established under rule 50;

(b) By receiving copies of official documents;

(c) Upon the invitation of the President and subject to the approval of the Conference, by making, through a limited number of their representatives, oral statements to the opening and closing sessions of the Conference, as appropriate.

Rule 64. Written statements

Written statements submitted by the designated representatives referred to in rules 60 to 63 shall be made available by the secretariat to delegations in the quantities and in the language or languages in which the statements are made available to it at the site of the Conference, provided that a statement submitted on behalf of a non-governmental organization is related to the work of the Conference and is on a subject in which the organization has a special competence. Written statements shall not be made at United Nations expense and shall not be issued as official documents.

CHAPTER XII

Amendments to the Rules of Procedure

Rule 65. Method of amendment

These Rules of Procedure may be amended by a decision of the Conference taken by a two-thirds majority of the representatives present and voting.

Part Four. Draft organization of work of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

1. As mandated by the General Assembly in its resolution 52/160 of 15 December 1997, the task of the Conference is to finalize and adopt a convention on the establishment of an international criminal court. The Conference should move promptly to the consideration of substantive matters after a short session on organizational matters.

2. After the opening of the Conference by the Secretary-General of the United Nations, the Conference will meet to elect the President, adopt the agenda and the rules of procedure and elect other officers.

3. The General Committee will meet immediately following the election of its members. Its work will include, *inter alia*, assisting the President in the general conduct of business and making recommendations with respect to the election of members of the Drafting Committee.

4. The plenary, on the recommendations of the General Committee will then elect the members of the Drafting

Committee and adopt the programme of work of the Conference.

5. The plenary will then proceed to hear statements from States in accordance with an established list of speakers prepared on a first-come-first-served basis. The Conference will also hear statements from a limited number of intergovernmental organizations and non-governmental organizations. The list of speakers will be opened for inscription on 15 April 1998.

6. With a view to the efficient and expeditious discharge of the work of the plenary, a time limit may be established for statements by States on the one hand (e.g., seven (7) minutes) and intergovernmental organizations and non-governmental organizations on the other (e.g., five (5) minutes). In principle, States should be given more time than intergovernmental organizations and non-governmental organizations. A total of seven meetings may be allotted for this purpose.

7. The Committee of the Whole should concentrate on the substantive work and should begin its work on 16 June. It may hold up to four meetings (with full interpretation) per day throughout the Conference, i.e., two bodies may meet concurrently, both morning and afternoon. The Committee of the Whole will report to the plenary upon the completion of its work.

8. A working group of the Committee of the Whole will begin its work on the afternoon of 17 June.

9. The Drafting Committee may begin its work on 19 June; two meetings (with full interpretation) per day may be allotted to it throughout the Conference. The Drafting Committee will receive its work from the Committee of the Whole and report to it. Time constraints might make it necessary to allow the Drafting Committee to report on the last portion of its work directly to the plenary.

10. The Credentials Committee will meet sometime during the second or third week of the Conference. One meeting has been allotted for that purpose.

11. The last day of the Conference is reserved for the signature of the Final Act and of the Statute of the Court and for the closure of the Conference.

C. Report of the Committee of the Whole

DOCUMENT A/CONF.183/8

[The present document reproduces the draft report of the Committee of the Whole circulated as documents A/CONF.183/C.1/L.92 and Corr.1 of 16 and 17 July 1998. It also incorporates the draft Statute for the International Criminal Court circulated as documents A/CONF.183/C.1/L.76 and Add.1 and 2 of 16 July 1998, Add.2/Corr.1 of 17 July 1998, Add.3-5 of 16 July 1998, Add.5/Corr.1 of 17 July 1998, Add.6 and Add.6/Corr.1 of 16 and 17 July 1998, Add.7-9 of 16 July 1998, Add.9/Corr.1 of 17 July 1998, and Add.10-13 of 16 July 1998, as well as the draft final act of the Conference circulated as document A/CONF.183/C.1/L.76/Add.14 of 16 July 1998.]

[Original: English]
[17 July 1998]

Contents

	<i>Page</i>
Chapter I. Introduction.....	93
Chapter II. Draft Statute for the International Criminal Court.....	94
Chapter III. List of proposals and working papers submitted to the Committee of the Whole and its working groups	133
Chapter IV. Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	139

Chapter I. Introduction

1. At its 1st plenary meeting, held on 15 June 1998, the Conference, inter alia, established a Committee of the Whole.

2. At the same meeting, the Conference elected by acclamation Mr. Philippe Kirsch (Canada) as Chairperson of the Committee of the Whole.

3. At its 2nd plenary meeting, held on the same day, the Conference decided, in relation to item 11 of its agenda, entitled "Consideration of the question concerning the finalization and adoption of a convention on the establishment of an international criminal court in accordance with General Assembly resolutions 51/207 of 17 December 1996 and 52/160 of 15 December 1997", to refer to the Committee of the Whole the draft preamble, draft articles 1 to 116 and the draft final act contained in document A/CONF.183/2/Add.1 and Corr.1.

4. At its 1st meeting, held on 16 June 1998, the Committee of the Whole elected by acclamation Ms. Silvia Alejandra Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho) as Vice-Chairpersons, and Mr. Yasumasa Nagamine (Japan) as Rapporteur.

5. The secretariat of the Committee of the Whole was composed as follows: Ms. Mahnoush H. Arsanjani, Secretary, and Ms. Christiane Bourloyannis-Vrailas and Ms. Virginia Morris, Assistant Secretaries.

6. In accordance with rule 29 of the Rules of Procedure (A/CONF.183/6) adopted by the Conference at its 1st plenary meeting, the Committee of the Whole had before it as the basic proposal for discussion by the Conference the draft convention on the establishment of an international criminal court transmitted by the Preparatory Committee on the Establishment of an International Criminal Court (A/CONF.183/2/Add.1 and Corr.1).

7. The Committee of the Whole held 42 meetings between 16 June and 17 July 1998.

8. The Committee of the Whole, in accordance with the methods of work and procedures suggested by the Secretary-General (A/CONF.183/3 and Corr.1) and the organization of work for the Conference proposed by the Preparatory Committee (A/CONF.183/2, part four), considered the draft articles before it and related amendments. It followed various procedures in relation to the articles or proposals before it.

9. In order to expedite the work and taking into account the need for further work on various articles, the Committee of the Whole established working groups for the articles of parts 3 (General principles of criminal law), 5 (Investigation and prosecution), 6 (The trial), 7 (Penalties), 8 (Appeal and review), 9 (International cooperation and judicial assistance) and 10 (Enforcement). A working group was also established for article 20 (Applicable law). The Committee of the Whole held discussions on the articles of part 3 before referring them to the

C. Report of the Committee of the Whole

working group. As for the articles of parts 5, 6, 7, 8, 9 and 10, the articles were directly referred to the working groups. A number of remaining articles and parts were referred to informal consultations after discussions in the Committee of the Whole.

10. The Committee of the Whole considered the report of the Drafting Committee at its 37th, 39th and 41st meetings, from 14 to 16 July 1998.

11. At its 42nd meeting, on 17 July 1998, the Committee of the Whole considered the proposal by the Bureau for the Statute of the International Criminal Court (A/CONF.183/C.1/L.76 and Add.1, Add.2 and Add.2/Corr.1, Add.3 and 4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and 8, Add.9 and Add.9/Corr.1, and Add.10–14). At the same meeting, the Committee of the Whole adopted the draft Statute for the International Criminal Court.

12. The present report is comprised of four chapters. Chapter I is the introduction. Chapter II contains the draft Statute for the International Criminal Court. Chapter III contains a list of proposals and working papers submitted to the Committee of the Whole and its working groups. Chapter IV contains the draft final act of the Conference.

Chapter II. Draft Statute for the International Criminal Court

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall

refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for the enforcement of international justice,

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1 The Court

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

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3 Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands (“the host State”).

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

C. Report of the Committee of the Whole

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 110 and 111 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 [5 bis]

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 [5 ter]

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means 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:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

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

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

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

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

C. Report of the Committee of the Whole

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

(f) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

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

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

3. For the purpose of this Statute it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 [5 quater] War crimes

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

2. For the purpose of this Statute, "war crimes" means:

(a) [A] Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) [a] Wilful killing;
- (ii) [b] Torture or inhuman treatment, including biological experiments;
- (iii) [c] Wilfully causing great suffering, or serious injury to body or health;

(iv) [d] Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) [e] Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) [f] Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) [g] Unlawful deportation or transfer or unlawful confinement;

(viii) [h] Taking of hostages.

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

(i) [a] Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) [b] Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) [c] Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) [d] Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

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

(vi) [f] Killing or wounding a combatant who, having laid down his arms or having no

- longer means of defence, has surrendered at discretion;
- (vii) [g] Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) [h] The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) [i] Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) [j] Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) [k] Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) [l] Declaring that no quarter will be given;
- (xiii) [m] Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) [n] Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) [o] Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) [p] Pillaging a town or place, even when taken by assault;
- (xvii) [i] Employing poison or poisoned weapons;
- (xviii) [ii] Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) [iii] Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) [q] Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 110 and 111;
- (xxi) [r] Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) [s] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7 [5 ter], paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) [t] Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) [u] Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) [v] Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) [w] Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

C. Report of the Committee of the Whole

(c) [C] In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

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

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

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

- (i) [a] Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) [b] Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) [c] Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
- (iv) [d] Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic

monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- (v) [e] Pillaging a town or place, even when taken by assault;
- (vi) [f] Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7 [5 ter], paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) [g] Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (viii) [h] Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) [i] Killing or wounding treacherously a combatant adversary;
- (x) [j] Declaring that no quarter will be given;
- (xi) [k] Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) [l] Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

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

3. Nothing in paragraphs 2 (c) and (d) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

C. Report of the Committee of the Whole

Article 9 [xx] Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10 [Y]

Nothing in this Part of this Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

*Article 11 [8] Jurisdiction *ratione temporis**

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12 [7], paragraph 3.

Article 12 [7, 7 bis, 7 ter] Preconditions to the exercise of jurisdiction

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

2. In the case of article 13 [6], paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

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

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13 [6] Exercise of jurisdiction

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

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14 [11];

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

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15 [12].

Article 14 [11] Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15 [12] Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.

C. Report of the Committee of the Whole

Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16 [10]

Deferral of investigation or prosecution

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

Article 17 [15]

Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, 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 article 20 [18], 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.

Article 18 [16]

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 [6] (a), and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 [6] (c) and 15 [12], the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of the receipt of that notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

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

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in

C. Report of the Committee of the Whole

accordance with article 81, paragraph 2. The appeal may be heard on an expedited basis.

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

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 [17] on the grounds of additional significant facts or significant change of circumstances.

Article 19 [17]

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

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17 [15].

2. Challenges to the admissibility of the case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12 [7].

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13 [6], as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a

case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17 [15], paragraph 1 (c).

5. A State referred to in paragraphs 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 81.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17 [15].

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court to:

(a) Pursue necessary investigative steps of the kind referred to in article 18 [16], paragraph 6;

(b) Take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17 [15], the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17 [15].

11. If the Prosecutor, having regard to the matters referred to in article 17 [15], defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of the proceedings of which deferral has taken place.

Article 20 [18]

Ne bis in idem

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

C. Report of the Committee of the Whole

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

3. No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 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.

Article 20 bis [20] *Applicable law*

1. The Court shall apply:

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

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7 [5 ter], paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3 GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21 *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 21 bis *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

Article 22 *Non-retroactivity ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 23 *Individual criminal responsibility*

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

C. Report of the Committee of the Whole

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 23 bis

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 24

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 25

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known

that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 27

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 29

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

C. Report of the Committee of the Whole

Article 30

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 20 bis [20]. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 31

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 32.

Article 32

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 35

Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 36

Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to

serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 41.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 50.

Article 37

Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 102. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8 inclusive, and article 38, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

C. Report of the Committee of the Whole

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 102. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership in the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(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.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 38, paragraph 2, shall not be eligible for re-election;

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 40 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 38 *Judicial vacancies*

1. In the event of a vacancy, an election shall be held in accordance with article 37 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 37.

Article 39 *The Presidency*

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. 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.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall 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 in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 40 *Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers:

- (b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

C. Report of the Committee of the Whole

- (ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
- (iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned;

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 41

Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 42

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her

C. Report of the Committee of the Whole

independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article.

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 44 The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 43.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis

that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling 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. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 45 Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 37, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 46 Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 47 Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

C. Report of the Committee of the Whole

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 48

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 47, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 49

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

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 Presidency;

(c) The Deputy Prosecutors and 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.

Article 50

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 51

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

C. Report of the Committee of the Whole

Article 52

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 53

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he

or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17 [15]; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17 [15]; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 [11] or the Security Council in a case under article 13 [6], paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 [11] or the Security Council under article 13 [6], paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 bis

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

C. Report of the Committee of the Whole

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender, as defined in article 7 [5 ter], paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57 bis, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or inter-governmental organization or arrangement in accordance with their respective competences and/or mandates;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 54 ter

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(d) Shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 of this Statute, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 57

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, 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 defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in

C. Report of the Committee of the Whole

subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15 [12], 18 [16], 19 [17], 54 bis, paragraph 2, 61, paragraph 7, [and 71] must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(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 under article 58, issue such orders, including measures such as those described in article 57, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and 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 under Part 9 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 under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (j), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

C. Report of the Committee of the Whole

- (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
2. The application of the Prosecutor shall contain:
- (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
 - (c) A concise statement of the facts which are alleged to constitute those crimes;
 - (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
 - (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
- (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
 - (c) A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.
5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without

conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date at which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9 of this Statute.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).
5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

C. Report of the Committee of the Whole

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2 within a reasonable time after the person's surrender or voluntary appearance before the Court the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the

Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence; and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

C. Report of the Committee of the Whole

- (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 8 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62 *Place of trial*

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63 *Trial in the presence of the accused*

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64 *Functions and powers of the Trial Chamber*

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber 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.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Chamber.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall

C. Report of the Committee of the Whole

satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial

procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as

C. Report of the Committee of the Whole

witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender, as defined in article 7 [5 ter], and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 44, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69 *Evidence*

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of

justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 71

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 57, paragraphs 2 and 3 (powers of the Pre-Trial Chamber), article 61, paragraph 3 (indictment proceedings), article 64, paragraph 3 (powers of the Trial Chamber), article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 6 (relating generally to protective measures sought by a State), article 86, paragraph 6 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraph 3 (e) and (f), or the application of article 71 bis.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

C. Report of the Committee of the Whole

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence or the Pre-Trial Chamber or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 90, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 90, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under the Statute, the Court may refer the matter in accordance with article 86,

paragraph 7, specifying the reasons for its conclusion; and

- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 71 bis

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 71. If the originator is not a State Party and refuses consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 72

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the

C. Report of the Committee of the Whole

evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 73 Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, 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.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 74 Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 75 Applicable penalties

1. Subject to article 100, the Court may impose one of the following penalties on a person convicted of a crime under article [5] of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 77 Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 75, paragraph 1 (b).

Article 79 Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

C. Report of the Committee of the Whole

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 79 bis

Non-prejudice to national application of penalties and national laws

Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 80

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 72 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

- (i) Procedural error,
- (ii) Error of fact, or
- (iii) Error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make an appeal on any of the following grounds:

- (i) Procedural error,
- (ii) Error of fact,
- (iii) Error of law, or
- (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

- (i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
- (ii) A decision by the Trial Chamber under subparagraph (c) (i) above may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 81

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57 bis, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

C. Report of the Committee of the Whole

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 82 Proceedings on appeal

1. For the purposes of proceedings under article 80 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 83 Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

- (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

- (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

- (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 47.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber;
- (b) Constitute a new Trial Chamber; or
- (c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 84 Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 85 General obligation to cooperate

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

Article 86

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or in one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under Part 9, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under Part 9 shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 86 bis

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 87

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 88, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20 [18], the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender;

(b) A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain:

- (i) A description of the person being transported;
- (ii) A brief statement of the facts of the case and their legal characterization; and
- (iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected; provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 87 bis
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 87 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to articles 18 [16] and 19 [17], made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 88

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

C. Report of the Committee of the Whole

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 89 Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 88.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request

for surrender and the documents supporting the request as specified in article 88 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 90 Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

C. Report of the Committee of the Whole

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 71, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (d), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court of the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request;

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence;

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 87 bis.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

(1) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

(2) The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

(2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

C. Report of the Committee of the Whole

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to the Statute.

Article 90 (a)

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 90, paragraph 1 (j).

Article 90 (b)

Postponement of execution of a request in respect of an admissibility challenge

Without prejudice to articles 54 quater and 54, paragraph 2, where there is an admissibility challenge under consideration by the Court pursuant to articles 18 [16] and 19 [17], the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to articles 18 [16] or 19 [17].

Article 90 bis

Contents of request for other forms of assistance under article 90

1. A request for other forms of assistance referred to in article 90 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 90 ter *Consultations*

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 90 quater

Cooperation with respect to waiver of immunity and consent to surrender

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a

C. Report of the Committee of the Whole

person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 91

Execution of requests under articles 90 and 90 bis

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to articles 18 [16] or 19 [17], the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 71 to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security shall also apply to the execution of requests for assistance under this article.

Article 91 bis *Costs*

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 90 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 92

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 88. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article X

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 94

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

C. Report of the Committee of the Whole

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 100.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 94 bis, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person; and

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 94 bis

Change in designation of State of enforcement

1. The Court may at any time decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may at any time apply to the Court to be transferred from the State of enforcement.

Article 95

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 94, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 96

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 97

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 98, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 98

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment

C. Report of the Committee of the Whole

or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

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

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 101

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 37, the number of judges;

(f) Consider, pursuant to article 86, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

C. Report of the Committee of the Whole

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 103 Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 103 bis Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 104 Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 105 Voluntary contributions

Without prejudice to article 104, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 106 Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 107 Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

C. Report of the Committee of the Whole

PART 13. FINAL CLAUSES

Article 108

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 109

Reservations

No reservations may be made to this Statute.

Article 110

Amendments

1. After the expiration of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven eighths of them.
5. Any amendment to article 5 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from the

Statute with immediate effect, notwithstanding paragraph 1 of article 115, but subject to paragraph 2 of article 115, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate any amendment adopted at a meeting of the Assembly of States Parties or a Review Conference to all States Parties.

Article 110 bis

Amendments to provisions of an institutional nature

1. Amendments to provisions of the Statute which are of an exclusively institutional nature, namely, articles 36, paragraphs 8 and 9 of articles 37, 38, 39, paragraphs 1 (first two sentences), 2 and 4 of article 40, paragraphs 4 to 9 of article 43, paragraphs 2 and 3 of articles 44, 45, 47, 48 and 50, may be proposed at any time, notwithstanding paragraph 1 of article 110, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 111

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include but is not limited to the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 110, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment of the Statute considered at a Review Conference.

Article 111 bis

Transitional Provision

Notwithstanding the provisions of article 12 [7], paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept

C. Report of the Committee of the Whole

the jurisdiction of the Court with respect to the category of crimes referred to in article 8 [5 quater] when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 111, paragraph 1.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 114

Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were

commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

Chapter III. List of proposals and working papers submitted to the Committee of the Whole and its working groups

PREAMBLE

1. The following proposals or working papers were submitted with respect to the preamble: Spain (A/CONF.183/C.1/L.22); Andorra (A/CONF.183/C.1/L.32); Dominican Republic (A/CONF.183/C.1/L.52); rolling text (A/CONF.183/C.1/L.54/Rev.1 and 2).

2. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to the preamble: A/CONF.183/C.1/L.61 and Corr.1; A/CONF.183/C.1/L.73.

PART 1. ESTABLISHMENT OF THE COURT

3. No proposals or working papers were submitted with respect to part 1.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

4. The following proposals or working papers were submitted with respect to part 2:

Article 5

Spain (A/CONF.183/C.1/L.1 and Corr.1)

Spain (A/CONF.183/C.1/L.4)

China (A/CONF.183/C.1/L.5)

United States of America (A/CONF.183/C.1/L.8)

United States of America (A/CONF.183/C.1/L.10)

Slovenia (A/CONF.183/C.1/L.11)

Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago and United Republic of Tanzania (A/CONF.183/C.1/L.12)

Lesotho, Malawi, Namibia, South Africa, Swaziland and United

C. Report of the Committee of the Whole

Republic of Tanzania (A/CONF.183/C.1/L.13)
Cuba (A/CONF.183/C.1/L.17)
Iraq (A/CONF.183/C.1/L.26)
India, Sri Lanka and Turkey (A/CONF.183/C.1/L.27 and Corr.1 and Rev.1)
Cuba (A/CONF.183/C.1/L.30)
Ukraine (A/CONF.183/C.1/L.33)
Nepal (A/CONF.183/C.1/L.35)
Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen (A/CONF.183/C.1/L.37 and Corr.1)
Armenia (A/CONF.183/C.1/L.38)
Cameroon (A/CONF.183/C.1/L.39)
New Zealand (A/CONF.183/C.1/L.40)
Comoros and Madagascar (A/CONF.183/C.1/L.46 and Corr.1)
Barbados, Dominica, Jamaica and Trinidad and Tobago (A/CONF.183/C.1/L.48)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen (A/CONF.183/C.1/L.56 and Corr.1)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)
Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey (A/CONF.183/C.1/L.71)
Indonesia, Philippines, Thailand and Viet Nam (A/CONF.183/C.1/L.74)
Group of African States (A/CONF.183/C.1/L.89)

Article 6

Republic of Korea (A/CONF.183/C.1/L.6)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)
India (A/CONF.183/C.1/L.79)

Article 7

Republic of Korea (A/CONF.183/C.1/L.6)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)
United States of America (A/CONF.183/C.1/L.70)
Republic of Korea (A/CONF.183/C.1/L.77)
India (A/CONF.183/C.1/L.79)
United States of America (A/CONF.183/C.1/L.90)

Article 8

Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 9

Republic of Korea (A/CONF.183/C.1/L.6)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 10

Belgium (A/CONF.183/C.1/L.7)

Spain (A/CONF.183/C.1/L.20)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)
India (A/CONF.183/C.1/L.79)

Article 11

Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 12

Mexico (A/CONF.183/C.1/L.14 and Rev.1)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 12 bis

Mexico (A/CONF.183/C.1/L.14 and Rev.1)

Article 13

Republic of Korea (A/CONF.183/C.1/L.34)
Uruguay (A/CONF.183/C.1/L.51)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 13 bis

Republic of Korea (A/CONF.183/C.1/L.34)

Article 14

Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 15

Mexico (A/CONF.183/C.1/L.14 and Rev.1)
China (A/CONF.183/C.1/L.15)
Uruguay (A/CONF.183/C.1/L.23)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 16

United States of America (A/CONF.183/C.1/L.25)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 17

Bureau discussion paper (A/CONF.183/C.1/L.53)
Working paper (A/CONF.183/C.1/L.60 and Rev.1)

Article 18

Japan (A/CONF.183/C.1/L.18)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 19

Turkey (A/CONF.183/C.1/L.50)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Article 20

United States of America (A/CONF.183/C.1/L.9)
Working paper (A/CONF.183/C.1/WGGP/L.11)
Working paper (A/CONF.183/C.1/WGAL/L.1)
Working paper (A/CONF.183/C.1/WGAL/L.3)

C. Report of the Committee of the Whole

Guatemala (A/CONF.183/C.1/WGAL/L.4)
Bureau discussion paper (A/CONF.183/C.1/L.53)
Bureau proposal (A/CONF.183/C.1/L.59 and Corr.1)

Mexico (A/CONF.183/C.1/L.81) (relating to the use of terms)

5. The following working group reports or recommendations of the Coordinator were submitted to the Committee of the Whole concerning part 2: A/CONF.183/C.1/L.44 and Corr.1; A/CONF.183/C.1/WGAL/L.2 and Add.1 and Add.1/Corr.1.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

6. The following proposals or working papers were submitted with respect to part 3:

Article 21

Chairman (A/CONF.183/C.1/WGGP/L.1)

Article 21 bis

Mexico (A/CONF.183/C.1/WGP/L.4)
Chairman's working paper (A/CONF.183/C.1/WGP/L.8 and Rev.1)

Article 23

France (A/CONF.183/C.1/L.3)
Working paper (A/CONF.183/C.1/WGGP/L.3 and Corr.1)
Working paper (A/CONF.183/C.1/WGGP/L.5 and Rev.1 and 2)

Article 25

United States of America (A/CONF.183/C.1/L.2)
Working paper (A/CONF.183/C.1/WGGP/L.7 and Rev.1)

Article 26

Chairman (A/CONF.183/C.1/WGGP/L.1)

Article 28

Chairman (A/CONF.183/C.1/WGGP/L.1)

Article 31

United States of America (A/CONF.183/C.1/WGGP/L.2)
Working paper (A/CONF.183/C.1/WGGP/L.6)
Chairman (A/CONF.183/C.1/WGGP/L.8 and Rev.1)
Syrian Arab Republic, Yemen, Iraq, Oman, Libyan Arab Jamahiriya, Qatar, Saudi Arabia, Morocco, Algeria, United Arab Emirates, Sudan, Kuwait, Egypt (A/CONF.183/C.1/WGGP/L.10)

Article 32

United States of America (A/CONF.183/C.1/WGGP/L.2)
Working paper (A/CONF.183/C.1/WGGP/L.9 and Rev.1 and Rev.1/Corr.1)

Article 33

United States of America (A/CONF.183/C.1/WGGP/L.2)

Article 34

United States of America (A/CONF.183/C.1/WGGP/L.2)

7. The following working group reports were submitted to the Committee of the Whole with respect to part 3: A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1,

Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3; A/CONF.183/C.1/WGP/L.14/Add.1 and Corr.1

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

8. The following proposals or working papers were submitted with respect to part 4:

Article 35

Coordinator's text (A/CONF.183/C.1/L.31 and Rev.1)

Article 36

Coordinator's text (A/CONF.183/C.1/L.31 and Rev.1)

Article 37

Switzerland (A/CONF.183/C.1/L.24)
Coordinator's text (A/CONF.183/C.1/L.31 and Rev.1, Rev.1/Add.1 and Rev.1/Add.1/Corr.1)
Ukraine (A/CONF.183/C.1/L.42)

Article 40

Coordinator's text (A/CONF.183/C.1/L.31 and Rev.1)

Article 44

Congo and Niger (A/CONF.183/C.1/L.43)

Article 47

United Arab Emirates (A/CONF.183/C.1/L.21)

Article 49

Japan (A/CONF.183/C.1/L.19)

Article 51

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela (A/CONF.183/C.1/L.16)

9. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to part 4: A/CONF.183/C.1/L.45 and Corr.1–3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3.

PART 5. INVESTIGATION AND PROSECUTION

10. The following proposals or working papers were submitted with respect to part 5:

Article 54

Working paper (A/CONF.183/C.1/WGPM/L.1)
United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.3)
France (A/CONF.183/C.1/WGPM/L.4)
Working paper (A/CONF.183/C.1/WGPM/L.6)
Working paper (A/CONF.183/C.1/WGPM/L.10 and Corr.1)
France (A/CONF.183/C.1/WGPM/L.11)
Argentina, Belgium, Canada, Finland, France, Germany, Israel, Italy, Japan, Malawi, New Zealand, Poland, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America (A/CONF.183/C.1/WGPM/L.18 and Corr.1)
France (A/CONF.183/C.1/WGPM/L.77)

Article 57

France (A/CONF.183/C.1/WGPM/L.8)
Poland (A/CONF.183/C.1/WGPM/L.31)
Working document (A/CONF.183/C.1/WGPM/L.38 and Rev.1 and Rev.1/Corr.1 and 2)
Discussion paper (A/CONF.183/C.1/WGPM/L.40)
Philippines (A/CONF.183/C.1/WGPM/L.61)
Working paper (A/CONF.183/C.1/WGPM/L.64)

Article 58

Working paper (A/CONF.183/C.1/WGPM/L.7 and Corr.1)

Article 59

Working paper (A/CONF.183/C.1/WGPM/L.5 and Corr.1)

Article 61

Working paper (A/CONF.183/C.1/WGPM/L.9 and Corr.1)
Austria (A/CONF.183/C.1/WGPM/L.19)
United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.20)
Working paper (A/CONF.183/C.1/WGPM/L.43 and Corr.1)
Working paper (A/CONF.183/C.1/WGPM/L.75)

11. The following working group reports were submitted to the Committee of the Whole with respect to part 5: A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1.

PART 6. THE TRIAL

12. The following proposals or working papers were submitted with respect to part 6:

Article 63

Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic (A/CONF.183/C.1/WGPM/L.15)
Malawi (A/CONF.183/C.1/WGPM/L.16)
Colombia (A/CONF.183/C.1/WGPM/L.17)
Working paper (A/CONF.183/C.1/WGPM/L.51 and Corr.1)
Working paper (A/CONF.183/C.1/WGPM/L.67)

Article 64

Working paper (A/CONF.183/C.1/WGPM/L.41 and Corr.1)
Israel (A/CONF.183/C.1/WGPM/L.52)

Article 65

Switzerland (A/CONF.183/C.1/WGPM/L.29)

Article 66

Working paper (A/CONF.183/C.1/WGPM/L.37 and Corr.1)

Article 67

United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.33)
Australia (A/CONF.183/C.1/WGPM/L.35)
Egypt, Oman and Syrian Arab

Republic (A/CONF.183/C.1/WGPM/L.36)
Chairman (A/CONF.183/C.1/WGPM/L.42)

Article 68

Canada (A/CONF.183/C.1/WGPM/L.58 and Rev.1)

Article 69

Holy See (A/CONF.183/C.1/WGPM/L.14)
United States of America (A/CONF.183/C.1/WGPM/L.21)
Syrian Arab Republic (A/CONF.183/C.1/WGPM/L.22)
Canada (A/CONF.183/C.1/WGPM/L.23)
Iraq (A/CONF.183/C.1/WGPM/L.24)
Colombia (A/CONF.183/C.1/WGPM/L.25)
Canada (A/CONF.183/C.1/WGPM/L.26)
Philippines (A/CONF.183/C.1/WGPM/L.27)
Poland (A/CONF.183/C.1/WGPM/L.31)
Israel (A/CONF.183/C.1/WGPM/L.34)
Canada (A/CONF.183/C.1/WGPM/L.48 and Rev.1)

Article 70

Japan (A/CONF.183/C.1/WGPM/L.13)
Netherlands (A/CONF.183/C.1/WGPM/L.65)
Working paper (A/CONF.183/C.1/WGPM/L.68 and Rev.1 and 2)

Article 71

United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.12)
Croatia (A/CONF.183/C.1/WGPM/L.32)
France and United States of America (A/CONF.183/C.1/WGPM/L.39)
Singapore (A/CONF.183/C.1/WGPM/L.49)
Working paper (A/CONF.183/C.1/WGPM/L.76 and Rev.1)

Article 71 bis

Belgium, Italy and United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.70 and Rev.1)

Article 72

Working paper (A/CONF.183/C.1/WGPM/L.71)

Article 73

France and United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.28)
Japan (A/CONF.183/C.1/WGPM/L.30)
Working paper (A/CONF.183/C.1/WGPM/L.63 and Rev.1)
United States of America (A/CONF.183/C.1/WGPM/L.69)

Article 74

Mexico (A/CONF.183/C.1/WGPM/L.4)

13. The following working group reports were submitted to the Committee of the Whole with respect to part 6: A/CONF.183/C.1/WGPM/L.2/Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1.

C. Report of the Committee of the Whole

PART 7. PENALTIES

14. The following proposals or working papers were submitted with respect to part 7:

Article 75

Italy (A/CONF.183/C.1/WGP/L.1)

Chairman's working paper (A/CONF.183/C.1/WGP/L.3 and Rev.1)

Chairman's working paper (A/CONF.183/C.1/WGP/L.10)

Algeria, Bahrain, Comoros, Egypt, Iran (Islamic Republic of), Iraq, Kuwait, Libyan Arab Jamahiriya, Nigeria, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen (A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2)

Barbados, Dominica, Jamaica, Singapore and Trinidad and Tobago (A/CONF.183/C.1/WGP/L.13)

Mexico (A/CONF.183/C.1/WGP/L.15)

Article 76

Italy (A/CONF.183/C.1/WGP/L.1)

Belgium, Benin, Brazil, Burundi, Dominican Republic, Egypt, France, Oman, Portugal, Republic of Korea, Romania, Samoa, Slovenia, South Africa, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United Republic of Tanzania (A/CONF.183/C.1/WGP/L.12)

Article 77

Italy (A/CONF.183/C.1/WGP/L.1)

Austria (A/CONF.183/C.1/WGP/L.5)

Ukraine (A/CONF.183/C.1/WGP/L.6)

Chairman's working paper (A/CONF.183/C.1/WGP/L.9 and Rev.1)

Article 79

Chairman's working paper (A/CONF.183/C.1/WGP/L.2)

Chairman's working paper (A/CONF.183/C.1/WGP/L.7)

15. The following working group reports were submitted to the Committee of the Whole with respect to part 7: A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3 and Add.3/Rev.1.

PART 8. APPEAL AND REVIEW

16. The following proposals or working papers were submitted with respect to part 8:

Article 81

Netherlands (A/CONF.183/C.1/WGPM/L.44)

Kenya (A/CONF.183/C.1/WGPM/L.46)

Canada (A/CONF.183/C.1/WGPM/L.47)

United States of America (A/CONF.183/C.1/WGPM/L.50)

Working paper (A/CONF.183/C.1/WGPM/L.72)

Article 82

Syrian Arab Republic (A/CONF.183/C.1/WGPM/L.53)

Israel (A/CONF.183/C.1/WGPM/L.54)

Philippines (A/CONF.183/C.1/WGPM/L.60)

Canada (A/CONF.183/C.1/WGPM/L.73)

Article 83

Japan (A/CONF.183/C.1/WGPM/L.45)

United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGPM/L.57)

Argentina (A/CONF.183/C.1/WGPM/L.59)

Syrian Arab Republic (A/CONF.183/C.1/WGPM/L.62)

Article 84

Kenya (A/CONF.183/C.1/WGPM/L.55)

Canada (A/CONF.183/C.1/WGPM/L.56)

Working paper (A/CONF.183/C.1/WGPM/L.74)

17. The following working group reports were submitted to the Committee of the Whole with respect to part 8: A/CONF.183/C.1/WGPM/L.2/Add.2 and Add.2/Corr.1 and 2, Add.3, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

18. The following proposals or working papers were submitted with respect to part 9:

Article 85

Rolling text (A/CONF.183/C.1/WGIC/L.10 and Corr.1)

Article 86

Rolling text (A/CONF.183/C.1/WGIC/L.10 and Corr.1)

Central African Republic (A/CONF.183/C.1/WGIC/L.14)

India (A/CONF.183/C.1/L.80)

Article 86 bis

Chairman (A/CONF.183/C.1/WGIC/L.16)

Article 87

China (A/CONF.183/C.1/WGIC/L.2)

Italy (A/CONF.183/C.1/WGIC/L.3)

Congo (A/CONF.183/C.1/WGIC/L.4)

Chairman (A/CONF.183/C.1/WGIC/L.5)

Chairman (A/CONF.183/C.1/WGIC/L.6)

Singapore (A/CONF.183/C.1/WGIC/L.7)

Croatia (A/CONF.183/C.1/WGIC/L.9)

Rolling text (A/CONF.183/C.1/WGIC/L.15 and Corr.1)

United States of America (A/CONF.183/C.1/WGIC/L.17 and Corr.1)

Denmark, Norway, Sweden and Switzerland (A/CONF.183/C.1/WGIC/L.18)

Canada (A/CONF.183/C.1/WGIC/L.20)

Article 88

Canada (A/CONF.183/C.1/WGIC/L.1)

Chairman (A/CONF.183/C.1/WGIC/L.5)

Rolling text (A/CONF.183/C.1/WGIC/L.8/Rev.1 and Corr.1 and 2)

Article 89

Rolling text (A/CONF.183/C.1/WGIC/L.8 and Rev.1 and Rev.1/Corr.1 and 2)

C. Report of the Committee of the Whole

Article 90

Rolling text (A/CONF.183/C.1/WGIC/L.15 and Corr.1)
Chairman (A/CONF.183/C.1/WGIC/L.16)

Article 90 bis

Rolling text (A/CONF.183/C.1/WGIC/L.15 and Corr.1)

Article 90 quater

Rolling text (A/CONF.183/C.1/WGIC/L.15 and Corr.1)

Article 91

Rolling text (A/CONF.183/C.1/WGIC/L.8 and Rev.1 and Rev.1/Corr.1 and 2)
Canada (A/CONF.183/C.1/WGIC/L.12)
Rolling text (A/CONF.183/C.1/WGIC/L.13 and Rev.1 and 2)
Chairman (A/CONF.183/C.1/WGIC/L.19)

Article 91 bis

Rolling text (A/CONF.183/C.1/WGIC/L.8 and Rev.1 and Rev.1/Corr.1 and 2)

19. The following working group reports were submitted to the Committee of the Whole with respect to part 9: A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2 and Add.4 and Add.4/Corr.1.

PART 10. ENFORCEMENT

20. The following proposals or working papers were submitted with respect to part 10:

Article 93

Japan (A/CONF.183/C.1/WGE/L.1)
Working paper (A/CONF.183/C.1/WGE/L.12)

Article 94

Italy (A/CONF.183/C.1/WGE/L.2)
Uruguay (A/CONF.183/C.1/WGE/L.3)
United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGE/L.4 and Rev.1)
Working paper (A/CONF.183/C.1/WGE/L.8)
Working paper (A/CONF.183/C.1/WGE/L.10)

Article 96

Working paper (A/CONF.183/C.1/WGE/L.6 and Corr.1)
Working paper (A/CONF.183/C.1/WGE/L.7)
Working paper (A/CONF.183/C.1/WGE/L.9)

Article 97

Syrian Arab Republic (A/CONF.183/C.1/WGE/L.5)
Working paper (A/CONF.183/C.1/WGE/L.11)

Article 98

Working paper (A/CONF.183/C.1/WGE/L.11)

Article 99

Japan (A/CONF.183/C.1/WGE/L.1)
Canada (A/CONF.183/C.1/WGE/L.17)

Article 100

Coordinator's informal draft (A/CONF.183/C.1/WGE/L.15 and Rev.1)

Article 101

Coordinator's proposal (A/CONF.183/C.1/WGE/L.19)

Article X

United Kingdom of Great Britain and Northern Ireland (A/CONF.183/C.1/WGE/L.4 and Rev.1)
Working paper (A/CONF.183/C.1/WGE/L.10)

21. The following working group reports were submitted to the Committee of the Whole with respect to part 10: A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2.

PART 11. ASSEMBLY OF STATES PARTIES

22. The following proposals or working papers were submitted with respect to part 11:

Article 102

Mexico (A/CONF.183/C.1/L.14)
Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela (A/CONF.183/C.1/L.16)
Ukraine (A/CONF.183/C.1/L.28)
Coordinator's text (A/CONF.183/C.1/L.41 and Corr.1)

23. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to part 11: A/CONF.183/C.1/L.47 and Corr.1 and Add.1 and 2.

PART 12. FINANCING

24. The following proposals or working papers were submitted with respect to part 12:

Article 103

Coordinator's text (A/CONF.183/C.1/L.55 and Rev.1 and Rev.1/Corr.1)

Article 103 bis

Coordinator's text (A/CONF.183/C.1/L.55/Rev.1 and Corr.1)

Article 105

Coordinator's text (A/CONF.183/C.1/L.55 and Rev.1 and Rev.1/Corr.1)

Article 107

Coordinator's text (A/CONF.183/C.1/L.55 and Rev.1 and Rev.1/Corr.1)

25. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to part 12: A/CONF.183/C.1/L.78 and Corr.1.

PART 13. FINAL CLAUSES

26. The following proposals or working papers were submitted with respect to part 13:

Article 108

Mexico (A/CONF.183/C.1/L.14 and Rev.1)
Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 109

Rolling text (A/CONF.183/C.1/L.54/Rev.1 and 2)

Article 110

Switzerland (A/CONF.183/C.1/L.24)
Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 110 bis

Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 111

Switzerland (A/CONF.183/C.1/L.24)
Denmark (A/CONF.183/C.1/L.29)
Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 112

Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 113

Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 114

Rolling text (A/CONF.183/C.1/L.54/Rev.1 and 2)

Article 115

Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

Article 116

Rolling text (A/CONF.183/C.1/L.54 and Rev.1 and 2)

27. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to part 13: A/CONF.183/C.1/L.61 and Corr.1.

FINAL ACT

28. The following proposals were submitted with respect to the Final Act:

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela (A/CONF.183/C.1/L.16)
Belarus, Kazakhstan and Ukraine (A/CONF.183/C.1/L.57)

29. The following recommendations of the Coordinator were submitted to the Committee of the Whole with respect to the Final Act: A/CONF.183/C.1/L.49 and Rev.1 and Rev.1/Add.1.

**Chapter IV. Draft Final Act of the United Nations
Diplomatic Conference of Plenipotentiaries
on the Establishment of an
International Criminal Court**

1. The General Assembly of the United Nations, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At the latter session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts

C. Report of the Committee of the Whole

with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. The General Assembly, in its resolution 51/207 of 17 December 1996, decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. The General Assembly, in its resolution 52/160 of 15 December 1997, requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency to participate in the Conference. The delegations of 160 States participated in the Conference. The list of participating States is contained in annex II.

15. The General Assembly, in the same resolution, requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work, on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental

organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The list of such organizations which were represented at the Conference by an observer is contained in annex III.

16. The Secretary-General, pursuant to the same resolution, invited non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution, as well as the rules of procedure to be adopted by the Conference. The list of non-governmental organizations represented at the Conference by an observer is contained in annex IV.

17. The Conference elected Mr. Giovanni Conso (Italy) as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

19. The following committees were set up by the Conference:

General Committee

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole

Chairman: Mr. Philippe Kirsch (Canada)

Vice-Chairmen: Ms. Silvia Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho)

Rapporteur: Mr. Yasumasa Nagamine (Japan)

C. Report of the Committee of the Whole

Drafting Committee

Chairman: Mr. M. Cherif Bassiouni (Egypt)

Members: Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

Chairman: Ms. Hannelore Benjamin (Dominica)

Members: Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: Mr. Manuel Rama-Montaldo, Secretary, Drafting Committee; Ms. Mahnoush H. Arsanjani, Secretary, Committee of the Whole; Mr. Mpazi Sinjela, Secretary, Credentials Committee; Assistant Secretaries of the Conference: Ms. Christiane Bourloyannis-Vrailas, Ms. Virginia Morris, Mr. Vladimir Rudnitsky, Mr. Renan Villacis.

21. The Conference had before it a draft Statute on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate (A/CONF.183/2/Add.1).

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or

by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR. ...) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR. ...) and the reports of the Committee of the Whole (A/CONF.183/8) and of the Drafting Committee (A/CONF.183/C.1/L.64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82-L.88 and L.91), the Conference drew up the *Rome Statute of the International Criminal Court*.

24. The foregoing Statute, which is subject to ratification, acceptance or approval, was adopted by the Conference on ... July 1998 and opened for signature on ... July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Statute will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the People and the Government of Italy

Resolution on treaty crimes

Resolution on the establishment of the Preparatory Commission for the International Criminal Court

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this ...th day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

Annex I

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

A

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee.

B

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Pays tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman, Mr. Adriaan Bos, for their outstanding and hard work, commitment and dedication.

C

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its deep appreciation and gratitude to the People and the Government of Italy for making the necessary arrangements for the holding of the Conference in Rome, for their generous hospitality and for their contribution to the successful completion of the work of the Conference.

D

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its appreciation and thanks to Mr. Giovanni Conso, President of the Conference, Mr. Philippe Kirsch, Chairman of the Committee of the Whole, and Mr. M. Cherif Bassiouni, Chairman of the Drafting Committee, who, through their experience, skilful efforts and wisdom in steering the work of the Conference, contributed greatly to the success of the Conference.

E

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Recognizing that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community,

Recognizing that the international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and social and economic order in States,

Deeply alarmed at the persistence of these scourges, which pose serious threats to international peace and security,

Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court,

Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,

Recommends that a Review Conference pursuant to article 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.

F

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at a date to be decided by the General Assembly of the United Nations;

C. Report of the Committee of the Whole

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;

4. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations;

5. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Rules of Procedure and Evidence;

(b) Elements of Crimes;

(c) A relationship agreement between the Court and the United Nations;

(d) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

(e) Financial regulations and rules;

(f) An agreement on the privileges and immunities of the Court;

(g) A budget for the first financial year;

(h) The rules of procedure of the Assembly of States Parties;

6. The draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be finalized before 30 June 2000;

7. The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute;

8. The Commission shall remain in existence until the *conclusion* of the first meeting of the Assembly of States Parties;

9. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties;

10. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations;

11. The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

Annex II

List of States participating in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Afghanistan
Albania
Algeria
Andorra
Angola
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burundi
Cameroon
Canada
Cape Verde
Central African Republic
Chad
Chile
China
Colombia
Comoros
Congo
Costa Rica
Côte d'Ivoire
Croatia

C. Report of the Committee of the Whole

Cuba	Mali
Cyprus	Malta
Czech Republic	Mauritania
Democratic Republic of the Congo	Mauritius
Denmark	Mexico
Djibouti	Monaco
Dominica	Morocco
Dominican Republic	Mozambique
Ecuador	Namibia
Egypt	Nepal
El Salvador	Netherlands
Eritrea	New Zealand
Estonia	Nicaragua
Ethiopia	Niger
Finland	Nigeria
France	Norway
Gabon	Oman
Georgia	Pakistan
Germany	Panama
Ghana	Paraguay
Greece	Peru
Guatemala	Philippines
Guinea	Poland
Guinea-Bissau	Portugal
Haiti	Qatar
Holy See	Republic of Korea
Honduras	Republic of Moldova
Hungary	Romania
Iceland	Russian Federation
India	Rwanda
Indonesia	Samoa
Iran (Islamic Republic of)	San Marino
Iraq	Sao Tome and Principe
Ireland	Saudi Arabia
Israel	Senegal
Italy	Sierra Leone
Jamaica	Singapore
Japan	Slovakia
Jordan	Slovenia
Kazakhstan	Solomon Islands
Kenya	South Africa
Kuwait	Spain
Kyrgyzstan	Sri Lanka
Lao People's Democratic Republic	Sudan
Latvia	Swaziland
Lebanon	Sweden
Lesotho	Switzerland
Liberia	Syrian Arab Republic
Libyan Arab Jamahiriya	Tajikistan
Liechtenstein	Thailand
Lithuania	The former Yugoslav Republic of Macedonia
Luxembourg	Togo
Madagascar	Trinidad and Tobago
Malawi	Tunisia
Malaysia	Turkey

C. Report of the Committee of the Whole

Uganda
Ukraine
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela
Viet Nam
Yemen
Zambia
Zimbabwe

Annex III

List of organizations and other entities represented at the Conference by an observer

Organizations

Palestine

Intergovernmental organizations and other entities

Agence de coopération culturelle et technique
Asian-African Legal Consultative Committee
Council of Europe
European Community
European Court of Human Rights
Humanitarian Fact-Finding Commission
Inter-American Institute of Human Rights
International Committee of the Red Cross
International Criminal Police Organization (INTERPOL)
International Federation of Red Cross and Red Crescent Societies
Inter-Parliamentary Union
League of Arab States
Organization of African Unity
Organization of American States
Organization of the Islamic Conference
Sovereign Military Order of Malta

Specialized agencies and related organizations

International Labour Organization
Food and Agriculture Organization of the United Nations
United Nations Educational, Scientific and Cultural Organization
International Fund for Agricultural Development
International Atomic Energy Agency

United Nations programmes and bodies

United Nations Children's Fund
Office of the United Nations High Commissioner for Refugees

United Nations Commission on Crime Prevention and Criminal Justice
Office of the United Nations High Commissioner for Human Rights
United Nations Office at Vienna, Office for Drug Control and Crime Prevention
International Tribunal for Rwanda
International Tribunal for the Former Yugoslavia
International Law Commission
World Food Programme

Annex IV

List of non-governmental organizations represented at the Conference by an observer

Agir ensemble pour les droits de l'homme (Working Together for Human Rights)
American Association for the International Commission of Jurists
American Association of Jurists
American Bar Association
Amnesty International
Arab Lawyers Union
Asia Pacific Forum on Women, Law and Development
Asian Center for Women's Human Rights
Asian Women's Human Rights Council
Asociación por Derechos Humanos (APRODEH; Association for Human Rights)
Australian Lawyers for Human Rights
Baha'i International Community
Bangladesh Legal Aid and Services Trust
Bar Human Rights Committee of England and Wales
Cairo Institute for Human Rights Studies
Canadian Network for an ICC/World Federalists of Canada
Carter Center
Center for Civil Human Rights
Center for Development of International Law
Center for Human Rights and Rehabilitation
Center for Reproductive Law and Policy
Children's Fund of Canada, Inc.
Colombian Commission of Jurists
Comité de Defensa de los Derechos Humanos y del Pueblo (Committee for the Defence of Human Rights and of the People)
Coalition for International Justice
Comité Latinoamericano y del Caribe para la Defensa de los Derechos de la Mujer (CLADEM; Latin American and Caribbean Committee for the Defence of Women's Rights)
Commission of Churches on International Affairs of the World Council of Churches
Committee of Former Nuremberg Prosecutors
Community Law Centre
Conseil national des barreaux (National Bar Council)

C. Report of the Committee of the Whole

Coordinating Board of Jewish Organizations
Corporación Colectiva de Abogados “José Alvear Restrepo” (José Alvear Restrepo Lawyers Collective Association)
Corporación de Desarrollo de la Mujer (La Morada; Association for the Development of Women)
Croatian Law Centre
Deutscher Juristinnenbund (German Women Lawyers Association)
Droits et devoirs en démocratie (3D; Rights and Duties in Democracy)
Egyptian Organization for Human Rights
European Law Students Association
Federación de Asociaciones de Defensa y Promoción de los Derechos Humanos (Federation of Associations for the Defence and Promotion of Human Rights)
Fédération internationale de l’action des Chrétiens pour l’abolition de la torture (FIACAT; International Federation of Christian Action to Abolish Torture)
Foundation for Human Rights Initiative
Foundation for the Establishment of an International Criminal Court and International Law Commission
Friends World Committee for Consultation
Fundación Ecueménica para el Desarrollo y la Paz (FEDEPAZ; Ecumenical Foundation for Development and Peace)
General Board of Church and Society of the United Methodist Church
Humanitarian Law Center
Human Rights Advocates
Human Rights Watch
ICAR Foundation
Information Workers for Peace
Instituto Latinoamericano de Servicios Legales Alternativos (ILSA; Latin American Institute of Alternative Legal Services)
Inter Press Service
Inter-African Union for Human Rights
Interamerican Concertation of Women’s Human Rights Activists (CIMA)
Inter-American Legal Services Association
International Association of Latin American Lawyers
Interights
Intermedia
International Association for Religious Freedom
International Association of Democratic Lawyers
International Association of Lawyers
International Association of Lawyers against Nuclear Arms (IALANA)
International Association of Penal Law
International Bar Association
International Centre for Criminal Law Reform and Criminal Justice Policy
International Centre for Human Rights and Democratic Development
International Commission of Jurists
International Court of the Environment
International Criminal Defense Attorneys Association
International Federation of Human Rights Leagues
International Federation of Women Lawyers, Kenya
International Human Rights Law Group
International Institute of Higher Studies in Criminal Sciences
International Law Association Committee on a Permanent ICC
International League for Human Rights
International Peace Bureau
International Right to Life Federation
International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme
International Service for Human Rights
International Society for Human Rights, Gambia
International Society for Human Rights, Germany
International Society for Traumatic Stress Studies
Japan Federation of Bar Associations
Juristes sans frontières (Lawyers without Borders)
Lama Gangchen World Peace Foundation
Law Projects Center, Yugoslavia
Lawyers Committee for Human Rights
Lawyers Committee on Nuclear Policy
Lawyers without Borders
Legal Research and Resource Development Centre
Leo Kuper Foundation
Lutheran World Federation
Médecins du monde (Doctors of the World)
Médecins sans frontières/Doctors without Borders
Minnesota Advocates for Human Rights
Movimento Nacional de Direitos Humanos (National Movement for Human Rights)
Movimiento por la Paz, Desarme y Libertad (National Movement for Peace, Disarmament and Freedom)
MOVIMONDO (Italy)
National Institute for Public Interest Law and Research
Netherlands Institute of Human Rights
No Peace Without Justice
Norwegian Helsinki Committee
Observatoire international des prisons, section du Cameroun (International Monitoring Centre for Prisons, Cameroon Branch)
Observatorio para la Paz (Peace Monitoring Centre)
One World Trust
OXFAM (United Kingdom and Ireland)
Pace Peace Center
Parliamentarians for Global Action
Plural - Centro de Estudios Constitucionales (Plural - Centre for Constitutional Studies)
Real Women of Canada
Redress

C. Report of the Committee of the Whole

Rencontre africaine pour la défense des droits de l'homme (RADDHO; African Meeting for the Defence of Human Rights)	Washington Working Group on the ICC/World Federalist Association
Save the Children Fund	Woman and Men Engaged in Advocacy, Research and Education (WEARE) for Human Rights
South Asia Human Rights Documentation Centre	Women's Caucus for Gender Justice and the ICC/MADRE
Tamilandu United Nations Association	Women's Consortium of Nigeria
Terre des Hommes Foundation	Women's Information Consultative Center
Terre des Hommes, Germany	Women's International League for Peace and Freedom
Transnational Radical Party	Women's League of Lithuania
Unión Nacional de Juristas de Cuba (National Union of Cuban Lawyers)	World Conference on Religion and Peace
Unitarian Universalist Association	World Federalist Association
United Nations Association, USA	World Federalist Movement/IGP
Volunteers for Prison Inmates	Young European Federalists
	ZIMRIGHTS (Zimbabwe Human Rights Association)

D. Report of the Drafting Committee

[The present report, submitted to the Committee of the Whole, comprises documents A/CONF.183/C.1/L.64 of 13 July 1998, A/CONF.183/C.1/L.65/Rev.1 of 14 July 1998, A/CONF.183/C.1/L.66 and Add.1 of 13 and 15 July 1998, A/CONF.183/C.1/L.67/Rev.1 of 14 July 1998, A/CONF.183/C.1/L.68/Rev.2 of 16 July 1998, A/CONF.183/C.1/L.82 and Corr.1 of 16 July 1998, A/CONF.183/C.1/L.83 and A/CONF.183/C.1/L.84 of 15 July 1998, A/CONF.183/C.1/L.85 and A/CONF.183/C.1/L.86 of 16 July 1998, A/CONF.183/C.1/L.87 of 15 July 1998, and A/CONF.183/C.1/L.88 and A/CONF.183/C.1/L.91 of 16 July 1998.]

Contents

	<i>Page</i>
Chapter I. Draft Statute for the International Criminal Court.....	149
Chapter II. Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	180

Chapter I. Draft Statute for the International Criminal Court

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds and that their cultures form a delicate mosaic and constitute a shared heritage,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1 The Court

An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons¹ for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.² The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3 Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands (“the host State”).

¹ The Drafting Committee will return to the issue of “persons” in connection with the definition of that term.

² The word “jurisdictions”, in the plural, will be re-examined by the Drafting Committee after receiving from the Committee of the Whole the text of the draft articles dealing with complementarity.

D. Report of the Drafting Committee

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

Crime of genocide

For the purpose of this Statute, "the crime of genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW³

Article 21

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place,⁴ a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.⁵

Article 21 bis

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 22

Non-retroactivity

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.⁶

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons

³ The present revision of part 3 (document A/CONF.183/C.1/L.65/Rev.1) has been prepared on the basis of the observations received from the Coordinators of various working groups of the Committee of the Whole and the incorporation of such observations into the text.

⁴ This phrase will be re-examined on final reading, when considering article 8.

⁵ Paragraph 3 will be re-examined on final reading in order to decide whether its placement should be more in connection with the question of "definition of crimes" in the Statute.

⁶ The question has been raised as regards a conduct which started before the entry into force and continues after the entry into force.

D. Report of the Drafting Committee

acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

*Article 23 bis*⁷

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 24

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 25

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 27

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.⁸

Article 29

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the

⁷ Former article X, previously 26.

⁸ The present text refers to crimes currently under article 5. In the event of the inclusion of treaty crimes, the question should be re-examined.

D. Report of the Drafting Committee

jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Article 30⁹

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person

or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person’s control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 20. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 31¹⁰

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 32.

Article 32

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

⁹ Former article 31.

¹⁰ Former article 30.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT¹¹

*Article 35
Organs of the Court*

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

*Article 36
Service of judges*

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41.
4. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50.

*Article 37
Qualifications, nomination and election of judges*

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 102. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly.

- (c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8 inclusive, and article 38, paragraph 2;
- (ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

- (b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

- (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

- (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

¹¹ The present revision of part 4 (document A/CONF.183/C.1/L.67/Rev.1) has been prepared on the basis of the observations received from the Coordinators of various working groups of the Committee of the Whole and the incorporation of such observations into the text.

D. Report of the Drafting Committee

- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 102. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership in the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical representation; and
- (iii) A fair representation of female and male judges.

(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.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 38, paragraph 2, shall not be eligible for re-election;

(b) At the first election, one third of the judges [on each of the lists referred to in paragraph 5] elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 40 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 38 *Judicial vacancies*

1. In the event of a vacancy, an election shall be held in accordance with article 37 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 37.

Article 39 *The Presidency*

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. 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.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall 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 in accordance with this Statute.

D. Report of the Drafting Committee

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 40 Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers;

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned;

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge

who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 41 Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges serving on a full-time basis shall not engage in any other occupation of a professional nature.¹²

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 42 Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43 The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [...],¹³ for examining them and for conducting investigations and

¹² The Drafting Committee believes that the Committee of the Whole should examine the question of whether this provision applies to all judges or only to those who serve on a full-time basis at the seat of the Court.

¹³ Text to be provided by the Committee of the Whole.

D. Report of the Drafting Committee

prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article.

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 44 The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 43.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling 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. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 45 Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 37, paragraph 8.

D. Report of the Drafting Committee

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 46

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 47

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 48

Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 47, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 49

Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the Rules of Procedure and Evidence.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the Rules of Procedure and Evidence.

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 Presidency;

(c) The Deputy Prosecutors and 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.

D. Report of the Drafting Committee

Article 50

Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 51

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 52

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; or
- (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this

Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 53

Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 54

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice; and

(d) ... *(pending)*¹⁴

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. *(pending)*¹⁵

¹⁴ This subparagraph is still pending in the Committee of the Whole.

¹⁵ This paragraph is still pending in the Committee of the Whole.

D. Report of the Drafting Committee

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crimes, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1,] of his or her conclusion and the reasons for the conclusion.

4. (a) At the request of the State making a referral under article 11 [or the Security Council under article 10, paragraph 1,] the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 3 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 3 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

5. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 bis

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57 bis, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with their respective competences and/or mandates;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 54 ter

Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(d) Shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 of this Statute, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

D. Report of the Drafting Committee

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 55

Information on national investigations or proceedings

(pending)¹⁶

Article 56

Deferral of an investigation by the Prosecutor

(pending)¹⁷

Article 57

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, 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 defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;¹⁸

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis, paragraph 1 bis,] 61, paragraph 6, [and 71] must be concurred in by a majority of its judges.¹⁹

¹⁶ Article 55 is still pending in the Committee of the Whole and has not been referred to the Drafting Committee.

¹⁷ Article 56 is still pending in the Committee of the Whole and has not been referred to the Drafting Committee.

¹⁸ This is to be reviewed after consideration of provisions on trial in absentia.

¹⁹ Exact article numbers to be verified.

D. Report of the Drafting Committee

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(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 under article 58, issue such orders, including measures such as those described in article 57, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and 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 under Part 9 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 under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (I), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.

Article 58

Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without

D. Report of the Drafting Committee

conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9 of this Statute.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61

Confirmation of the charges before trial

1. The Pre-Trial Chamber shall, within a reasonable time after the person's surrender or voluntary appearance before the Court, hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. Subject to the provisions of paragraph 1 bis, the hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the

D. Report of the Drafting Committee

Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

2. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence; and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 8 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62

Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article are to be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

D. Report of the Drafting Committee

2. The Trial Chamber 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.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Chamber.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall

satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial

D. Report of the Drafting Committee

procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as

witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

...

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender, as defined in article [5 ter], and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented

D. Report of the Drafting Committee

and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 44, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69 Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be inconsistent with or prejudicial to the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64, paragraphs 3 and 6. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Statute and the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court may rule on the admissibility and relevance of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

7. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

8. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

9. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

D. Report of the Drafting Committee

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 71

Sensitive national security information

(pending)²⁰

Article 72

Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 73

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, 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.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 74

Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

²⁰ Article 71 is still pending in the Committee of the Whole and has not been referred to the Drafting Committee.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and in the presence of the accused.

PART 7. PENALTIES

Article 75

Applicable penalties

1. Subject to article 100, the Court may impose one of the following penalties on a person convicted of a crime under article [5] of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 75, paragraph 1 (b), which may be applied only where justified by the circumstances of the crimes.

Article 79

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by the order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

PART 8. APPEAL AND REVISION

Article 80

Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 72 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82;

D. Report of the Drafting Committee

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) above may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 81

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57 bis, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 82

Proceedings on appeal

1. For the purposes of proceedings under article 80 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court.

Final subparagraph on dissenting opinions: (*pending*)

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 83

Revision of conviction or sentence

1. The convicted person or, after death, ..., ²¹ or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

²¹ The addition of a phrase is still pending in the Committee of the Whole.

D. Report of the Drafting Committee

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 47.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 84

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE²²

Article 85

General obligation to cooperate

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

Article 86

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or in one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under Part 9, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under Part 9 shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

²² The present revision of part 9 (document A/CONF.183/C.1/L.68/Rev.2) has been prepared on the basis of the observations received from various Coordinators of the working groups of the Committee of the Whole and the incorporation of such observations into the text.

D. Report of the Drafting Committee

5. The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties [or, where the Security Council referred the matter to the Court, the Security Council].

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [or, where the Security Council referred the matter to the Court, to the Security Council].^{23 24}

Article 86 bis

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 87

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 88, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. A State Party may deny a request for surrender only if, with respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court.

3. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of

ne bis in idem as provided in article ..., the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

4. If a request for surrender is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.

5. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender;

(b) A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain:

- (i) A description of the person being transported;
- (ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected; provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

6. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 87 bis

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 87 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

²³ The expression "refer the matter" has been used twice in the paragraph, but each time in a different context and with a different meaning. This potential amphibology should be corrected in further readings.

²⁴ *Note from the Committee of the Whole:* The text within brackets in article 86, paragraph 7, should be reconsidered in the light of the decision on the question of the referral of a matter to the Court by the Security Council.

D. Report of the Drafting Committee

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to articles 16 and 17, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the

requesting State, determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 88

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the

D. Report of the Drafting Committee

State Party shall advise the Court of the specific requirements of its national law.

Article 89 *Provisional arrest*

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 88.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 88 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 90 *Other forms of cooperation*

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. A State Party may deny a request for assistance, in whole or in part, only if:

(a) With respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)]], it has not accepted the jurisdiction of the Court;

D. Report of the Drafting Committee

(b) The request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence].

5. Before denying a request for assistance, the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. [former 6] (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request;

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence;

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

- (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 87 bis.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

- (1) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
 - (2) The questioning of any person detained by order of the Court;²⁵
- (ii) In the case of assistance under subparagraph (b) (i) (1):

- (1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
- (2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to the Statute.

Article 90 (a)

Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the

²⁵ The question arises whether the intention in this subparagraph is that the questioning be done only at the seat of the Court. If so, it should be specified.

D. Report of the Drafting Committee

assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 90, paragraph 1 (j).

Article 90 (b)

Postponement of execution of a request in respect of an admissibility challenge

Without prejudice to articles 54 quater and 54, paragraph 2, where there is an admissibility challenge under consideration by the Court pursuant to [articles 16 and 17], the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to articles 16 or 17.

Article 90 bis

Contents of request for other forms of assistance under article 90

1. A request for other forms of assistance referred to in article 90 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 90 ter Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 90 quater

Cooperation with respect to waiver of immunity and consent to surrender

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 91

Execution of requests under articles 90 and 90 bis

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime which is alleged to have been committed, and there has been a determination of admissibility pursuant to articles [16 or 17],²⁶ the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 71 to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security shall also apply to the execution of requests for assistance under this article.

Article 91 bis
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 90 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 92
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 88. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article X
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 94
Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

²⁶ Note from the Committee of the Whole: The reference to articles 16 and 17 in article 91, paragraph 4 (a), should be reviewed in the light of the text of these articles.

D. Report of the Drafting Committee

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 100.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 94 bis, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person; and

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 94 bis

Change in designation of State of enforcement

1. The Court may at any time decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may at any time apply to the Court to be transferred from the State of enforcement.

Article 95

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 94, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement

shall not impede the making of any such application by a sentenced person.

Article 96

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 97²⁷

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to another State which agrees or is obliged to receive him or her, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 98, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 98

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

²⁷ A concern was raised in the Drafting Committee about the text possibly being in violation of internationally protected human rights. The Coordinator of the relevant working group has been advised.

D. Report of the Drafting Committee

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

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

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at

such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 101

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designed by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;²⁸

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 37, the number of judges;

(f) Consider, pursuant to article 86, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

²⁸ See document A/CONF.183/2, annex to the draft final act.

D. Report of the Drafting Committee

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 103 *Financial regulations*

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 103 bis *Payment of expenses*

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 104 *Funds of the Court and of the Assembly of States Parties*

The funds of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 105 *Voluntary contributions*

Without prejudice to article 104, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 106 *Assessment of contributions*

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 107 *Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 108 *Settlement of disputes*

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

D. Report of the Drafting Committee

...
...

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

...
...

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

Chapter II. Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

1. The General Assembly of the United Nations, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.
2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.
3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority.
4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At the latter session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.
5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries.
6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

D. Report of the Drafting Committee

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. The General Assembly, in its resolution 51/207 of 17 December 1996, decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. The General Assembly, in its resolution 52/160 of 15 December 1997, requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. The General Assembly, in the same resolution, requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions

to participate as observers in its sessions and work, on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. The Secretary-General, pursuant to the same resolution, invited non-governmental organizations accredited by the Preparatory Committee with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution, as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer: ...

17. The Conference elected Mr. Giovanni Conso (Italy) as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

19. The following committees were set up by the Conference:

General Committee

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole

Chairman: Mr. Philippe Kirsch (Canada)

Vice-Chairmen: Ms. Silvia Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan (Romania) and Mr. Phakiso Mochochoko (Lesotho)

Rapporteur: Mr. Yasumasa Nagamine (Japan)

D. Report of the Drafting Committee

Drafting Committee

- Chairman:* Mr. M. Cherif Bassiouni (Egypt)
- Members:* Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

- Chairman:* Ms. Hannelore Benjamin (Dominica)
- Members:* Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia.

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: ...

21. The Conference had before it a draft Statute on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate (A/CONF.183/2/Add.1).

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR. ...) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR. ...) and the reports of the Committee of the Whole (A/CONF.183/...) and of the Drafting Committee (A/CONF.183/...), the Conference drew up the *Rome Statute of the International Criminal Court*.

24. The foregoing Statute, which is subject to ratification, acceptance or approval, was adopted by the Conference on ... July 1998 and opened for signature on ... July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Statute will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the People and the Government of Italy

Resolution on the establishment of the Preparatory Commission for the International Criminal Court

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this ...th day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

Annex

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee.

D. Report of the Drafting Committee

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Pays tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman, Mr. Adriaan Bos, for their outstanding and hard work, commitment and dedication.

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its deep appreciation and gratitude to the People and the Government of Italy for making the necessary arrangements for the holding of the Conference in Rome, for their generous hospitality and for their contribution to the successful completion of the work of the Conference.

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its appreciation and thanks to Mr. Giovanni Conso, President of the Conference, Mr. Philippe Kirsch, Chairman of the Committee of the Whole, and Mr. M. Cherif Bassiouni, Chairman of the Drafting Committee, who, through their experience, skilful efforts and wisdom in steering the work of the Conference, contributed greatly to the success of the Conference.

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at a date to be decided by the General Assembly of the United Nations;

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;

3 bis. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations;

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Elements of Crimes and the Rules of Procedure and Evidence on a priority basis;

(b) A relationship agreement between the Court and the United Nations;

(c) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

(d) Financial regulations and rules;

(e) An agreement on the privileges and immunities of the Court;

(f) A budget for the first financial year;

(g) The rules of procedure of the Assembly of States Parties;

5. The Commission shall remain in existence until the *conclusion* of the first meeting of the Assembly of States Parties;

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties;

7.²⁹ The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat services as it may require, subject to the approval of the General Assembly of the United Nations;

8. The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

²⁹ *Note from the Committee of the Whole:* The wording of paragraph 7 of the annex is subject to the finalization of article 104.

Part Two

Proposals, reports and other documents

E. Documents of the plenary

1. Organization of work

DOCUMENT A/CONF.183/3

[incorporating document A/CONF.183/3/Corr.1 of 5 July 1998]

Memorandum of the Secretary-General on the methods of work and procedures for the Conference

[Original: English]
[12 May 1998]

1. The present memorandum on the methods of work and procedures for the Conference has been prepared in accordance with General Assembly resolution 52/160 of 15 December 1997, entitled "Establishment of an international criminal court". (The text of the resolution is reproduced in volume II.)

I. PROVISIONAL AGENDA FOR THE CONFERENCE

2. The provisional agenda for the Conference, which has been prepared by the Secretariat, is set out in document A/CONF.183/1.

3. Items 1 to 10 of the provisional agenda concern matters relating to the organization of the Conference. Item 11 concerns the substantive work of the Conference. Item 12 concerns the adoption of a convention and other instruments deemed appropriate and of the final act of the Conference. Item 13 concerns the signature of the Final Act and of the Convention.

II. DRAFT RULES OF PROCEDURE

4. The General Assembly, in paragraph 4 of its resolution 52/160, requested the Secretary-General to prepare the text of the draft rules of procedure for the Conference, to be submitted to the Preparatory Committee on the Establishment of an International Criminal Court for its consideration and recommendation to the Conference, with a view to the adoption of such rules by the Conference in accordance with the rules of procedure of the General Assembly, and to provide for consultations on the organization and methods of work of the Conference, including the rules of procedure, prior to the convening of the last session of the Preparatory Committee. The Secretariat prepared the draft rules of procedure, which were considered during consultations held prior to the last session of the Preparatory Committee and by the Preparatory Committee at its last session from 16 March to 3 April 1998. The Preparatory Committee adopted for recommendation to the Conference the draft rules of procedure, as orally amended.

5. The draft rules of procedure are contained in document A/CONF.183/2/Add.2.

III. OFFICERS

6. According to rule 6 of the draft rules of procedure, the Conference shall elect from among the representatives of

participating States the following officers: a President and [22] Vice-Presidents, as well as the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. These officers shall be elected on the basis of ensuring the representative character of the General Committee, taking into account in particular equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

IV. COMMITTEES OF THE CONFERENCE

7. The draft rules of procedure provide for the establishment of a Credentials Committee, a General Committee, a Committee of the Whole, and a Drafting Committee.

8. *Credentials Committee.* The draft rules of procedure provide in rule 4 for the establishment at the beginning of the Conference of a Credentials Committee consisting of nine members from among the representatives of participating States to be appointed by the Conference on the proposal of the President. The rule also provides that the Credentials Committee shall examine the credentials of representatives of States and report to the Conference without delay.

9. *General Committee.* The draft rules of procedure provide in rule 11 for the establishment of a General Committee, comprising the President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee. The draft rules of procedure provide in rule 13 that the General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work. The draft rule also provides that the General Committee shall exercise the powers conferred upon it by rule 34, dealing with the promotion of general agreement.

10. *Committee of the Whole.* The draft rules of procedure provide in rule 48 for the establishment of a Committee of the Whole. The rule provides that the Committee of the Whole shall have as its officers a Chairman, three Vice-Chairmen and a Rapporteur. The Committee may set up working groups pursuant to rule 50.

11. *Drafting Committee.* The draft rules of procedure provide in rule 49 for the establishment of a Drafting Committee consisting of [21] members, including its Chairman. The rule provides that the Chairman is to be elected by the Conference in accordance with rule 6 and the other members are to be appointed by the Conference on the proposal of the General Committee, taking into account equitable geographical distribution as well as the need to ensure the representation of

E. Documents of the Plenary

the languages of the Conference and to enable the Drafting Committee to fulfil its functions. The Rapporteur of the Committee of the Whole participates *ex officio*, without a vote, in the work of the Drafting Committee.

12. Pursuant to draft rule 49, the Drafting Committee shall, without reopening substantive discussion on any matter, coordinate and refine the drafting of all texts referred to it, without altering their substance, formulate drafts and give advice on drafting as requested by the Conference or by the Committee of the Whole and report to the Conference or to the Committee of the Whole as appropriate.

V. SECRETARIAT

13. The Secretary-General has designated the Legal Counsel, Mr. Hans Corell, as his representative at the Conference and has appointed the Director of the Codification Division of the Office of Legal Affairs, Mr. Roy S. Lee, as Executive Secretary of the Conference.

14. The specific duties of the secretariat are set out in rule 15 of the draft rules of procedure. Rule 16 provides that in the exercise of their duties the Secretary-General or any other member of the staff of the secretariat designated for that purpose may, at any time, make oral or written statements concerning any question under consideration.

VI. PROPOSALS

15. The General Assembly, in paragraph 2 of its resolution 52/160, requested the Preparatory Committee to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate. Rule 29 provides that this draft convention shall constitute the basic proposal for consideration by the Conference.

16. The draft statute for the establishment of an international criminal court, together with the draft final act prepared by the Preparatory Committee, consists of 116 articles and is set out in document A/CONF.183/2/Add.1 and Corr.1.

17. According to rule 30 of the draft rules of procedure, other proposals shall normally be submitted in writing to the Executive Secretary of the Conference, who shall circulate copies to all delegations.

VII. GENERAL AGREEMENT AND DECISION-TAKING

18. In its resolution 52/160, the General Assembly recognized the importance of concluding the work of the Conference through the promotion of general agreement on matters of substance. The draft rules of procedure provide in rule 34 that the Conference shall make its best endeavours to ensure that the work of the Conference is accomplished by general agreement. The rule further provides that if, in the consideration of any matter of substance, all feasible efforts to

reach general agreement have failed, the President of the Conference shall consult the General Committee and recommend the steps to be taken, which may include the matter being put to a vote.

19. Similar provision is made in rule 52 (d), which is in square brackets, regarding the work of the Committee of the Whole.

20. The draft rules of procedure provide in rule 35 that each State participating in the Conference shall have one vote.

21. Rule 36, which is in brackets, deals with the question of the majority required in any vote which may be taken in the Conference. Rule 52 (e), which is also in square brackets, deals with the same question insofar as the subsidiary bodies of the Conference are concerned.

VIII. MEETINGS OF THE CONFERENCE

22. Meetings of the organs of the Conference for which interpretation is required will normally be held from 10 a.m. to 1 p.m. and from 3 p.m. to 6 p.m., from Monday to Friday. The facilities with full interpretation services available to the Conference are: two meetings (morning and afternoon) on the first day (15 June), four meetings (morning and afternoon) on the second day (16 June) and six meetings per day (morning and afternoon) from the third day (17 June) to the end of the Conference. Thus, from 17 June, three concurrent meetings may be held each day in the morning and three in the afternoon.

IX. SCHEDULE OF WORK

23. The Conference is convened for the period from Monday, 15 June, to Friday, 17 July 1998, to finalize and adopt a convention on the establishment of an international criminal court. The Conference should move promptly to the consideration of substantive matters after a short meeting on organizational matters. A draft organization of work for the Conference (A/CONF.183/2, part four) is proposed by the Preparatory Committee for the consideration of the Conference.

24. In view of the number of draft articles to be considered and the limited time available to the Conference, general statements should be made only in the plenary and only over the course of seven meetings in the first week. The draft Statute, together with the draft Final Act and its annex transmitted by the Preparatory Committee (A/CONF.183/2/Add.1 and Corr.1), should be as a whole referred directly to the Committee of the Whole. There should be no general debate in the Committee of the Whole and its work on the draft statute should begin as soon as possible.

25. The Conference at its first plenary meeting, in the morning of 15 June 1998, may be expected to deal with at least items 1 to 8 of the provisional agenda (Opening of the Conference by the Secretary-General; Election of the President; Adoption of the agenda; Adoption of the rules of procedure,

E. Documents of the Plenary

Election of Vice-Presidents, Election of the Chairman of the Committee of the Whole, Election of the Chairman of the Drafting Committee and Appointment of the Credentials Committee).

26. The Conference at its second plenary meeting, in the afternoon of 15 June 1998, may be expected to deal with items 9 and 10 of the provisional agenda (Appointment of the other members of the Drafting Committee; and Organization of work).

27. It is envisaged that the Conference will meet in plenary in the final week of the Conference to take such action as may be necessary under items 11 to 13 of the provisional agenda, including: consideration of the report of the Committee of the Whole and those parts of the report of the Drafting Committee which may need to be submitted directly to the Conference (see para. 31 below).

28. The Credentials Committee is expected to meet sometime during the second or third week of the Conference. One meeting has been allotted for this purpose. It should be noted that rule 5 of the draft rules of procedure provides that, pending a decision of the Conference on their credentials, representatives shall be entitled to participate provisionally in the Conference.

29. The General Committee is expected to hold its first meeting in the afternoon of Monday, 15 June 1998, immediately before the second plenary meeting.

30. The Committee of the Whole is expected to hold its first meeting on Tuesday, 16 June 1998, and to establish its own work programme, with a view to finalizing its work within the number of meetings available to it. The Committee, including any working group or working groups it may establish under rule 50, may hold up to four meetings (with full interpretation) per day throughout the Conference, that is, two bodies may meet concurrently, both in the morning and in the afternoon. The Committee of the Whole should report to the plenary as soon as its work is completed, which should in any event be not later than 10 July

31. The Drafting Committee is expected to hold its first meeting on 19 June 1998. Two meetings per day (with full interpretation) may be allotted to it throughout the Conference. The Drafting Committee will receive its work from the Committee of the Whole and report to it. Time constraints may make it necessary for the Drafting Committee to report on the last portion of its work directly to the plenary.

2. Communications received by the Rome Conference

(a) Communications regarding consultations on the draft rules of procedure and the candidature of the Chairman of the Committee of the Whole

DOCUMENT A/CONF.183/4

Communications received regarding consultations on the draft rules of procedure for the Conference (rules 6, 11 and 49) and the candidature of the Chairman of the Committee of the Whole: note by the Secretary-General

[Original: English]
[5 June 1998]

1. On 3 April 1998, the Preparatory Committee on the Establishment of an International Criminal Court adopted provisional rules of procedure for the Conference and recommended that those rules be adopted by the Conference. However, the Preparatory Committee was unable to agree on the composition of the General Committee and the Drafting Committee. Therefore, figures in rules 6, 11 and 49 appear in square brackets (see A/CONF.183/2/Add.2).

2. At the request of the regional groups, the Legal Counsel, Mr. Hans Corell, continued consultations on the composition of those Committees. During those consultations, agreement was reached on the following:

General Committee

The President of the Conference	1
The Chairman of the Committee of the Whole	1
The Chairman of the Drafting Committee	1
31 Vice-Presidents of the Conference, as follows:	
African States	8
Asian States	8
Eastern European States	4
Latin American and Caribbean States	5
Western European and Other States	6
TOTAL	34

Drafting Committee

The Chairman	1
Members as follows:	
African States	5
Asian States	6
Eastern European States	3
Latin American and Caribbean States	4
Western European and Other States	6
TOTAL	25

Consequently, the figures set out in square brackets in rules 6, 11 and 49, respectively, should be replaced by the figures now agreed among the regional groups, as follows:

Rule 6: for [22] read 31;

Rule 11: for [25] read 34;

Rule 49: for [21] read 25 and for [20] read 24.

3. In a letter dated 21 May 1998 addressed to the Chairmen of the regional groups, Mr. Adriaan Bos (Netherlands) who had been nominated by the regional groups as Chairman of the Committee of the Whole, stated, *inter alia*, the following:

“I should like to express my deepest gratitude to your Regional Group for nominating me to the post of Chairman of the Committee of the Whole of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. I have considered this a great honour and as one of the most important assignments of my entire career. It has always been my fullest intention to do my very best to accomplish the mandate that would be entrusted to me as Chairman of the Committee of the Whole at the Rome Conference.

“It is therefore with the deepest regret that I have to inform your Regional Group that I will not be able to assume the function as the Chairman of the Committee of the Whole. I have recently learned that I will have to undergo surgery and, thereafter, a course of medical treatment. Accordingly, as you may readily appreciate, I will not physically be in a position to serve the Conference with the requisite energy. In the circumstances, I wish to suggest that the Regional Groups nominate another person for the post of Chairman of the Committee of the Whole.

“I should like to recommend strongly for this post Ambassador Philippe Kirsch, Legal Adviser of the Foreign Ministry of Canada. His impartiality, diplomatic experience and negotiating skills are well known and are universally recognized within the United

Nations system. He has chaired many international meetings. Ambassador Kirsch enjoys my complete confidence and I have every faith that he will be able to provide the necessary leadership and dedication to the work of the Committee of the Whole. Accordingly, I would urge your Regional Group to give its fullest support to the nomination of Ambassador Philippe Kirsch. I understand that he is willing to assume that position.

“I always enjoyed working with the representatives of your group and I had great hopes for continuing this cooperation in Rome together with all other Members of the United Nations. I express the hope that the wish of so many to see the Statute of the International Criminal Court adopted in Rome, will be fulfilled! ...”

4. Following the consultations referred to in paragraph 2 above, the regional groups agreed on the nomination of Mr. Philippe Kirsch (Canada) as Chairman of the Committee of the Whole of the Conference.

DOCUMENT A/CONF.183/5

Communication received regarding consultations on the draft rules of procedure for the Conference (rules 19, 36 and 52): note by the Secretary-General

[Original: English]
[8 June 1998]

1. On 3 April 1998, the Preparatory Committee on the Establishment of an International Criminal Court adopted provisional rules of procedure for the Conference on the Establishment of an International Criminal Court and recommended that those rules be adopted by the Conference. However, the Preparatory Committee was unable to agree on the rule on a quorum and certain rules on voting. Therefore, rules 19, 36 and 52 appear in square brackets (see A/CONF.183/2/Add.2).

2. By a letter dated 2 June 1998, the Permanent Mission of the Netherlands to the United Nations informed the Legal Counsel, Mr. Hans Corell, that, following informal consultations among interested delegations, a proposal for a solution had emerged with respect to the provisions in question. According to this proposal, the draft rules of procedure, as reflected in document A/CONF.183/2/Add.2, should be amended as follows:

(a) The square brackets around rule 19 should be removed and the text of the draft rule should be adopted;

(b) Rule 36 should be formulated as follows:

“Rule 36. Majority required

“1. Subject to rule 34, decisions of the Conference on the adoption of the text of the Statute of

the International Criminal Court as a whole shall be taken by a two-thirds majority of the representatives present and voting, provided that such majority shall include at least a majority of the States participating in the Conference.

“2. Subject to rule 34, decisions of the Conference on all other matters of substance shall be taken by a two-thirds majority of the representatives present and voting.

“3. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.

“4. If the question arises whether a matter is one of procedure or of substance, the President shall rule on the question. An appeal against this ruling shall be put to the vote immediately and the President’s ruling shall stand unless overruled by a majority of the representatives present and voting.

“5. If a vote is equally divided, the proposal or motion shall be regarded as rejected.”;

(c) The square brackets around rule 52 should be removed; the text of paragraphs (a) to (d) should remain unchanged, and subparagraph (e) should be formulated as follows:

“(e) Subject to subparagraph (d), decisions on matters of substance shall be taken by a three-fifths majority of the representatives present and voting, provided that such a majority includes at least one third of the States participating in the Conference. Other decisions shall be taken by a majority of the representatives present and voting, except that the reconsideration of a proposal shall require the majority established by rule 33.”

(b) Other communications

DOCUMENT A/CONF.183/INF/4

Communication from the Inter-Agency Standing Committee to the Conference: note by the Secretary-General

*[Original: English]
[11 June 1998]*

The Secretary-General has received the attached communication to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court from the Inter-Agency Standing Committee. The communication is transmitted for information (see annex).

The Inter-Agency Standing Committee was established by the United Nations General Assembly by its resolution 46/182 of 19 December 1991, for the purpose of strengthening coordination between humanitarian organizations and is composed of the following members: Food and Agriculture Organization of the United Nations, Office for the Coordination of Humanitarian Affairs of the Secretariat, Office of the United Nations High Commissioner for Human Rights, Office of the United Nations High Commissioner for Refugees, United Nations Children’s Fund, United Nations Development Programme, World Food Programme, World Health Organization, International Committee of the Red Cross, International Federation of Red Cross and Red Crescent Societies, International Organization for Migration, InterAction, International Council for Voluntary Agencies and the Steering Committee for Humanitarian Response.

Annex

Communication from the Inter-Agency Standing Committee to the Conference

1. The Inter-Agency Standing Committee supports the earliest establishment of the International Criminal Court to investigate and prosecute crimes of genocide, crimes against humanity and war crimes. It considers that the Court should have the necessary authority and capacity to undertake vigorous investigation and expeditiously bring to justice suspected war criminals.

2. The Inter-Agency Standing Committee strongly believes that wilful denial of humanitarian assistance, direct attacks against civilians, forceful deportation or displacement of population and other serious violations of international humanitarian law, committed both in international and internal armed conflict, should be included in the jurisdiction of the Court. The Inter-Agency Standing Committee also believes that attacks against humanitarian personnel should be considered as a crime under the jurisdiction of the Court.

3. The Inter-Agency Standing Committee recognizes the critical importance for all Governments and concerned parties to support and cooperate fully with the Court.

4. The members of the Inter-Agency Standing Committee stand ready to cooperate with the Court. This cooperation should take fully into account the need to respect the basic humanitarian principles, in particular the principles of humanity, neutrality and impartiality, and the need to maintain humanitarian access to the victims of armed conflicts and to ensure the safety and security of humanitarian personnel in the field. In this connection, adequate protective and non-disclosure measures would be necessary for cooperation between the Court and organizations involved in humanitarian activities.

DOCUMENT A/CONF.183/INF/6

**Letter dated 30 June 1998 from the Chairman of the
Organizing Committee for the Conference
to the President of the Conference**

[Original: Italian]
[2 July 1998]

Mayor Rutelli has confirmed the readiness of the City of Rome to host in the Sala degli Orazi e Curiazi of the Campidoglio, beginning at 10 a.m. on Saturday 18 July 1998, the closing ceremony of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

As United Nations Protocol was already able to observe on the occasion of a visit last week, the Sala degli Orazi e Curiazi, which is of tremendous artistic and historical value, has only limited capacity, meaning that only one representative per country participating in the Conference can attend.

I should therefore be grateful if you would transmit the text of the present letter to the secretariat of the Conference, for the information of Conference participants.

(Signed) Umberto COLESANTI

DOCUMENT A/CONF.183/INF/7

**Letter from the President of the Conference to
all representatives of participating States**

[Original: English]
[4 July 1998]

We have now reached the last stage of our five-week Conference. I recognize that you have all been working day and night and during weekends in every way you can to accomplish the task that the General Assembly of the United Nations has entrusted to us: the finalization and adoption of a Convention on the Establishment of an International Criminal Court.

I understand that the Committee of the Whole has completed a general review of all the draft articles of the Statute assigned to it, and has furthermore organized working groups and meetings to tackle specific articles requiring focused discussion and innovative solutions. The Drafting Committee has also conducted its work in an efficient manner, without reopening substantive discussion or altering the substance, to coordinate and refine the texts referred to it.

Delegations have also intensified consultations and meetings among themselves with a view to addressing specific issues of particular interest.

I am very pleased that all these have led to concrete results and that significant progress has been made on critical issues germane to the general acceptability of the Statute.

As you know, in numerous communications various sectors of the international community have expressed their strong support for and commitment to this Conference.

We are, therefore, performing an extremely important task which truly enjoys the support of the world community.

Our efforts need to be continued and there is still a lot to do on important points in the coming days. For this reason, we need to give new momentum to our work, focusing on essential issues so as to finalize the Statute of the International Criminal Court on 17 July 1998.

In order to allow the Conference to conclude on time, the results of your hard work will have to be consolidated into a coherent whole and translated into six official languages. At the same time, delegations will need sufficient time to consult with their capitals.

All this takes time and requires the concerted efforts of all of you. For this reason, we all need to follow a very tight schedule. Mr. Philippe Kirsch, Chairman of the Committee of the Whole, together with all the Coordinators, is playing a central role in this regard. I have full confidence in them.

I know I can continue to rely on you and on your unflinching effort in bringing the Conference to the fruitful conclusion we are committed to attain.

(Signed) Giovanni CONSO
President

DOCUMENT A/CONF.183/INF/8

**Letter of the Secretary-General to the President
of the Conference**

[Original: English]
[7 July 1998]

As I am sure you are aware, I am following the deliberations of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court with greatest interest and attention. I know that all participants attending the Conference are working extremely hard and that they spare no effort in trying to achieve the task entrusted to the Conference, which is to finalize and adopt a convention on the establishment of an international criminal court.

At the same time, it is obvious that many questions still remain to be solved. Even if it could be expected that this would be the case also at a relatively late stage of the deliberations, time is nevertheless running short. I would, therefore, like to convey to you and to the Conference my sincere hope that the participating States will find the necessary spirit of cooperation in order to be able to finalize the Statute on 17 July with a view to creating a court which is strong and independent enough to carry out its task. I reiterate what I said in my address at the opening of the Conference: The overriding interest must be that

E. Documents of the Plenary

of the victims, and of the international community as a whole. The court must be an instrument of justice, not expedience. It must be able to protect the weak against the strong. It must demonstrate that an international conscience is a reality.

(Signed) Kofi A. ANNAN

3. Non-governmental organizations

DOCUMENT A/CONF.183/INF/3

Non-governmental organizations accredited to participate in the Conference: note by the Secretary-General

[Original: English]
[5 June 1998]

1. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Secretary-General to invite non-governmental organizations, accredited by the Preparatory Committee with due regard to the provisions of part VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Committee, on the understanding that participation meant attending meetings of its plenary and, unless otherwise decided by the Conference in specific situations, formal meetings of its subsidiary bodies except the drafting group, receiving copies of the official documents, making available their materials to delegates and addressing, through a limited number of their representatives, its opening and/or closing sessions, as appropriate, in accordance with the rules of procedure to be adopted by the Conference.

2. On the basis of the lists of non-governmental organizations compiled by the Secretariat with the assistance of the NGO Coalition for the Establishment of an International Criminal Court, the Preparatory Committee decided that the non-governmental organizations listed in the present note should be invited to participate in the Conference in the manner set out in resolution 52/160.

NON-GOVERNMENTAL ORGANIZATIONS ACCREDITED TO PARTICIPATE IN THE CONFERENCE

African Law Students-Young Lawyers Association
Agir ensemble pour les droits de l'homme
Alternative Law Research and Development Center, Inc.
(ALTERLAW)
American Association for the International Commission of
Jurists
American Association of Jurists
American Bar Association
American Jewish Committee
Amnesty International
Arab Commission on Human Rights
Arab Lawyers' Union

Article 9 Society Hiroshima
Asamblea Permanente de Derechos Humanos
Asia Pacific Forum on Women, Law and Development
Asian Center for Women's Human Rights
Asian Women's Human Rights Council
Asociación de Defensa de Derechos
Asociación pro Derechos Humanos (APRODEH)
Associação Moçambicana das Mulheres de Carreira Jurídica
Association des femmes juristes du Bénin
Association internationale de droit pénal
Association internationale des jeunes avocats
Association of the Bar of the City of New York
Association pour le progrès et la défense des droits des femmes
maliennes
Association tchadienne des juristes
Australian Lawyers for Human Rights
Avocats sans frontières
Baha'í International Community
Bangladesh Legal Aid and Services Trust
Bangladesh Society for the Enforcement of Human Rights
Bar Human Rights Committee of England and Wales
Be Active, Be Emancipated
Better Law Forum International
Biplabi Sanskritic Gosthi
Botswana Centre for Human Rights (DITSWANELO)
Bulgarian Lawyers for Human Rights
Cairo Institute for Human Rights Studies
Cambodian Human Rights Task Force
Campaign for United Nations Reform
Canadian Network for an ICC/World Federalists of Canada
Caribbean Association of Feminist Research and Action
Carter Center
Catholic Commission for Justice and Peace in Zimbabwe
Catholic Commission of Peace and Justice
Center for Civil Human Rights
Center for Development of International Law
Center for Human Rights and Rehabilitation
Center for Reproductive Law and Policy
Center for Women's Global Leadership
Centro de Asesoría Laboral del Perú
Centro de Estudios Legales y Sociales
Centro Nicaraguense de Derechos Humanos
Children's Fund of Canada, Inc.
Coalition for International Justice
Colombian Commission of Jurists
Comisión Chilena de Derechos Humanos
Comisión de Derechos Humanos de El Salvador
Comisión de Derechos Humanos de Guatemala
Comité de Defensa de los Derechos Humanos
Comité Latinoamericano y del Caribe para la Defensa de los
Derechos de la Mujer (CLADEM)
Comite Permanente por la Defensa de Derechos Humanos
Committee for the Defence of Human Rights
Committee of Former Nuremberg Prosecutors
Community Law Centre

E. Documents of the Plenary

Conseil national des barreaux
Conseil sur les droits des femmes
Constitutional Rights Project
Coordinating Board of Jewish Organizations
Coordination of Women's Advocacy
Corporación Colectiva de Abogados "Jose Alvear Restrepo"
Corporación de Desarrollo de la Mujer
Croatian Law Centre
Deutscher Juristinnenbund
Development and Peace Foundation
Droits et devoirs en démocratie (3D)
EarthAction
Egyptian Organization for Human Rights
Equality Now
European Federalist Movement
European Law Students' Association
European Roma Rights Centre
Federación de Asociaciones de Defensa y Promoción de las
Derechos Humanos
Fédération internationale de l'action des Chrétiens pour
l'abolition de la torture (FIACAT)
Fédération internationale des ligues des droits de l'homme
Federation of Women Lawyers, Kenya
Foundation for Human Rights Initiative
Foundation for the Establishment of an International Criminal
Court and International Law Commission
Franciscans International
Franklin and Eleanor Roosevelt Institute
Friends World Committee for Consultation
Fundación Ecueménica para el Desarrollo y la Paz (FEDEPAZ)
Fundación Federalista
General Board of Church and Society of the United Methodist
Church
Ghana Committee on Democracy and Human Rights
Gioventù Federalista Europea
Helsinki Citizens Assembly
Human Rights Advocates
Human Rights Alliance
Human Rights Commission of Pakistan
Human Rights Internet
Human Rights Research and Education Centre
Human Rights Watch
Humanitarian Law Center
ICAR Foundation
Indian Institute for Peace, Disarmament and Environment
Protection
Indonesian Legal Aid and Human Rights Association
INFORM
Information Workers for Peace
Instituto Latinoamericano de Servicios Legales Alternativos
(ILSA)
Inter Press Service
Interafrican Union for Human Rights
Interamerican Concertation of Women's Human Rights
Activists (CIMA)
Interights
Intermedia
International Alert
International Association for Religious Freedom
International Association of Democratic Lawyers
International Association of Lawyers against Nuclear Arms
(IALANA)
International Bar Association
International Centre for Criminal Law Reform and Criminal
Justice Policy
International Centre for Human Rights and Democratic
Development
International Commission of Jurists
International Commission of Jurists, Kenya
International Commission of Jurists, Portugal
International Court of the Environment
International Criminal Defence Attorneys Association
International Federation of Women Lawyers, Enugu Branch
International Helsinki Federation for Human Rights
International Human Rights Law Group
International Informatization Academy
International Islamic Federation of Student Organizations
International Law Association Committee on a Permanent ICC
International League for Human Rights
International Peace Bureau
International Right to Life Federation
International Scientific and Professional Advisory Council of
the United Nations Crime Prevention and Criminal Justice
Programme
International Service for Human Rights
International Society for Human Rights
International Society for Human Rights, Gambia
International Society for Human Rights, Germany
International Society for Traumatic Stress Studies
International Travel Council
Istituto Superiore Internazionale di Scienze Criminali
Japan Federation of Bar Associations
Juristes sans frontières
Lama Gangchen World Peace Foundation
Law Projects Center
Law Society of Kenya
Lawyers Committee for Human Rights
Lawyers Committee on Nuclear Policy
Lebanese Union for Child Welfare
Legal Aid for Women and Environmental Development
Legal and Human Rights Centre
Legal Assistance Centre
Legal Research and Resource Development Centre
Legal Resources Centre
Leo Kuper Foundation
Liberal International
Liga Argentina por los Derechos del Hombre
Ligue camerounaise des droits de la personne
Ligue rwandaise pour la promotion et la défense des droits de
l'homme

E. Documents of the Plenary

Ligue tchadienne des droits de l'homme
Lutheran World Federation
Mara Institute of Technology
Médecins du monde
Médecins sans frontières
Minnesota Advocates for Human Rights
Movimento Nacional de Direitos Humanos
Movimiento por la Paz, el Desarme y la Libertad
MOVIMONDO
National Institute for Public Interest Law and Research
National Society for Human Rights
Netherlands Institute of Human Rights
Network of NGOs of Trinidad and Tobago
No Peace Without Justice
Norwegian Helsinki Committee
Nuclear Age Peace Foundation
Observatoire international des prisons, section du Cameroun
Observatorio para la Paz
Oficina de Tutela Legal del Arzobispo de San Salvador
Oficina Internacional de Derechos Humanos Acción Colombia
One World Trust
Open Society Fund
OXFAM (United Kingdom and Ireland)
Pace Peace Center
Pan-African Reconciliation Council
Parliamentarians for Global Action
Pax Christi International
Plural - Centro de Estudios Constitucionales
Presbyterian Church, USA
Pubudu Community Organisation
Real Women of Canada
Redress
Refugee Women's Network
Rencontre africaine pour la défense des droits de l'homme
(RADDHO)
Réseau africain pour le développement intègre
Royal Commonwealth Society
Salvation Army
Save the Children Fund
Servicio Pax y Justicia del Ecuador (SERPAJ)
Society for the Advancement of Women
South Asia Human Rights Documentation Centre
Sri Lanka Women's NGO Forum
Students against Genocide
Tamilandu United Nations Association
Tanzania Human Rights Education Trust (TAHURET)
Terre des Hommes Foundation
Terre des Hommes, Germany
Transnational Radical Party
Uganda Young Lawyers Association
Union internationale des avocats
Unión Nacional de Juristas de Cuba
Unitarian Universalist Association
United Nations Association, USA
Vietnam Veterans of America Foundation
Volunteers for Prison Inmates
War and Peace Foundation
Washington Working Group on the ICC/World Federalist
Association
Women and Media Collective
Woman and Men Engaged in Advocacy, Research and
Education (WEARE) for Human
Rights
Women, Law and Development Centre
Women's Caucus for Gender Justice and the ICC/MADRE
Women's Centre for Peace and Development
Women's Consortium of Nigeria (WOCON)
Women's Information Consultative Center
Women's International League for Peace and Freedom
(WILPF)
Women's League of Lithuania
World Conference on Religion and Peace
World Council of Churches Commission of Churches on
International Affairs
World Federalist Association
World Federalist Movement/IGP
World Muslim Congress
World Society of Victimology
Youth Approach for Development and Cooperation
Zimbabwe Women's Resource Centre and Network
ZIMRIGHTS (Zimbabwe HumanRights Association)

F. Documents of the Committee of the Whole¹

1. Preamble

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.54/REV.2

Coordinator's rolling text regarding the preamble and part 13

[Original: English]
[10 July 1998]

As at 7.00 p.m., Friday, 10 July 1998, still subject to further consultations.

PREAMBLE

[The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are woven together in a shared heritage, a delicate tapestry that may at any time be rent asunder by unimaginable atrocities threatening the peace, security and well-being of our world,

Mindful that during this past century millions of children, women and men have been victims of grave crimes that deeply shock the conscience of humanity,

Affirming that serious crimes of concern to the international community as a whole must not go unpunished, and to that end their effective prosecution must be ensured both by measures taken at the national level and by enhancing international cooperation,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to [and would have no bearing on] national criminal jurisdictions,

Recalling that it is the duty of every State to exercise its criminal jurisdiction against those responsible for international crimes,

Determined to put an end to impunity and thus to contribute to the prevention of such crimes,

Reaffirming the purposes and principles of the Charter of the United Nations,

Determined, to these ends and for the sake of present and future generations, to establish a permanent International Criminal Court in relation[ship] with the United Nations

system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:]

PART 13. FINAL CLAUSES

Article 108 *Settlement of disputes*

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to resolve the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 109 *Reservations*

Option 1

No reservations may be made to this Statute.

Option 2

1. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

alternatively

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a State, the Court shall be competent to decide the admissibility of such reservations.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

¹ A limited number of delegations submitted documents to the plenary with respect to the draft Statute. These documents are reproduced in section F.

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.²

Option 4

No article on reservations.

*Article 110
Amendments*

1. After the expiration of [5] [10] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the [Secretary-General of the United Nations], who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple [two-thirds] majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a [two-thirds] [three-fourths] [five-sixths] [seven-eighths] majority of [all States Parties] [those present and voting, representing an absolute majority of all States Parties].

4. Except as provided in paragraph 5, an amendment shall enter into force for [all] States Parties one year after instruments of ratification or acceptance have been deposited with the [Secretary-General of the United Nations] by [five-sixths] [seven-eighths] of them [, including at least ..³ States Parties].

[5. Any amendment to article 5 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [five-sixths] [seven-eighths] of them]].

6. If an amendment has been accepted by [five-sixths] [seven-eighths] of States Parties in accordance with paragraphs 4 or 5, any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect, notwithstanding article 115, paragraph 1, but subject to article 115, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. [The Secretary-General of the United Nations] shall circulate any amendment adopted at a meeting of the Assembly of States Parties or a Review Conference to all States Parties.

*Article 110 bis
Amendments to provisions of an institutional nature*

1. Amendments to provisions of the Statute which are of an exclusively institutional nature, namely, article 36, article 37 [excluding paragraphs 1 and 2, or 3 to 7, or 1 to 7], article 38, [article 39, paragraph 3, article 40, article 43, paragraphs 2 to 4, 8 and 9, article 44, paragraphs 1 to 3, article 45], article 50 and [article 72] may be proposed [at any time] [after the Statute has been in force for ...], notwithstanding article 110, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the [Secretary-General of the United Nations] who shall promptly circulate it to all States Parties.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a [two-thirds] [three-fourths] majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

*Article 111
Review of the Statute*

1. [Five] [Ten] years after the entry into force of this Statute the [Secretary-General of the United Nations] shall convene a Review Conference to consider any amendments to this Statute. Such review may include but is not limited to the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the [Secretary-General of the United Nations] shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 110, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment of the Statute considered at a Review Conference.

*Article 112
Signature, ratification, acceptance, approval or accession*

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on [17 July 1998]. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until [17 October 1998]. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

² This paragraph may be redundant in that it restates existing law.

³ Same number as in article 114.

F. Documents of the Committee of the Whole

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts which would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the first day of the month after the 60th day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the [Secretary-General of the United Nations].

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Nor shall the withdrawal affect any cooperation with the Court in connection with criminal investigations and proceedings [in relation to which the withdrawing State had a duty to cooperate] prior to the date at which the withdrawal became effective; nor shall it prejudice in

any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal became effective.

Article 116

Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.61

[incorporating document A/CONF.183/C.1/L.61/Corr.1 of 14 July 1998]

Recommendations of the Coordinator regarding the preamble and part 13

[Original: English]
[11 July 1998]

1. At its 20th meeting, on 30 June 1998, the Committee of the Whole entrusted Mr. Tuiloma Neroni Slade (Samoa) with the task of coordinating informal consultations on the text for the preamble to the Statute and part 13 on final clauses.

2. As a result of the informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text:

PREAMBLE

[The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are woven together in a shared heritage, a delicate tapestry that may at any time be rent asunder by unimaginable atrocities threatening the peace, security and well-being of our world,

Mindful that during this past century millions of children, women and men have been victims of grave crimes that deeply shock the conscience of humanity,

Affirming that serious crimes of concern to the international community as a whole must not go unpunished, and to that end their effective prosecution must be ensured both by measures taken at the national level and by enhancing international cooperation,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to [and would have no bearing on] national criminal jurisdictions,

Recalling that it is the duty of every State to exercise its criminal jurisdiction against those responsible for international crimes,

Determined to put an end to impunity and thus to contribute to the prevention of such crimes,

Reaffirming the purposes and principles of the Charter of the United Nations,

Determined, to these ends and for the sake of present and future generations, to establish a permanent International Criminal Court in relation[ship] with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:]

PART 13. FINAL CLAUSES

Article 108 *Settlement of disputes*

Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to resolve the dispute or make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 109 *Reservations*

Option 1

No reservations may be made to this Statute.

Option 2

1. Any State may at the time of signature, ratification, acceptance, approval or accession make reservations in respect of the following ...

alternatively

1. No reservations to this Statute shall be permitted unless expressly provided for in specific articles of the Statute.

2. In the event of a dispute or legal question arising in connection with the admissibility of reservations made by a

State, the Court shall be competent to decide the admissibility of such reservations.

Option 3

1. At the time of signature, ratification, acceptance, approval or accession, any State may make reservations to articles of this Statute except [those in Parts ...] [articles ...].

2. A State which has made reservations may at any time by notification in writing to the Secretary-General of the United Nations withdraw all or part of its reservation.²

Option 4

No article on reservations.

Article 110 *Amendments*

1. After the expiration of [5] [10] years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties, who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple [two-thirds] majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a [two-thirds] [three-fourths] [five-sixths] [seven-eighths] majority of [all States Parties] [those present and voting, representing an absolute majority of all States Parties].

4. Except as provided in paragraph 5, an amendment shall enter into force for [all] States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by [five-sixths] [seven-eighths] of them [, including at least ...³ States Parties].

[5. Any amendment to article 5 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance [, unless the Assembly or the Conference has decided that the amendment shall come into force for all States Parties once it has been accepted by [five-sixths] [seven-eighths] of them]].

6. If an amendment has been accepted by [five-sixths] [seven-eighths] of States Parties in accordance with paragraph 4 or 5, any State Party which has not accepted the amendment

may withdraw from the Statute with immediate effect, notwithstanding article 115, paragraph 1, but subject to article 115, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate any amendment adopted at a meeting of the Assembly of States Parties or a Review Conference to all States Parties.

Article 110 bis

Amendments to provisions of an institutional nature

1. Amendments to provisions of the Statute which are of an exclusively institutional nature, namely, article 36, article 37, paragraphs 8 and 9, article 38, article 39, paragraphs 1 [first two sentences⁴], 2 and 4, article 40, article 43, paragraphs 4 to 9, article 44, paragraphs 2 and 3, article 45, article 47, article 48 and article 50 may be proposed [at any time] [after the Statute has been in force for ...], notwithstanding article 110, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a [two-thirds] [three-fourths] majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 111

Review of the Statute

1. [Five] [Ten] years after the entry into force of this Statute the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties shall convene a Review Conference to consider any amendments to this Statute. Such review may include but is not limited to the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations or such other person designated by the Assembly shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 110, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment of the Statute considered at a Review Conference.

Article 112

Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

[Article 113

Early activation of principles and rules of the Statute

Pending the entry into force of the Statute, States that have signed the Statute shall, in accordance with applicable principles of international law, refrain from acts which would defeat the object and purpose of the Statute. To this end, in ensuring the international prosecution and suppression of crimes of international concern, States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court.]

Article 114

Entry into force

1. This Statute shall enter into force [following the completion of the Rules of Procedure and Evidence] on the first day of the month after the 60th day following the date of the deposit of the [...] instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Statute after the deposit of the [...] instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 115

Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the

⁴ It is recommended that the Drafting Committee break paragraph 1 of article 39 into two paragraphs, the first paragraph to contain the first two sentences and the second paragraph the rest of paragraph 1.

date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged by reason of its withdrawal from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Nor shall the withdrawal affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date at which the withdrawal became effective; nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal became effective.

Article 116
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998

DOCUMENT A/CONF.183/C.1/L.73

**Recommendations of the Coordinator regarding
the preamble**

[Original: English]
[14 July 1998]

As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text for the preamble.

“PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, and that their cultures are pieced together in a shared heritage, a delicate mosaic that may at any time be pulled apart by unimaginable atrocities threatening the peace, security and well-being of our world,

Mindful that during this past century millions of children, women and men have been victims of grave crimes that deeply shock the conscience of humanity,

Affirming that serious crimes of concern to the international community as a whole must not go unpunished, and to that end their effective prosecution must be ensured both

by measures taken at the national level and by enhancing international cooperation,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Recalling that it is the duty of every State to exercise its criminal jurisdiction against those responsible for international crimes,

Determined to put an end to impunity and thus to contribute to the prevention of such crimes,

Reaffirming the purposes and principles of the Charter of the United Nations,

Determined, to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:”

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.22

Spain: proposal regarding the preamble

[Original: Spanish]
[26 June 1998]

Word the preamble as follows:

“The States Parties to this Statute,

Conscious that during this century millions of persons have been victims of grave crimes affecting the international community as a whole,

Recognizing that the prevention and suppression of such crimes requires more effective international cooperation, and wishing therefore to promote and enhance international cooperation in the prosecution and punishment of crimes of international concern,

Determined, to that end, to establish a permanent International Criminal Court within the United Nations system, with jurisdiction over the most serious crimes affecting the international community as a whole,

Considering that the International Criminal Court will be complementary to national criminal justice systems.

Taking into account the purposes and principles of the Charter of the United Nations, in particular those relating to the

maintenance of international peace and security and to respect for universal human rights,

Mindful that this Statute should not be interpreted as affecting in any way the scope of the provisions of the Charter relating to the functions and the powers of the organs of the United Nations,

Affirming that the relevant norms of general international law will continue to govern those questions not expressly regulated in this Statute,

Have agreed as follows:"

DOCUMENT A/CONF.183/C.1/L.32

Andorra: proposal regarding the preamble

[Original: English]
[30 June 1998]

NOTE. The present text could constitute the beginning of the preamble to the Statute, *before* any of the current proposals, and would give a possible appropriate tone and framework to the document. Indeed the establishment of the International Criminal Court is a moment of unprecedented historical significance which merits the inclusion of some kind of inspiring yet focused language in the preamble, around a basic statement of purpose, in a style similar to the one we find, to take one example, at the beginning of the Charter of the United Nations. This would also facilitate the dissemination of the Statute and its goals among the peoples of the world.

We propose that the beginning of the preamble, before any of the current proposals, be worded as follows:

"The States Parties to this Statute,

"Convinced that all peoples are united by a common bond, and that our cultures are woven together in a shared history, a delicate tapestry that may at any moment be rent and torn asunder by unspeakable acts of brutality and ignorance that threaten the well-being of our world,

"We, at the turning of the new millennium, as an act of political will, renounce for all further generations those stains on the human spirit that have haunted us for centuries, and ..."

DOCUMENT A/CONF.183/C.1/L.52

Dominican Republic: proposal regarding the preamble

[Original: English]
[8 July 1998]

Word the preamble as follows:

"The States Parties to this Statute,

Considering that the century now ending will have witnessed crimes the extreme gravity and extent of which deeply affect the conscience of humankind,

Convinced that, for the sake of future generations, it is necessary to put an end to the impunity with which such acts are committed and to prevent such attacks on dignity and life,

Emphasizing that each State still has the duty to exercise its penal jurisdiction over individuals responsible for crimes of international significance,

Determined to remain united in the effort to punish such violations of the universally accepted principles of international law,

Resolved, at the dawn of the third millennium, to guarantee the lasting enforcement of and respect for justice,

Noting that no permanent international criminal court currently exists,

Being prepared to strengthen the United Nations system harmoniously with a permanent international criminal court which, complementary to national jurisdictions, will have jurisdiction over those crimes which are of concern to international society as a whole,

Insisting on the fact that the advent of justice is an indispensable prerequisite for the attainment of peace,

Have agreed as follows:"

2. Part 1. Establishment of the Court

Notes contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 1 and 3 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 19 June 1998⁵

Article 1
The Court

NOTE

Article 1 is transmitted to the Drafting Committee on the understanding that: (a) the term "persons" must be considered following the conclusion of the consideration of part 3 on "General principles of criminal law"; and (b) the phrase "bring persons to justice" must be aligned in all language versions.

⁵ The transmittal letter containing the notes was reproduced in document A/CONF.183/DC/R.2. In normal practice, restricted documents are not published in the Official Records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Article 3
Seat of the Court

NOTE

Article 3, paragraph 3, is transmitted to the Drafting Committee on the understanding that: (a) the term “special agreement” means an agreement between the Court and the State concerned; and (b) the Drafting Committee should consider the question of the placement of this paragraph.

3. Part 2. Jurisdiction, admissibility and applicable law

(a) Documents submitted by the Bureau

(i) Discussion paper

DOCUMENT A/CONF.183/C.1/L.53

Bureau: discussion paper regarding part 2

[Original: English]
[6 July 1998]

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) *Option 1*

The crime of aggression;

Option 2

No such provision;

- (e) *Option 1*

Treaty crimes (**terrorism, drug trafficking, crimes against United Nations and associated personnel**);

Option 2

No such provision.

Genocide

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

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) **Further discussion needed;**
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;

- (i bis) The crime of apartheid;

(j) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Other proposals have been made on the topics of terrorism and economic embargoes, and further discussion may be required.

2. For the purpose of paragraph 1:

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

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

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

F. Documents of the Committee of the Whole

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

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

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

(d bis) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1 above, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

War crimes

Option 1

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

Option 2

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

Option 3

No such provision.

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

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

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering, or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(a bis) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(b) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

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

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

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

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

(g) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable

purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

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

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) *Option 1*

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

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

Option 2

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

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

Option 3

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

(p) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(p bis) **(drafting subject to further discussion)**

(q) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(r bis) **(on United Nations personnel) (drafting subject to further discussion)**

(s) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t) (definition still under discussion)

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

Option 1

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) Taking of hostages;

(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Option 2

No section C.

Option 1

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(b bis) (on United Nations personnel) (drafting subject to further discussion)

(c) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments, hospitals and places where the

sick and wounded are collected, provided they are not military objectives;

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

(e) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(e bis) (definition still under discussion)

(f) (definition still under discussion)

(g) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) Killing or wounding treacherously a combatant adversary;

(i) Declaring that no quarter will be given;

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

(k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(l) (subject to further discussion).

Option 2

No section D.

Article Y

Drafting subject to further discussion.

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

Aggression

Option 1

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

(a) initiating, or

(b) carrying out

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

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

- (a) planning,
- (b) preparing, or
- (c) ordering

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

Option 2

No such provision.

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

Treaty crimes

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

Article 6

Exercise of jurisdiction

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

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

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

Option 1

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

Option 2

No subparagraph (c).

Article 7

Acceptance of jurisdiction

Paragraph 1 governs preconditions to the exercise of jurisdiction (the need for acceptance by States).

NB: If the Statute were to provide for automatic jurisdiction for some crimes but an “opt-in” or “State-consent” regime for other crimes, then consequential amendments to paragraph 1 would be required, and the placement of the following provisions would be reconsidered.

1. *Option 1*

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

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

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

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

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

Option 2

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

Option 3

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the following States are Parties to the Statute or have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 ter:

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

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

Option 4

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

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

Automatic jurisdiction

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

Article 7 bis

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

1. A State Party to this Statute may:

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

(b) At a later time, by declaration lodged with the Registrar,

accept the jurisdiction of the Court with respect to such of the crimes of ... referred to in article 5 as it specifies in the declaration.

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

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

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

Article 7 ter

Acceptance by non-States Parties

If the acceptance of a State that is not a Party to this Statute is required under article 7, paragraph 1, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

Article 8

Temporal jurisdiction and non-retroactivity

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

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

2. If the law as it appeared at the commission of the crimes is changed prior to final judgement in the case, the law more favourable to the accused shall be applied.

Article 8 combines current articles 8 and 22; placement could be considered.

Article 9

(Deleted)

Article 10

Role of the Security Council

Aggression

1. *Option 1*

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

Option 2

No such provision.

Deferral

2. *Option 1*

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

Option 2

(A revised version of option 1)

Option 3

No such provision.

Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

3. *Option 1*

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

Option 2

No paragraph 3.

Article 12
Prosecutor

Option 1

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on alleged crimes within the jurisdiction of the Court obtained from States, organs of the United Nations, international intergovernmental and non-governmental organizations, victims, associations on their behalf, or any other reliable source.

2. Upon receipt of information relating to the commission of a crime within the jurisdiction of the Court, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, international intergovernmental or non-governmental organizations, victims or their representatives or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction of the case pursuant to article 17.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 to 3, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.

Option 2

No such article.

Article 13

Information submitted to the Prosecutor

(Deleted)

Article 14

Duty of the Court as to jurisdiction

(Further consultations)

Article 15

Issues of admissibility

1. Having regard to the third paragraph 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;

F. Documents of the Committee of the Whole

(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 18, 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 whether one or more of the following exist, as applicable:

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

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

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

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

Article 16

Option 1

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by notification to all States Parties and any non-States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis where necessary to protect persons or prevent destruction of evidence.

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

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

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

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

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

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17.

(Subject to further discussion, including with respect to article 17)

Option 2

No such article.

Article 17

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

(Further consultations)

Article 18

Ne bis in idem

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

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

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

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

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

Article 19

(Deleted)

Article 20
Applicable law

1. The Court shall apply:

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

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

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

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

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

(ii) Proposal

DOCUMENT A/CONF.183/C.1/L.59

[*incorporating document A/CONF.183/C.1/L.59/Corr.1 of 11 July 1998*]

Bureau: proposal regarding part 2

[*Original: English*]
[*10 July 1998*]

This proposal is not final, as it contains some options and certain provisions require further drafting. It will be adjusted in the light of discussions which follow.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

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

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes.

The crime of aggression and one or more of the treaty crimes (terrorism, drug trafficking and crimes against United Nations personnel) may be inserted in the draft Statute if generally accepted provisions are developed by interested delegations by the end of Monday, 13 July. If this is not possible, the Bureau will propose that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference.

Article 5 bis
Genocide

For the purpose of the present Statute, the crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 5 ter
Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) **(Crimes of sexual violence) Drafting requires further discussion;**

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(i bis) The crime of apartheid;

(j) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Other proposals have been made on the topics of terrorism and economic embargoes, and further discussion may be required.

2. For the purpose of paragraph 1:

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

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

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

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

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

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

(d bis) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1 above, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

*Article 5 quater
War crimes*

Option 1

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

Option 2

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

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

A. Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) Wilful killing;

(b) Torture or inhuman treatment, including biological experiments;

(c) Wilfully causing great suffering, or serious injury to body or health;

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(f) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

F. Documents of the Committee of the Whole

(g) Unlawful deportation or transfer or unlawful confinement;

(h) Taking of hostages.

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(a bis) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(a ter) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict; **(former r bis)**

(b) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

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

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

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

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

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

(h) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned

nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons;

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

(j) Declaring that no quarter will be given;

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

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

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

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

(o) Employing the following weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of international humanitarian law:

(i) Poison or poisoned weapons;

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

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

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

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

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

(p) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(p bis) **(Crimes of sexual violence) (Drafting requires further discussion);**

(q) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(r) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(s) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(t) Conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities;

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

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(c) Taking of hostages;

(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

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

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(b bis) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

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

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

(e) **(Deleted) (Covered in section C)**

(e bis) **(Crimes of sexual violence) (Drafting requires further discussion);**

(f) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(g) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(h) Killing or wounding treacherously a combatant adversary;

(i) Declaring that no quarter will be given;

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

(k) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Nothing in sections C and D shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all means consistent with international law.

Article xx
Elements of crimes

1. Elements of crimes shall be formulated, interpreted and applied in a manner consistent with the terms of articles 5 bis, 5 ter, 5 quater and 21, paragraph 2.
2. Elements of crimes shall be adopted by the Assembly of States Parties⁶ in accordance with its Rules of Procedure, and shall be an annex to this Statute.
3. Elements of crimes may be amended in accordance with ...⁷
4. Elements of crimes shall be adopted before the Prosecutor commences an investigation.

Article Y

Nothing in this part of the present Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 6
Exercise of jurisdiction

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

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12. **(Drafting of this provision may be changed if option 2 in article 12 is adopted.)**

Article 7
Preconditions to the exercise of jurisdiction

Preconditions for genocide

1. In the case of article 6 (a) or (c), the Court may exercise its jurisdiction with respect to the crime of genocide if one or more of the following States have accepted jurisdiction in accordance with article 7 bis or ter:

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

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

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

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

Preconditions for crimes against humanity and war crimes

2. *Option 1*

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

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

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

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

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

Option 2

Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation, the Court shall have jurisdiction with respect to a crime referred to in articles 5 ter and 5 quater provided that the following States have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 bis or ter:

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

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

Option 3

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

⁶ Elements of crimes shall be formulated by the Preparatory Commission in accordance with a mandate to be included in the Final Act.

⁷ Awaiting the outcome of discussions on article 110, and in particular the paragraph on amendments to article 5.

Article 7 bis
Acceptance of jurisdiction

Option I

Automatic jurisdiction over all three core crimes

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in articles 5 bis, 5 ter and 5 quater.

Option II

Automatic jurisdiction for genocide and opt-in for crimes against humanity and war crimes

1. A State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crime of genocide.

2. With regard to the crimes referred to in articles 5 ter and 5 quater, a State Party to this Statute may:

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

(b) At a later time, by declaration lodged with the Registrar,

accept the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

3. A declaration may be of general application, or may be limited to one or more of the crimes referred to in articles 5 ter and 5 quater.

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

5. A declaration may not contain limitations other than those mentioned in paragraphs 2 to 4.

Article 7 ter

Acceptance by non-States Parties

If the acceptance of a State that is not a Party to this Statute is required under article 7, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with part 9 of this Statute.

Article 8
Temporal jurisdiction and non-retroactivity

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

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

2. If the law as it appeared at the commission of the crimes is changed prior to final judgement in the case, the law more favourable to the accused shall be applied.

Article 8 combines current articles 8 and 22; placement could be considered.

Article 9

(Deleted)

Article 10

Role of the Security Council

Option 1

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

NB: The question of the need for preservation of evidence requires further discussion.

Option 2

In the event that the Court is requested by the Security Council, acting by resolution adopted under Chapter VII of the Charter of the United Nations, to suspend its investigation or prosecution of a situation for a specified period of time, then the Court shall suspend such activity for such a period of time; that request may be renewed by the Security Council under the same conditions.

Option 3

No such provision.

Article 11

Referral of a situation by a State

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the complainant State.

Article 12
Prosecutor

Option 1

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on alleged crimes within the jurisdiction of the Court obtained from States, organs of the United Nations, international intergovernmental and non-governmental organizations, victims, associations on their behalf, or any other reliable source.

2. Upon receipt of information relating to the commission of a crime within the jurisdiction of the Court, the Prosecutor shall analyse the seriousness of the information. For this purpose, he or she may seek additional information from States, organs of the United Nations, international intergovernmental or non-governmental organizations, victims or their representatives or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, having regard to article 15, it shall authorize the commencement of the investigation. This shall be without prejudice to subsequent determinations by the Court as to the jurisdiction of the case pursuant to article 17.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence pertaining to the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 to 3, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.

Option 2

A provision for additional safeguards before the Prosecutor can act.

Article 13
Information submitted to the Prosecutor

(Deleted)

Article 14
Duty of the Court as to jurisdiction

(Further consultations)

Article 15
Issues of admissibility

1. Having regard to the third paragraph 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 article 18, 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 whether one or more of the following exist, as applicable:

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

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

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

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

Article 16

Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 6 (a) or the Prosecutor initiates an investigation pursuant to article 6 (c) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, the Prosecutor shall notify all States Parties and, where applicable, any non-States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of the receipt of such notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts that may constitute offences described in article 5 and that relate to the information provided in the notification to States. The Prosecutor may proceed with the investigation until such time as a State informs the Prosecutor of that State's investigation. At the request of a State which has been notified by the Prosecutor, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor seeks a ruling of the Pre-Trial Chamber and a determination is made pursuant to article 15. In the case of a State that has jurisdiction and was not notified by the Prosecutor or if the State was notified but failed to inform the Prosecutor of its investigation within one month of the notification, the Prosecutor may defer to the State's investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation, in which case the Prosecutor shall seek a ruling of the Pre-Trial Chamber and a determination is made pursuant to article 15.

4. A ruling of the Pre-Trial Chamber pursuant to paragraphs 2 and 3 may be appealed to the Appeals Chamber by the State concerned or by the Prosecutor. At the request of either party, such appeal shall be heard on an expedited basis. The Appeals Chamber may authorize the Prosecutor to proceed with an investigation while the appeal is pending.

5. When the Prosecutor has deferred an investigation pursuant to paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay. Where States fail to provide information on the progress of its investigations and any subsequent prosecutions, the Prosecutor may seek a ruling of the Pre-Trial Chamber pursuant to article 15.

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

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17 based on significant additional facts or change of circumstances.

Article 17

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

(Further discussion needed)

Article 18

Ne bis in idem

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

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

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

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

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

Article 19

(Deleted)

Article 20

Applicable law

Drafting subject to further discussion in the Working Group.

(b) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.60/REV.1

Coordinator's working paper on article 17

[Original: English]

[14 July 1998]

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

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it.⁸ The Court may, on its own motion, determine the admissibility of a case pursuant to article 15.

2. Challenges to the admissibility of the case, on the grounds referred to in article 15, or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State⁹ which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

[(c) A State from which consent is required under article 7 bis.]¹⁰

The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those having referred a situation under article 6, as well as victims, may also submit observations to the Court.

3.¹¹ The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. However, in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.

⁸ Some delegates held the view that the issue achieved in this sentence should be dealt with in a separate article 14.

⁹ A number of delegations accepted subparagraph (b) with the proviso that a State non-Party which challenged the admissibility of a case under article 17 should assume the obligations of a State Party in accordance with the provisions of articles 15 and 16 and of part 9.

¹⁰ The final wording of subparagraphs (b) and (c) will depend upon the content of articles 7 bis and 15.

¹¹ It was suggested that if several States have jurisdiction over a case and one of those States has already challenged the jurisdiction of the Court, the remaining States should not bring additional challenges except on different grounds.

Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court may be based only on article 15, paragraph 1 (c).¹²

4. A State referred to in paragraphs 2 (b) and (c) of this article shall make a challenge at the earliest opportunity.

5. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber, under article 81.

6. If a challenge is made by a State pursuant to paragraphs 2 (b) and (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 15.

7. Pending a ruling by the Court, the Prosecutor may seek authority from the Court to:

(a) Pursue necessary investigative steps of the kind referred to in article 16, paragraph 6;

(b) Take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) Prevent, in cooperation with the relevant State(s), the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

The making of a challenge shall not affect the validity of any act performed by the Prosecutor, or any order or warrant issued by the Court, prior to the making of the challenge.

8. If the Court has decided that a case is inadmissible under article 15, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 15.

9. In the event that the Prosecutor, having regard to the matters referred to in article 15, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. Such information shall, at the request of the State concerned, be confidential.

If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State in respect of whose proceedings deferral has taken place.¹³

¹² The final wording of this subparagraph will depend on the content of article 15.

¹³ This provision reflects the text of article 56.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.44

[incorporating document A/CONF.183/C.1/L.44/Corr.1 of 7 July 1998]

Recommendations of the Coordinator regarding article 5

[Original: English]
[7 July 1998]

Article 5

Crimes within the jurisdiction of the Court

1. At its 3rd and 4th meetings, on 17 June 1998, the Committee of the whole considered article 5 entitled "Crimes within the jurisdiction of the Court". The Committee entrusted Mr. Waleed Sadi (Jordan) with the task of coordinating informal consultations on the text of the definition of "Crimes against humanity".

2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text:

Crimes against humanity

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

- (a) Murder;
- (b) Extermination;
- (c) Enslavement
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape or other violent sexual acts, or enforced prostitution [, or enforced pregnancy];¹⁴
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender¹⁵ or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (i bis) The crime of apartheid;

(j) Other inhumane acts of a similar character intentionally¹⁶ causing great suffering, or serious injury to body or to mental or physical health.¹⁷

[(j bis) Act of terrorism.]¹⁸

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts¹⁹ referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of²⁰ a State or organizational policy to commit such attack;

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

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

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

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

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

(d bis) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1 above, committed in the context of an

¹⁴ The formulation of this subparagraph should be reconsidered in the light of the relevant discussions in the context of the definition of war crimes.

¹⁵ "Gender" refers to male or female.

¹⁶ The need for the reference to intention requires further discussion in the light of part 3 entitled "General principles of criminal law".

¹⁷ An additional proposal on this subject is contained in document A/CONF.183/C.1/L.17.

¹⁸ Several delegations supported this proposal while others did not. There was no consensus on this matter.

¹⁹ One delegation expressed reservations with regard to the expression "multiple commission of acts".

²⁰ Some delegations favoured the insertion of the term "knowingly" before the expression "in furtherance of".

institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

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

[(f) "Act of terrorism" means:

- (i) An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime;
- (ii) This crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.]

(c) Documents of the Working Group on Applicable Law

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGAL/L.1²¹
Working paper on article 20

[Original: English]
 [8 July 1998]

Applicable law

1. The Court shall apply:

²¹ This document was initially circulated as a document of the Working Group on General Principles of Criminal Law on 4 July 1998 under the symbol A/CONF.183/C.1/WGGP/L.11, before the establishment of the Working Group on Applicable Law.

(a) In the first place, this Statute and its Rules of Procedure and Evidence,²²

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

(c)

Option 1²³

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

Option 2²³

Failing that, and only insofar as it is consistent with the objectives and purpose of this Statute:

- (i) The national law of the State where the crime was committed or, if the crime was committed in the territories of more than one State, the national law of the State where the substantial part of the crime was committed;
- (ii) If the laws of the State or States mentioned in subparagraph (i) do not exist, the national law of the State of nationality of the accused or, if the accused does not have a nationality, the national law of the State of his or her permanent residence; or
- (iii) If the laws of the States mentioned in subparagraphs (i) and (ii) do not exist, the national law of the State which has custody of the accused.

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights,²⁴ which include the prohibition on any adverse distinction founded on gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status, or on any other similar criteria.

²² Subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not.

²³ Most delegations favoured option 1, but some still favour option 2. A view was expressed that the laws indicated in option 2 could be given as examples of the national laws referred to in option 1, so that the two options could be combined.

²⁴ Some delegations were of the view that this paragraph should end after the words "human rights".

DOCUMENT A/CONF.183/C.1/WGAL/L.3

Working paper on article 20, paragraph 3

[Original: English]
[13 July 1998]

Applicable Law

Possible presidential statement to be included in the official records of the Conference:

It was understood that the term "gender" is to be interpreted in this Statute in the same manner as set out in annex IV, paragraphs 2 and 3, of the 1995 Beijing Declaration and Platform for Action:

"2. Having considered the issue thoroughly, the contact group noted that: (1) the word 'gender' had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences; (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action.

"3. Accordingly the contact group reaffirmed that the word 'gender' as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage ...".

(ii) **Recommendations/Report**

DOCUMENT A/CONF.183/C.1/WGAL/L.2

[incorporating documents A/CONF.183/C.1/WGAL/L.2/Add.1 and Add.1/Corr.1 of 14 July 1998]

Report of the Working Group on Applicable Law

[Original: English]
[11 July 1998]

I. Introduction

1. At its 26th meeting, on 8 July 1998, the Committee of the Whole decided to refer to the Working Group on Applicable Law, under the chairmanship of Mr. Per Saland (Sweden), article 20 (Applicable law).

2. The Working Group held two meetings, on 10 and 11 July 1998, to consider article 20 of part 2. The Working Group herewith transmits provisions of that article to the Committee of the Whole for its consideration.

3. The Working Group held one additional meeting, on 14 July 1998, to consider article 20 of part 2. The Working Group herewith transmits the following articles to the Committee of the Whole for its consideration: the addition to the definition of persecution under crimes against humanity in article [5]; and article 20, paragraph 3.

4. The Working Group has thereby concluded its consideration of article 20.

II. Text of draft articles

Article 20
Applicable law

1. The Court shall apply:

(a) In the first place, this Statute and its Rules of Procedure and Evidence;²⁵

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law,²⁶ including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate,²⁷ the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.²⁸

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights,²⁹ and be without any adverse distinction founded on grounds such as gender, as defined in article [5 ter], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Article 5 ter

Insert the following language after the definition of "persecution" under crimes against humanity as paragraph 3 of article 5 ter:

"For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within

²⁵ Subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not. If a decision is taken to include elements of crimes, this will be reflected accordingly in paragraph 1 (a).

²⁶ It is understood that the term "international law" means public international law.

²⁷ Some delegations were of the view that the phrase "including, as appropriate" should be replaced by the word "especially".

²⁸ Some delegations express the view that, as a matter of principle, no reference to any national laws of States should be made. The Court ought to derive its principles from a general survey of legal systems and their respective national laws.

²⁹ Some delegations were of the view that this paragraph should end after the words "internationally recognized human rights".

the context of society. The term 'gender' does not indicate any meaning different from above."

NOTE

Whenever the word "gender" appears subsequently in the Statute, it shall be accompanied by the following words: "as defined in article [5 ter]."

(d) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 5, 22, X (former article 26) and 29 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 22 June 1998³⁰

NOTE

This document is reproduced under part 3.

Note regarding article 20 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 13 July 1998³¹

*Article 20
Applicable law*

NOTE

Understanding of the Committee of the Whole with respect to part 2:

The wording of article 20, paragraph 1 (a), is subject to a decision on whether the Rules of Procedure and Evidence should be an integral part of the Statute, as annexes or otherwise, or not. If a decision is taken to include elements of crimes, this will be reflected accordingly in that paragraph.

³⁰ The transmittal letter containing the notes was reproduced in document A/CONF.183/DC/R.8. In normal practice, restricted documents are not published in the official records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

³¹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.182. In normal practice, restricted documents are not published in the official records of a conference. However, these notes constitute part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Note regarding article 5 ter (definition of the term "gender" for the purpose of the Rome Statute) contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 15 July 1998³²

*Article [5 ter]
Crimes against humanity*

NOTE

Understanding of the Committee of the Whole:

Whenever the word "gender" appears subsequently in the Statute, it shall be accompanied by the following text: "as defined in article [5 ter]."

(e) Documents submitted by delegations

DOCUMENT A/CONF.183/INF/9

Information conveyed by New Zealand

*[Original: English]
[13 July 1998]*

INTERNATIONAL COMMITTEE OF THE RED CROSS: CONCERNS ON JURISDICTION OF THE COURT RELATING TO THE BUREAU PROPOSAL IN DOCUMENT A/CONF.183/C.1/L.59 AND CORR.1

It is essential that the International Criminal Court have automatic jurisdiction over war crimes and crimes against humanity, and not only over genocide. If it is to serve as an effective complement to national courts, the Court must be competent to try such cases as soon as a State becomes party to the treaty. By virtue of the principle of universal jurisdiction, every State has the right, and in many instances the duty, under international law to prosecute or extradite suspected war criminals. This principle reaffirms the fundamental rule that war criminals are not immune from prosecution, wherever they have committed their crimes and whatever their nationality. Any form of additional consent, such as an opt-in precondition for the exercise of the Court's jurisdiction, gives the impression that States can lawfully protect war criminals from prosecution. This would be a retrograde step for international law and would severely limit the Court's effectiveness.

³² The transmittal letter containing the note was not reproduced as a document owing to time constraints. In normal practice, letters that are not issued as documents are not published in the official records of a conference. However, this letter constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the letter are published as part of the Official Records of the Conference.

NOTE

Further details on the legal basis of this position are to be found in the International Committee of the Red Cross kit already distributed. More copies are available upon request.

DOCUMENT A/CONF.183/INF/10

Information conveyed by New Zealand

[Original: English]
[13 July 1998]

INTERNATIONAL COMMITTEE OF THE RED CROSS: STATEMENT
OF 8 JULY 1998 RELATING TO THE BUREAU DISCUSSION PAPER
IN DOCUMENT A/CONF.183/C.1/L.53

The comments of the International Committee of the Red Cross (ICRC) herein are limited to the part of article 5 dealing with war crimes and are given by ICRC in its capacity as an expert of international humanitarian law which has the task of ensuring that existing law is not weakened.

1. With regard to the possible threshold for war crimes, ICRC has already indicated that no such threshold exists in humanitarian law: every serious violation of the law is a war crime which States have the obligation to repress. Nevertheless, if there is a fear that the Court might be overloaded with cases, ICRC understands the wish of a number of nations to accept option 2 of the draft, on the understanding that isolated cases will be prosecuted at the national level.

2. On the list of war crimes in section B, we would like to raise several points:

Subparagraph (b): The addition of the words "clearly" and "overall" in this provision relating to proportionality in attacks must be understood as not changing existing law. The word "overall" could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word 'overall' is redundant;

Subparagraph (c): The purpose of this rule is to prohibit the bombardment of towns that are immediately open to occupation and it is hoped that the addition of the words "and which are not military objectives" does not change this customary rule;

Subparagraph (e): This rule should read "making improper use ...". As far as emblems are concerned, the notion of perfidy only relates to the misuse of those to which humanitarian law gives a special protection and which may not be attacked. Such protection is given to persons who are not, or are no longer taking part in hostilities. Humanitarian law gives no special protection to military uniforms, nor to United Nations uniforms when used by combatants. It is therefore inappropriate to use the word "perfidious" in this context;

Subparagraph (o): ICRC expressed its preference of option 3 as this accurately reflects existing international law. However, if a list is chosen, subparagraph (vi) becomes of extreme importance as it is essential that the use of other weapons prohibited by international law be added to the list. If option 1 is chosen, the chapeau must include the words "or which are inherently indiscriminate" which reflects a fundamental rule of humanitarian law, recently reaffirmed by the International Court of Justice, and which led to the prohibition of some of the weapons in this list.

3. War crimes committed in non-international armed conflicts

ICRC considers it essential that these be included in the Statute and urges States to consider carefully the actual acts that are criminal, without reference to which treaty these may appear in. In particular, whether certain States are party or not to Additional Protocol II can be of no importance to this list as it must include actions which are violations of customary law and which are generally recognized by the international community as prohibited heinous acts.

Several States have mentioned certain concerns, which can be met. First, with regard to the threshold, that is, which situations amount to armed conflicts and which fall below this threshold, this is relevant for the implementation of article 3 common to the Geneva Conventions, to which 188 States are party. It is generally understood that for a situation to be an armed conflict it needs to involve armed confrontation of a military nature between two or more armed groups. Acts such as riots and demonstrations do not amount to armed conflicts.

Secondly, a concern was indicated relating to the primary responsibility of the Government of a State to deal with these situations and with any violations of international humanitarian law. Of this there is no doubt: ICRC has stressed time and again the importance of complementarity between national jurisdictions and the International Criminal Court, so that the latter will only have a role to play if the former does not do so.

4. Article Y

This is of critical importance. It is essential that the Statute of the Court indicate that it in no way affects existing international humanitarian law nor impede its development. The

list of war crimes contained in the current draft Statute is incomplete owing to the necessity to attain an agreement in time. Mention may be made, for example, of the use of prohibited weapons, indiscriminate attacks, the starvation of civilians as a method of warfare and the 130-year' old prohibition of the use of bullets that explode in the human body (Declaration of St. Petersburg, 1868) in armed conflicts. The fact that a certain rule is not included under the jurisdiction of the Court can in no way mean that it does not reflect serious violations under international customary law.

5. Definitional elements of the crimes

If such a document is drafted, it is of imperative importance that it be done with extreme care. A great deal of existing law is to be found in detailed treaty provisions and in both international and national case law that interprets international humanitarian law provisions. Any inaccuracy could create the danger of such a document amounting to unintended international legislation rather than a reflection of existing law. The experience of ICRC in its Advisory Service work (which helps governments incorporate humanitarian law into their domestic legislation) is that national legal systems, concepts and vocabulary vary widely. Care should be taken, therefore, in this international document intended for the Court, to avoid approaching such elements from a primarily domestic law perspective but rather to concentrate on international law and practice.

DOCUMENT A/CONF.183/INF/11

Information conveyed by New Zealand

[Original: English]
[13 July 1998]

INTERNATIONAL COMMITTEE OF THE RED CROSS: CONCERNS
ON THRESHOLD FOR WAR CRIMES COMMITTED IN NON-
INTERNATIONAL ARMED CONFLICTS AS CONTAINED IN THE
BUREAU PROPOSAL IN DOCUMENT A/CONF.183/C.1/L.59 AND
CORR.1

Under section D of the Bureau proposal, a threshold has been added restricting the types of non-international armed conflicts the Court would be able to deal with. The International Committee of the Red Cross (ICRC) understands that the threshold that has been added stems from article 1 of Protocol II Additional to the 1949 Geneva Conventions. However, it is essential to stress that many of the crimes listed under section D find their legal basis under general international law, and are not only provided for in Protocol II.

Clear examples of this are: directing attacks against the civilian population; directing attacks at units, transports or personnel lawfully using the emblems of the Geneva Conventions; recruiting children into the armed forces or using children to participate actively in hostilities; forcing the displacement of the civilian population; perfidy and pillage.

This new requirement under section D means that only such conflicts involving armed forces of a State and dissident armed forces or other organized armed groups are covered, thus excluding dissident armed forces fighting against one another. In addition, these dissident armed forces or armed groups would have to:

- (a) Be under responsible command;
- (b) Exercise such control over a part of the territory of a State as to enable them to carry out sustained and concerted military operations; and
- (c) Be able to implement international humanitarian law.

The reality is that more and more States are confronted with non-international armed conflicts taking place on their territory involving a number of dissident armed groups fighting against one another, or armed groups fighting against the established Government which either does not control part of the territory or does not have a proper chain of command. These types of non-international armed conflicts must also fall under the jurisdiction of the Court.

A threshold such as that found in the Bureau proposal not only would represent a step back from existing law but would also be so restrictive that it would prevent the Court from dealing with the type of atrocities in conflicts which the world has witnessed over the past years.

DOCUMENT A/CONF.183/C.1/L.1

[incorporating document A/CONF.183/C.1/L.1/Corr.1 of 24 June 1998]

Spain: proposal regarding article 5

[Original: Spanish]
[17 June 1998]

Amend to read:

*“Article 5
Crimes within the jurisdiction of the Court*

“1. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of aggression, as defined in article 5 bis;
- (b) The crime of genocide, as defined in article 5 ter;
- (c) Crimes against humanity, as defined in article 5 quater;
- (d) War crimes, as defined in article 5 quinquies.

“2. The crimes within the jurisdiction of the Court are crimes under international law as such, whether or not they are punishable under national law.”

Article 5 bis
Crime of aggression

...

Article 5 ter
Crime of genocide

...

Article 5 quater
Crimes against humanity

...

Article 5 quinquies
War crimes

A. Delete the part in brackets entitled "Crimes against United Nations and associated personnel.

B. Insert the following provision in the appropriate place in sections B and D of the part entitled "War crimes":

"Intentionally directing attacks against United Nations or associated personnel or against United Nations installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter."

DOCUMENT A/CONF.183/C.1/L.4

Spain: proposal regarding article 5

[Original: Spanish]
[17 June 1998]

War crimes

Section B, subparagraph (g)

Amend to read:

"(g) ... attacks against internationally protected cultural property ... (remainder of the text unchanged);"

Section B, subparagraph (r)

Add the following:

"; as well as against personnel of the Protecting Power or its substitute and impartial humanitarian organizations carrying out activities to protect and assist the victims of an armed conflict in accordance with the Geneva Conventions;"

Section D, subparagraph (b)

Add the following:

"as well as against personnel of impartial humanitarian organizations carrying out activities to protect and assist the victims of the conflict;"

DOCUMENT A/CONF.183/C.1/L.5

China: proposal regarding article 5

[Original: English]
[18 June 1998]

War crimes

Section B

1. In subparagraph (a), at the end of option 1, add the words "and causing death or serious injury to body or health".
2. In subparagraph (a bis), at the end of option 1, add the words "and causing death or serious injury to body or health".
3. In subparagraph (c), option 2, add the word "intentionally" at the beginning, and add the words "and causing death or serious injury to body or health" at the end.
4. In subparagraph (e), replace "making improper use" by "the perfidious use".
5. In subparagraph (f), in option 2, add the words "which is not justified by the security of the population or imperative military reasons" after "into the territory it occupies".

DOCUMENT A/CONF.183/C.1/L.6

Republic of Korea: proposal regarding articles 6 [9], 7 [6] and 8 [7]³³

[Original: English]
[18 June 1998]

Acceptance and exercise of jurisdiction of the Court

1. The acceptance and exercise of jurisdiction is one of the cardinal issues to be resolved in the establishment of the International Criminal Court. During the debate in the Preparatory Committee, there emerged two conflicting schools of thought on this issue: one preferred to confer on the Court inherent jurisdiction, while the other adhered to the State consent regime at each stage.
2. In our view, both schools have their respective shortcomings. Those who favour the concept of inherent jurisdiction overlook the fact that the proposed Court is a treaty body to be created through the consent of States. It is State consent that justifies the jurisdictional link between the States Parties to the Statute and the Court. Foregoing any precondition to the exercise of jurisdiction would run a risk of rendering the

³³ The numbers within brackets indicate the numbering of the corresponding articles in document A/CONF.183/2/Add.1 and Corr.1.

acceptance of the Court's jurisdiction meaningless. In such a case, the Court would likely exercise its jurisdiction over the offenders of the crimes under the Statute, irrespective of whether the interested States had accepted the Court's jurisdiction. Furthermore, the rationale behind the rule of complementarity makes the jurisdictional link based on State consent indispensable.

3. On the other hand, the adherents of the State consent regime also fail to recognize that the requirement of State consent at two distinct stages - acceptance and exercise - would render the Court ineffective owing to this jurisdictional hazard. For the Court to be as effective as possible, State consent should be called for once, when a State becomes a party to the Statute. Otherwise, it would deprive the Court of the predictability of its function by granting States a *de facto* right of veto to determine whether the Court is able to exercise jurisdiction. Thus, State consent to the acceptance and exercise of jurisdiction should be integrated into a single act.

4. The Republic of Korea believes that an appropriate compromise formula on the jurisdiction of the Court should be sought, whereby the merits of the two ends of the spectrum could be combined. The core elements of a potentially viable compromise are as follows:

(a) State consent constituting the basis of the jurisdiction of the Court should not be separated at the two different stages - acceptance and exercise of the Court's jurisdiction. By becoming a Party to the Statute, a State is considered as having accepted, and agreed to the exercise of, the jurisdiction of the Court once and for all. In this sense, it would be apt to regard the Court's jurisdiction as *automatic* rather than *inherent*;

(b) For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States has given its consent to the exercise of jurisdiction by the Court, which, in accordance with (a) above, is acquired automatically by becoming a State Party to the Statute. The interested States should include the territorial State, the custodial State, the State of the nationality of the accused, and the State of the nationality of the victim. Unless one of the four categories of interested States is a party to the Statute, the Court is not able to exercise its jurisdiction over a case in which that State has jurisdictional nexus. Hence, the requirement here is not cumulative, but selective.

5. Based on these two core elements, the Republic of Korea is putting forward a compromise proposal on the jurisdiction of the Court (see annex). The proposal is intended to address the concerns of both those eager to ensure the effective functioning of the Court and those wary of possible encroachment by the Court on the State consent regime.

6. The approach the Republic of Korea proposal has taken is similar to that of the United Kingdom proposal, contained in

A/AC.249/WG.3/DP.1. However, there are two fundamental differences between the two proposals:

(a) Essentially, while the United Kingdom proposal requires the cumulative consent of the territorial State and the custodial State, the Republic of Korea proposal requires only the consent of one of the four categories of interested States, which is selective. This will give the Court a wider window of opportunity to exercise its jurisdiction;

(b) The second difference is a conceptual one. The United Kingdom proposal rests on the premise that the Court has universal jurisdiction over the core crimes, while the Republic of Korea proposal presupposes that jurisdiction is conferred upon the Court based on State consent pursuant to the provisions of the Statute. This difference is to be reflected in the approach to a non-State party becoming engaged in the functioning of the Court.

7. The delegation of the Republic of Korea hopes that the present proposal would be used as a basis for resolving existing differences over the jurisdiction of the Court at the Diplomatic Conference. The delegation also welcomes any comments or suggestions thereto.

Annex

Article 6 [9]

Acceptance of the jurisdiction of the Court

1. A State that becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

[2. Subject to the provisions of the Statute and the conditions of the Rules of Procedure and Evidence, a State that is not a Party to the Statute may, by declaration lodged with the Registrar, accept the jurisdiction of the Court in respect of a particular case, if the acceptance of jurisdiction by that State is required for the exercise of jurisdiction by the Court under article 8.]

Article 7 [6]

Exercise of jurisdiction

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

(a) A case in which such a crime appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;

(b) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12; or

(c) 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 in accordance with article 10.

Article 8 [7]

Preconditions to the exercise of jurisdiction

In the case of article 7, subparagraph (a) or (b), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute [, or have accepted jurisdiction in accordance with article 6, paragraph 2]:

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

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

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

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

DOCUMENT A/CONF.183/C.1/L.7

Belgium: proposal regarding article 10

[Original: English]
[19 June 1998]

Role of the Security Council

Paragraph 2

Add the following sentence at the end of the paragraph:

“Without prejudice to article 86, paragraph 4, such request shall not affect the right of the Prosecutor to take the necessary measures to preserve evidence.”

DOCUMENT A/CONF.183/C.1/L.8

United States of America: proposal regarding article 5

[Original: English]
[19 June 1998]

Crimes within the jurisdiction of the Court

At the end of the “Crimes within the jurisdiction of the Court” section, add the following language:

“Definitional elements for these crimes, contained in annex xxx, shall be an integral part of this Statute, and shall be applied by the Court in conjunction with the general provisions of criminal law, in its determinations.”

DOCUMENT A/CONF.183/C.1/L.9

United States of America: proposal regarding article 20

[Original: English]
[19 June 1998]

Applicable law

Paragraph 1 (a)

Replace the words “and its Rules of Procedure and Evidence” with the words “including its annexes”.

DOCUMENT A/CONF.183/C.1/L.10

United States of America: proposal regarding an annex on definitional elements for part 2 crimes

[Original: English]
[19 June 1998]

A. Genocide

(a) *Part 2 offence:* Any of several acts “committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such”.

(b) *Elements:*

(i) That the accused intentionally committed one or more of the following acts against a person in a national, ethnical, racial, or religious group, because of that person’s membership that group.

a. Killing;

b. Causing serious bodily or mental harm;

c. Inflicting conditions of life intended to bring about physical destruction of the group in whole or in part;

d. Imposing measures intended to prevent births within the group; or

e. Forcibly transferring children of the group to another group;

(ii) That when the accused committed such act, there existed a plan to destroy such group in whole or in part;

(iii) That when the accused committed such act, the accused had intent to take part in or had knowledge of the plan to destroy such group in whole or in part.

B. Crimes against humanity

1. *General comments*

The following comments apply to all of part B:

(a) In contrast to war crimes, crimes against humanity need not take place during an armed conflict and the

relevant acts must be accompanied by an intent to take part in, or knowledge of, a widespread [or/and] systematic attack. The accused need not be personally responsible for the widespread or systematic attack;

(b) For purposes of the section, "attack" means any activity intended to harm or cause harm to the victim(s) through use of force or compulsion. It does not necessarily involve military conduct;

(c) "Widespread" means the attack is massive in nature and directed against a large number of persons. It excludes isolated offences;

(d) "Systematic" means the attack constitutes or is part of, or in furtherance of, a preconceived plan or policy, or repeated practice over a period of time. It excludes isolated offences.

2. *Murder*

(a) *Part 2 offence:* Murder.

(b) *Elements:*

- (i) That the accused intended to kill or cause death to one or more persons;
- (ii) That the accused killed or caused the death of one or more persons;
- (iii) That the killing was without lawful justification or excuse; and
- (iv) That the killing was carried out in conscious furtherance of a widespread [or/and] systematic attack.

(c) *Comment:* The "without lawful justification or excuse" requirement means that lawful acts of war would be excluded.

3. *Extermination*

(a) *Part 2 offence:* Extermination.

(b) *Elements:*

- (i) That the accused intended to kill or cause the death of a population, or a large portion of a population;
- (ii) That the accused killed or caused the death of a population, or a large portion of a population;
- (iii) That the killing was without lawful justification or excuse; and
- (iv) That the killing was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) *Comments:*

(i) "Caused to be killed" can include an intentional failure to provide essential food, shelter and/or medical care when under custody or control of the accused;

(ii) The third element in this offence would mean, for example, that a siege or an embargo would not result in culpability with respect to this offence;

(iii) Extermination is distinguished from genocide in that it does not require the targeting of the population to be based solely on nationality, race, ethnicity, or religion. It is distinguished from murder in that it involves an intent to kill, and killing of, a population, or a large portion of a population, as opposed to one person.

4. *Enslavement*

(a) *Part 2 offence:* Enslavement.

(b) *Elements:*

- (i) That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;
- (ii) That one or more persons was deprived of all essential individual rights or forced to do labour without any compensation;
- (iii) That the deprivation or forced labour was without lawful justification or excuse; and
- (iv) That the enslavement was carried out with conscious participation in a widespread [or/and] systematic attack.

(c) *Comment:* The "without lawful justification or excuse" requirement would mean, for example, that the detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, would not result in culpability with respect to this offence.

5. *Unlawful imprisonment*

(a) *Part 2 offence:* Imprisonment in flagrant violation of international law or fundamental legal norms.

(b) *Elements:*

- (i) That the accused intended to imprison or cause to be imprisoned a group of people, a population, or part of a population, with the knowledge that such imprisonment was unlawful;
- (ii) That the accused unlawfully imprisoned or caused to be imprisoned such persons;

- (iii) That in carrying out the imprisonment, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and
- (iv) That the imprisonment was carried out with conscious participation in a widespread [or/and] systematic attack.
- (c) *Comments.*
- (i) *Imprisonment.* The term “imprisonment” means all forms of physical detention or confinement to a particular place;
- (ii) The “unlawful” requirement means, for example, that the following cases do not constitute an offence: the lawful detention of persons by a competent court after conviction or pursuant to a probable cause determination by a pre-trial chamber; the lawful arrest or detention of persons for non-compliance with the lawful order of a court or in order to secure fulfilment of any obligation prescribed by law; or the lawful detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety.
- (ii) That the accused knew of the lawful residence of the population or group in the place from which the accused expelled them;
- (iii) That the accused caused the population or group to be forcibly deported or transferred;
- (iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and
- (v) That the forcible movement was carried out with conscious participation in a widespread [or/and] systematic attack.
- (c) *Comment:* The requirement that the act be without justification precludes prosecutions for justified movements such as: any movement of a population consistent with article 49 of the Fourth Geneva Convention of 1949; any movement in case of an emergency or calamity threatening the life or well-being of the population; any service of punishment lawfully imposed; and any movement required as a necessary adjunct of a lawful internment.

6. *Torture*

- (a) *Part 2 offence:* Torture.
- (b) *Elements:*
- (i) That the accused intended to inflict severe physical or mental pain or suffering to one or more persons;
- (ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;
- (iii) That the acts did not arise from or were not inherent in or incidental to lawful sanctions; and
- (iv) That the acts were carried out with conscious participation in a widespread [or/and] systematic attack.

7. *Deportation*

- (a) *Part 2 offence:* Deportation or forcible transfer of population.
- (b) *Elements:*
- (i) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;

8. *Rape, sexual abuse or enforced prostitution*

- (a) *Part 2 offence:* Rape or other sexual abuse of comparable gravity, or enforced prostitution.
- (b) *Elements:*
- (i) That the accused intended to attack a person or persons through acts of a sexual nature;
- (ii) That the accused committed or caused to be committed one of the following acts by force:
 - a. Rape;
 - b. Sexual abuse; or
 - c. Enforced prostitution; and
- (iii) That the acts were committed with conscious participation in a widespread [or/and] systematic attack.
- (c) *Comments:*
- (i) *Rape.* The *actus reus* of rape is the forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object;
- (ii) *Sexual abuse.* The *actus reus* of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual

mutilation, enforced pregnancy and enforced sterilization;

- (iii) *Enforced prostitution.* The *actus reus* of enforced prostitution is enslavement of a sexual nature wherein the “forcible” element need not be present for each individual sex act, but is generally present regarding a mandated activity that involves acts of a sexual nature;
- (iv) *Committed by force* means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either expressed or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent *may* negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

9. *Persecution*

(a) *Part 2 offence:* Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious [or gender] [or other similar] grounds and in connection with other crimes within the jurisdiction of the Court.

(b) *Elements:*

- (i) That the accused intended to deprive an identifiable group of persons of life, liberty or security of person because of the target group’s political, racial, national, ethnic, cultural or religious affiliation;
- (ii) That the accused unlawfully deprived one or more members of the group of life, liberty or security of person;
- (iii) That the deprivation caused death or serious bodily or mental harm or complete loss of human dignity; and
- (iv) That the deprivation was carried out in conjunction with one or more of the other crimes described in this Statute and with conscious participation in a widespread [or/and] systematic attack.

C. *War crimes*

1. *General comments:* The following comments apply to all of part C:

(a) *Military necessity.* The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy;

(b) *Military purpose.* The term “military purpose” means any function that makes an effective contribution to military action or offers a military benefit;

(c) *Collateral damage.* Collateral damage includes that incidental injury or additional damage that was not intended by an attack or course of action. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of *proportionality*, however, may prohibit some attacks on legitimate military objectives that would cause collateral damage or injury which is clearly excessive in the light of the overall military advantage anticipated;

(d) *Proportionality.* The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be clearly excessive in relation to the overall military advantage anticipated;

(e) *Military objective.* A military objective is any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage;

(f) *Civilian object.* A civilian object is any object which is not a military objective;

(g) All war crimes contain an element that the act in question took place in the course of armed conflict. This means that the offence must have been associated with the conduct of military operations during the course of hostilities in which the scope, duration and intensity of the use of force amounted to that of an armed conflict. For example, larceny or murder that take place among troops within a unit would not be war crimes merely because the offences occurred during a time period when armed conflict was taking place;

(h) In several cases, there is a particular *mens rea* requirement for war crimes which involves a level of knowledge of the commander or other accused. Decisions by military commanders and others responsible for planning, deciding upon or executing attacks can only be judged on the basis of their assessment of the information reasonably available to them under the circumstances at the relevant time.

2. *Murder*

(a) *Part 2 offences:* Wilful killing, killing or wounding a combatant who, having laid down his arms or having no longer a means of defence, has surrendered at discretion; violence to life and person, in particular murder of all kinds.

(b) *Elements:*

- (i) That the act or omission took place in the course of armed conflict;
- (ii) That the accused intended to kill or cause death to one or more persons taking no active part in hostilities; and
- (iii) That the accused killed or caused death to one or more persons taking no active part in hostilities.

(c) *Comments:* This crime encompasses faults of omission. If death is the foreseeable consequence of such omission, intent can be inferred. Examples include withholding food rations to prisoners of war or medical care to wounded enemy combatants in order to cause death.

3. *Torture*

(a) *Part 2 offences:* Torture; violence to life and person, in particular cruel treatment and torture; wilfully causing great suffering, or serious injury to body or health.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to inflict severe physical or mental pain or suffering upon one or more persons;
- (iii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons; and
- (iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions.

4. *Inhumane treatment*

(a) *Part 2 offences:* Wilfully causing great suffering or serious injury to body or health; violence to life and person, in particular mutilation; inhuman treatment, including biological experimentation; subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and that causes death to or seriously endangers the health of such person or persons; committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused committed an act against a certain person or subjected that person to a particular medical or biological procedure or treatment;
- (iii) (*for inhuman treatment*) That the act was intended to and did, in fact, subject the victim to mutilation, extreme suffering grossly out of proportion to the treatment expected of one human being from another or grave injury to the victim's human dignity; or
- (iv) (*for biological experimentation*) That the intent of the procedure or treatment was non-therapeutic and was neither justified by medical reason nor carried out in the victim's interest; and
- (v) (*for both inhuman treatment and biological experimentation*) That the act or treatment caused death or serious bodily or mental harm.

5. *Extensive destruction or unlawful appropriation*

(a) *Part 2 offences:* Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; pillaging a town or place, even when taken by assault.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to unlawfully destroy, damage or appropriate certain real or personal property;
- (iii) That the accused destroyed, damaged or appropriated that property;
- (iv) That the destruction, damage or appropriation was without lawful justification or excuse, including military necessity; and
- (v) That the amount of destruction, damage or appropriation was extensive and was carried out in a manner devoid of concern for the consequences to the rights of the victim(s).

(c) *Comment:* Causing collateral damage cannot constitute this offence. Likewise, destruction or appropriation justified by military necessity is not unlawful.

6. *Compelling hostile acts*

(a) *Part 2 offences:* Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused coerced a certain person, by act or threat, to engage in hostile acts against that person's own country;
- (iii) That the person coerced was a prisoner of war or a civilian national of the hostile power; and
- (iv) That the accused knew of the nationality or prisoner of war status of the coerced person.

(c) *Comment:* Implicit in the second element is the fact that the acts compelled cannot be constituted by lawful prisoner of war or civilian labour as defined by articles 49 to 57 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, and articles 51 and 52 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

7. *Denying judicial guarantees*

(a) *Part 2 offences:* Wilfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial, declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused caused judicial proceedings to be concluded which resulted in some punishment of a certain prisoner of war or civilian;
- (iii) That the accused intended to deprive the person of a fair and regular trial; and
- (iv) (*for international armed conflicts*) That such act was performed without according the person a fair and regular trial as defined by the third and fourth Geneva Conventions of 1949; or

(v) (*for non-international armed conflicts*) That such act was performed without judgement by a regularly constituted court or without according indispensable judicial guarantees.

(c) *Comment:* For international armed conflicts, the substance of this offence is the violation of one or more of the penal provisions of articles 82 to 88 and 99 to 108 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; and articles 64 to 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949. For non-international armed conflicts, the elements of the offence are only met when the combined violations of penal provisions rise to the level of denying indispensable judicial guarantees recognized by all civilized peoples.

8. *Deportation*

(a) *Part 2 offences:* Unlawful deportation or transfer; ordering the displacement of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.

(b) *Elements:*

- (i) That the act took place in the course of an armed conflict;
- (ii) That the accused intended to unlawfully deport or transfer a population or group of people from their lawful place of residence;
- (iii) That the accused caused a population or group to be forcibly deported or transferred; and
- (iv) That the deportation or transfer was without, and the accused knew it was without, justification based on security considerations, other imperative reason of public welfare, or other lawful authority; and
- (v) (*for international armed conflicts*) That the population or group of people deported or transferred were persons protected by the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949.

(c) *Comment:* States are authorized, for reasons of security, to intern civilians in some situations in accordance with articles 41 to 43, 68 and 78 to 104 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 1949. It is the Prosecutor's burden to prove that internment of civilians was not undertaken for security purposes once a prima facie case is made for that defence.

9. *Unlawful confinement*

(a) *Part 2 offence:* Unlawful confinement.

- (b) *Elements:*
- (i) That the act took place in the course of an international armed conflict;
 - (ii) That the accused intended to confine or cause to be confined a group of people, a population or part of a population, with the knowledge that such confinement was unlawful;
 - (iii) That the accused unlawfully confined, or caused to be confined, such persons;
 - (iv) That in carrying out the confinement, the accused systematically conducted or caused to be carried out unlawful arrests, detentions or use of sham legal process that departed substantially from established indispensable governing norms; and
 - (v) That the confinement was, and the accused knew at the time the confinement was, unlawful.

(c) *Comment: Confinement.* The term “confinement” means all forms of detention that substantially interfere with a person’s liberty.

10. *Taking hostages*

- (a) *Part 2 offence:* Taking of hostages.
- (b) *Elements:*
- (i) That the act took place in the course of armed conflict;
 - (ii) That the accused intentionally seized, detained or otherwise held hostage a certain person without lawful justification or excuse;
 - (iii) That the accused threatened to injure, kill or continue to detain such person; and
 - (iv) That the act was performed with the intent to compel a State, an international inter-governmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.

11. *Attacking of civilians*

(a) *Part 2 offence:* Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities.

- (b) *Elements:*
- (i) That the act took place in the course of armed conflict;
 - (ii) That the accused intentionally directed an attack against a civilian population as such;

- (iii) That none of the civilians against whom the attack was directed were taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated;
 - (iv) That the accused knew the object of the attack to be a civilian population, as such, not taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated; and
 - (v) That the attack resulted in death or serious injury to civilians.
- (c) *Comment:* Causing incidental injury or collateral damage does not constitute attacking civilians, as the intent and knowledge requirements would not be satisfied.

12. *Causing unnecessary damage*

(a) *Part 2 offence:* Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which is not justified by military necessity.

- (b) *Elements:*
- (i) That the act took place in the course of international armed conflict;
 - (ii) That the accused intentionally launched an attack;
 - (iii) That the attack resulted in collateral damage or incidental injury;
 - (iv) That the use of force causing collateral damage was not justified by military necessity; and
 - (v) That the accused knew that such use of force was not justified by military necessity.

(c) *Comment:* The knowledge element is key to military necessity analysis for this offence. Since the military necessity evaluation is necessarily subjective, the analysis must be based upon the perspective of the accused prior to the attack and incorporate consideration of the exigent circumstances.

12 (alternative). *Causing disproportionate damage*

(a) *Part 2 offence:* Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread long-term and severe damage to the natural environment that would be excessive in relation to the concrete and direct overall military advantage anticipated.

(b) *Elements:*

- (i) That the act took place in the course of an international armed conflict;
- (ii) That the accused intentionally launched an attack;
- (iii) That the attack resulted in collateral damage or incidental injury;
- (iv) That the collateral damage or incidental injury was clearly excessive in relation to the overall military advantage anticipated; and
- (v) That the accused knew that such collateral injury or damage would be disproportionate to the military advantage gained.

(c) *Comment:* The knowledge element is key to proportionality analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused prior to the attack.

13. *Attacking an undefended town*

(a) *Part 2 offence:* Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally launched an attack against a certain town, village, dwelling or building;
- (iii) That the object of the attack was open for immediate, unresisted occupation;
- (iv) That the accused knew that the object of the attack was open for immediate, unresisted occupation; and
- (v) That the attack was not justified by military necessity.

13 (alternative). *Attacking a non-defended locality*

(a) *Part 2 offence:* Making [declared] non-defended localities and demilitarized zones the object of attack.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally launched an attack against a certain non-defended locality or within a certain zone;

- (iii) That the attack resulted in death or serious injury to one or more persons;

(for demilitarized zones)

- (iv) That the parties to the conflict conferred on the zone, by agreement, the status of demilitarized zone, and the accused knew that this status had been conferred; and

- (v) That since the demilitarized zone status was conferred, the zone met, and the accused knew the zone met, the following conditions:

- a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;
- b. No hostile use had been made of its fixed military installations or establishment;
- c. No acts of hostility had been committed by its authorities or by its population; and
- d. Any activity linked to the military effort of the adversary had ceased; or

(for non-defended localities)

- (vi) That the locality was, and the accused knew that the locality was, an inhabited place near or in a zone where forces were in contact which was open for occupation by the forces of the accused, and had been declared to the forces of the accused to be non-defended by the appropriate authorities;

- (vii) That since the declaration of non-defended status, the locality met, and the accused knew that the locality met, the following conditions:

- a. All combatants, as well as mobile weapons and mobile military equipment, had been evacuated;
- b. No hostile use had been made of its fixed military installations or establishments;
- c. No acts of hostility had been committed by its authorities or by the population; and
- d. No activities in support of military operations had been undertaken therein.

14. *Attacking protected objects*

(a) *Part 2 offence:* Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intentionally attacked one or more of the following: a building dedicated to religion, art, science or charitable purposes, a historical monument or a hospital or place where the sick and wounded are collected;
- (iii) That the accused intended the object of that attack to be the building, object or place that was attacked;
- (iv) That the object of attack was not being used for a military purpose at the time of the attack; and
- (v) That the accused knew that the object of attack was not being used for a military purpose at the time of the attack.

15. *Perfidy*

(a) *Part 2 offences:* Killing or wounding treacherously individuals belonging to the hostile nation or army; killing or wounding treacherously a combatant adversary, making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions of 1949, resulting in death or serious personal injury.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to kill or cause serious injury to an adversary;
- (iii) That the accused committed an act resulting in the death or serious injury of an adversary;
- (iv) That the accused intended the death or injury to be accomplished by inviting the confidence of an adversary to believe himself to be entitled to, or obliged to accord, protection under the international law of armed conflict, with intent to betray that confidence; and
- (v) That the death or injury occurred as a direct result of such misrepresentations.

(c) *Comments:* The perfidious activity described in element (iv) could include improper use of a flag of truce, uniform of the enemy or the United Nations or distinctive emblems of the Geneva Conventions of 1949. However, such uses would not result in culpability if not perfidious as defined by the elements (e.g., if the use of an enemy uniform does not

cause detrimental belief in an obligation or protection). Ruses of war are legitimate so long as they do not involve perfidy.

16. *Denying quarter*

(a) *Part 2 offence:* Declaring that no quarter will be given.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused was a person in command or had authority over certain forces;
- (iii) That the accused made a declaration or gave an order to those subordinate forces to the effect that any bona fide surrender by the enemy be refused, even if it would be reasonable to accept and that all enemy persons proffering surrender be killed;

(iv) That in so declaring or ordering, the accused intended that his stated intent be executed.

(c) *Comment:* Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

17. *Sexual offences*

(a) *Part 2 offences:* Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization and any other form of sexual violence also constituting a grave breach of the Geneva Conventions of 1949.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intended to commit a certain sexual act upon a certain person or forced that person to engage in a certain sexual act;
- (iii) That the accused committed or caused to be committed one of the following acts by force:

a. Rape;

b. Sexual abuse; or

c. Enforced prostitution.

(c) *Comments:*

(i) *Rape.* The *actus reus* of rape is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ,

or forcible penetration, however slight, of the anal or genital opening of another by any object;

- (ii) *Sexual abuse.* The *actus reus* of sexual abuse is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offences of sexual mutilation, enforced pregnancy and enforced sterilization;
- (iii) *Enforced prostitution.* The *actus reus* of enforced prostitution is enslavement of a sexual nature wherein the “forcible” element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature;
- (iv) *Committed by force* means that the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm or where the victim is unable to resist because of the lack of mental or physical faculties.

18. *Immunizing an area with protected persons*

(a) *Part 2 offence:* Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.

- (b) *Elements:*
 - (i) That the act took place in the course of international armed conflict;
 - (ii) That at the time of the offence, the accused was defending a military objective from likely attack;
 - (iii) That the accused caused either the military objective, one or more civilian persons or one or more persons protected under one of the Geneva Conventions of 1949 to be moved so that the military objective and the civilian personnel or protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or protected persons; and

- (iv) That the accused’s actions were intended to shield the military objective from attack, to shield, favour or impede military operations, or to otherwise undermine the adversary’s will to attack or continue an attack.

19. *Attacking objects displaying a protective emblem*

(a) *Part 2 offence:* Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions of 1949.

(b) *Elements:*

- (i) That the act took place in the course of armed conflict;
- (ii) That the accused intentionally attacked a building, an object, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions of 1949;
- (iii) That the accused intended the object of the attack to be the person or object attacked and knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions of 1949; and
- (iv) That the object of attack was not, and the accused knew it was not, being used for a military purpose at the time of the attack.

20. *Starvation*

(a) *Part 2 offence:* Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions of 1949.

(b) *Elements:*

- (i) That the act or omission took place in the course of international armed conflict;
- (ii) That the accused engaged in an act or omission to attack, destroy, remove or render useless objects indispensable to the nourishment and survival of the civilian population of an adverse party;
- (iii) That the accused’s act or omission was intended for the specific purpose of denying nourishment necessary for the survival of the civilian population of an adverse party; and
- (iv) That as a result of the accused’s acts, one or more persons died from starvation.

(c) *Comment:* An omission can only constitute this offence if the accused omitted to fulfil a lawful duty, for example, feeding prisoners under his care.

21. *Using illegal weapons*

(a) *Part 2 offence:* Employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering: (i) poison or poisoned weapons; (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (iii) bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict; (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

(b) *Elements:*

- (i) That the act took place in the course of international armed conflict;
- (ii) That the accused intentionally attacked an adversary in that armed conflict with:
 - a. Bullets which expand or flatten easily in the human body;
 - b. Bacteriological agents or toxins; or
 - c. Chemical weapons; and
- (iii) That at the time of the offence, the accused was aware of the nature of the weapon he or she was using and its prohibited status under international law.

(c) *Comments:*

- (i) *Chemical weapons* means chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. It does not include riot control agents as they are defined in that Convention. Use of chemical weapons against a civilian population might also constitute one or more crimes against humanity regardless of the context.
- (ii) *Bacteriological agents or toxins* means any microbial or other biological agent or toxin, whatever its origin or method of production.

DOCUMENT A/CONF.183/C.1/L.11

Slovenia: proposal regarding article 5

[Original: English]
[19 June 1998]

War crimes

Section B, subparagraph (c)

Option 2

After the words “demilitarized zones”, add the words “and United Nations-declared safe areas”, so that the subparagraph would read:

“making non-defended localities, demilitarized zones and United Nations-declared safe areas the objects of attack;”

DOCUMENT A/CONF.183/C.1/L.12

Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago and United Republic of Tanzania: proposal regarding article 5

[Original: English]
[22 June 1998]

Crimes against humanity

After paragraph 1 (i), insert a new subparagraph as follows:

“(i bis) Institutionalized racial discrimination, including the practices of apartheid;”.

DOCUMENT A/CONF.183/C.1/L.13

Lesotho, Malawi, Namibia, South Africa, Swaziland and United Republic of Tanzania: proposal regarding article 5

[Original: English]
[22 June 1998]

War crimes

Section D, subparagraph (e)

At the end of the paragraph, insert the words:

“as well as the practices of apartheid and other inhumane and degrading practices involving outrage upon personal dignity based on racial discrimination”.

DOCUMENT A/CONF.183/C.1/L.14/REV.1

**Mexico: revised proposals regarding articles 12 bis, 15,
and 108**

[Original: Spanish]
[24 June 1998]

*Article 12 bis*³⁴

1. When the Prosecutor, upon receipt of the information referred to in article 12, concludes that there is sufficient basis to initiate an investigation, he or she shall notify the interested States of his or her decision.
2. Before deciding to proceed with the investigation, the Prosecutor shall hear and take into account the views of the interested States.
3. If the Prosecutor decides to proceed with the investigation, he or she shall proceed in accordance with article 13, paragraph 1, of this Statute. When making its determination, the Pre-Trial Chamber shall take into account the views referred to in paragraph 2 above.
4. The application of the present article is without prejudice to the right of the interested States to challenge the admissibility of a case in accordance with the procedure provided for in this Statute.

Article 15
Issues of admissibility

1. Paragraph 2 (b)
For undue delay, *read* unjustified delay.
2. Paragraph 2 (c)
After impartially *add* in accordance with the norms of due process recognized by international law.
3. Paragraph 3
In the second line, *for* partial *read* substantial, so that the phrase will now read "due to a total or substantial collapse or unavailability of its national judicial system ..."

Article 108
Settlement of disputes

Any dispute between two or more States Parties relating to the interpretation or application of this Statute which is not resolved through negotiations within three months, shall be settled by one of the means of settlement of disputes chosen by the parties to the controversy, and if this is not possible also within three months, it shall be sent to the International Court of Justice for consideration in accordance with this Statute.

DOCUMENT A/CONF.183/C.1/L.15

China: proposal regarding article 15

[Original: English]
[23 June 1998]

Issues of admissibility

- Paragraph 2 (a)
After made *insert* in violation of its national law
- Paragraph 2 (b)
After with *insert* its national rules of proceedings and
- Paragraph 2 (c)
After with *insert* the general applicable standards of its national rules of proceedings and

DOCUMENT A/CONF.183/C.1/L.17

Cuba: proposal regarding article 5

[Original: Spanish]
[23 June 1998]

Crimes against humanity

- Paragraph 1
- (j) Other inhumane acts, such as economic, financial and commercial blockades intentionally causing great suffering or seriously injuring physical integrity or mental or physical health.

DOCUMENT A/CONF.183/C.1/L.18

Japan: proposal regarding article 18

[Original: English]
[24 June 1998]

Ne bis in idem

- Paragraph 3, chapeau
After "by the Court" *add* " for the same conduct", so that the chapeau of the paragraph would read:
"No person who has been tried by another court for conduct also proscribed under article 5 shall be tried by the Court for the same conduct unless the proceedings in the other court:"

³⁴ The placement of this article may be decided at a later stage.

DOCUMENT A/CONF.183/C.1/L.20

Spain: proposal regarding article 10

[Original: Spanish]
[25 June 1998]

Role of the Security Council

A. Word the provision in paragraph 7 (at present between brackets) as follows:

“1. Where the Security Council is actively dealing with a dispute or a situation affecting international peace and security and a matter related directly to that dispute or situation is referred to the Court, the Council, acting under Chapter VII of the Charter, may call on the Court to desist from commencing or continuing the corresponding proceedings for a specified period not exceeding 12 months.

2. Upon the expiry of the initial period for which the Security Council has called for the proceedings before the Court to be suspended, the Council may similarly call for an extension of the suspension for a further period not exceeding 12 months, in order to enable it to continue its action for the maintenance of international peace and security.

3. Both in the case of the initial request and in that of any subsequent request by the Security Council, the Court [the Pre-Trial Chamber], having heard the Prosecutor and any interested State Party, shall decide to suspend the proceedings and concurrently shall take all necessary measures for the preservation of the evidence and any other precautionary measures in the interests of justice.

4. If the Court [the Pre-Trial Chamber] decides to suspend the proceedings for a specified period in order to accede to the request of the Security Council, and the Council, during that period, does not take measures under Chapter VII of the Charter in connection with the dispute or situation in question, the Court may, at the end of the period, continue its consideration of the case.”

B. Place this provision in a separate article.

NB: This proposal also applies to the provision in article 10, paragraph 2, of the “Further option for articles 6, 7, 10 and 11”.

DOCUMENT A/CONF.183/C.1/L.23

Uruguay: proposal regarding article 15

[Original: Spanish]
[26 June 1998]

Issues of admissibility

Paragraph 1 (a)

After unwilling add unjustifiably

Paragraph 2 (a)

Before purpose add unjustified

DOCUMENT A/CONF.183/C.1/L.25

United States of America: proposal regarding article 16

[Original: English]
[29 June 1998]

Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by *notification to all States Parties and any non States Parties that may have jurisdiction. The Prosecutor may notify such States on a confidential basis where necessary to protect persons or prevent destruction of evidence.*

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

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

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

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

³⁵ We have simplified paragraph 2 somewhat and split it into a paragraph 2 and new paragraph 3, for purposes of clarity.

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

7. The fact that a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge the admissibility of a case under article 17 [or withhold its consent to the exercise of jurisdiction under article 7].

DOCUMENT A/CONF.183/C.1/L.26

Iraq: proposal regarding article 5

[Original: Arabic]
[29 June 1998]

War crimes

Section B, subparagraph (o)

Option 4, subparagraph vi (bis):

Weapons containing depleted uranium.

DOCUMENT A/CONF.183/C.1/L.27/REV.1

India, Sri Lanka and Turkey: proposal regarding article 5

[Original: English]
[6 July 1998]

Crimes against humanity

1. Add a paragraph 1 (j) bis reading:
act of terrorism
2. Add a paragraph 2 (f) reading:
act of terrorism
 - (i) an act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime.

- (ii) this crime shall also include any serious crime which is the subject matter of a multilateral convention for the elimination of international terrorism which obliges the parties thereto either to extradite or to prosecute an offender.

DOCUMENT A/CONF.183/C.1/L.30

Cuba: proposal regarding article 5

[Original: Spanish]
[29 June 1998]

Crimes against humanity

Paragraph 2, chapeau and subparagraph (a)

2. For the purpose of paragraph 1:

(a) extermination includes the infliction of conditions of life, inter alia, deprivation of access to foodstuffs and medicines, calculated to bring about the destruction of a population.

DOCUMENT A/CONF.183/C.1/L.33

Ukraine: proposal regarding article 5

[Original: Russian]
[30 June 1998]

War crimes

STATEMENT BY THE DELEGATION OF UKRAINE CONCERNING
THE ILLEGALITY OF THE USE OF NUCLEAR WEAPONS

1. Ukraine firmly believes that article 5, section B, subparagraph (o) (War crimes) should state directly that the use in international armed conflicts of weapons such as nuclear weapons is an act subject to criminal prosecution in accordance with the statute of the International Criminal Court.
2. In the opinion of the Ukrainian delegation, a decision to that effect would not create a new rule of international law, but would be an affirmation by States parties to the statute of the future court that, as was confirmed by the International Court of Justice in its advisory opinion of 8 July 1996,³⁶ the use of nuclear weapons is a breach of contemporary international humanitarian law and of the laws and customs of international armed conflicts.
3. Because of their indiscriminate effect on members of armed forces and on the civilian population and in view of the superfluous injury and unnecessary suffering caused by their use, nuclear weapons must, for the purposes of international justice, be placed on the same footing as chemical,

³⁶ A/51/218, annex; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226.

bacteriological and other types of weapons that are subject to a comprehensive ban.

4. Ukraine, the first State in the world to have voluntarily renounced nuclear weapons and to have attained non-nuclear status, calls on other delegations to subscribe to its position concerning the illegality of the use of nuclear weapons.

DOCUMENT A/CONF.183/C.1/L.34

Republic of Korea: proposal regarding articles 13 and 13 bis

[Original: English]
[30 June 1998]

Articles 13

Information submitted to the Prosecutor

1. Upon receipt of information on alleged crimes under article 5, provided by victims, associations on their behalf, regional or international organizations or any other reliable source, the Prosecutor shall examine the seriousness of the content of the information.

2. For the purpose of examination, the Prosecutor may request additional information from States, organs of the United Nations, regional or international governmental organizations or other sources that he or she may deem appropriate, and may receive written or oral testimony at the seat of the Court.

3. After the examination in accordance with paragraphs 1 and 2,

(a) If the Prosecutor considers that there is a reasonable ground to initiate an investigation, he or she may decide to do so in accordance with article 13 bis; or

(b) If the Prosecutor considers that the information provided is manifestly unfounded, he or she shall decide not to initiate an investigation and shall inform those who provided the information. Such a decision shall not preclude a subsequent provision of information to the Prosecutor based on new facts or evidence.

Article 13 bis

Challenges to ex officio investigation of the Prosecutor

1. If the Prosecutor decides to initiate an investigation in accordance with article 12 or article 13, paragraph 3 (a), he or she shall notify all States Parties of such a decision. Any interested State Party set out in article 8 may lodge with the Pre-Trial Chamber a challenge to the Prosecutor's decision to investigate within [thirty] days of notification, after which no challenge will be allowed. After the hearing, the Pre-Trial Chamber shall make a ruling on the admissibility of the challenge.

2. Within [thirty] days after the notification or pending a ruling of the Pre-Trial Chamber under paragraph 1, the Prosecutor shall not commence the investigation.

3. If the Pre-Trial Chamber decides that there is a reasonable ground to initiate an investigation, and the case appears to constitute one within the jurisdiction of the Court, taking into account article 15, the Prosecutor may commence investigation. The dismissal of challenge shall not affect the subsequent determinations by the Court of its jurisdiction or the admissibility of the case pursuant to article 17.

4. If the Pre-Trial Chamber decides that a challenge is manifestly well-founded, the Prosecutor shall not initiate an investigation of the case in question.

5. The acceptance of a challenge by the Pre-Trial Chamber under paragraph 4 shall not preclude the initiation of a subsequent investigation by the Prosecutor based on new facts or evidence.

DOCUMENT A/CONF.183/C.1/L.35

Nepal: proposal regarding article 5

[Original: English]
[30 June 1998]

Crimes against humanity

Paragraph 2 (b)

“deportation or forcible transfer of population” means the expulsion or displacement otherwise of a population or a group of populations from the area in which it is habitually resident for any purpose carried out on political, philosophical, racial, ethnic, religious or any other similar grounds contrary to the recognized principles of human rights or humanitarian law”.

DOCUMENT A/CONF.183/C.1/L.37

[incorporating document A/CONF.183/C.1/L.37/Corr.1 of 10 July 1998]

Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal regarding article 5

[Original: English]
[1 July 1998]

Crime of aggression

Option 2, paragraph 1

Rephrase the paragraph to read as follows:

“1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions in his State, against another State, or of depriving other peoples of their rights to self-determination, freedom and independence. in

contravention of the Charter of the United Nations, by resorting to armed force, to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.”

The remainder of the option should remain as it is.

DOCUMENT A/CONF.183/C.1/L.38
Armenia: proposal regarding article 5

[Original: English]
[1 July 1998]

Crime of aggression

NOTE: The following amendments are proposed for consideration in order to contribute to the clarity of the definition of the crime of aggression in article 5 of the draft Statute.

Option 2

Paragraph 1

- Delete the square brackets.

After political independence of that State *insert*

“except when this is required by the principle of equal rights and self-determination of peoples³⁷ and the rights of individual or collective self-defence.³⁸”

Paragraph 2 (c)

Delete the words “of the ports or coasts”.

DOCUMENT A/CONF.183/C.1/L.39
Cameroon: proposal regarding articles 5 and 10

[Original: French]
[2 July 1998]

Article 5
Crimes within the jurisdiction of the Court

Proposals aimed at specifying the manner in which the crime of aggression (article 5) might fall within the jurisdiction of the Court, with the consequent reformulation of the relationship between the Court and the Security Council (article 10).

Crime of aggression

Option A

1. For the purpose of the present Statute, the crime of aggression is one of the following acts committed by an

³⁷ Article 1, paragraph 2, of the Charter of the United Nations.

³⁸ Article 51 of the Charter of the United Nations.

individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when this use of force is in manifest contravention of the Charter of the United Nations.

2. The Court shall prosecute and punish the crime of aggression as defined in paragraph 1 of this article without prejudice to the powers exercised by the Security Council in regard to aggression under Chapter VII of the Charter of the United Nations.

Option B

1. For the purpose of the present Statute, and subject to the role performed by the Security Council in regard to aggression in accordance with article 10 of the present Statute, the crime of aggression is one of the following acts committed by an individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when that use of armed force is in manifest contravention of the Charter of the United Nations.

NB: Since of necessity this definition of the crime of aggression involves the relationship between the Court and the Security Council, a new formulation for article 10 appears to be necessary.

Article 10

Relationship between the Security Council and the Court

1. The Security Council shall determine the existence of aggression in accordance with the pertinent provisions of the Charter of the United Nations before any proceedings take place in the Court in regard to a crime of aggression.

2. The Security Council may determine the existence of aggression in accordance with paragraph 1 of this article:

- (a) On its own initiative;
- (b) At the request of a State which considers itself the victim of aggression;
- (c) At the request of the Court when a complaint relating to a crime of aggression has been submitted to it;
- (d) At the request of any other organ of the United Nations which, under the Charter, is able to draw the attention of the Security Council to a situation likely to endanger the maintenance of international peace and security.

3. The Court, when a complaint relating to a crime of aggression has been submitted to it, shall suspend its deliberation and refer the matter to the Security Council for a declaration, in accordance with the pertinent provisions of the Charter, that the aggression does or does not exist. A letter from the President of the Security Council shall convey the Security Council's finding to the Prosecutor of the Court, accompanied by all supporting material available to the Council in regard to the aggression whose existence it has determined (NB: This sentence is a repetition of article 10, paragraph 2).

4. Notwithstanding the provisions of paragraph 1 of this article, the Court may commence an investigation for the purpose of establishing whether a crime of aggression within the meaning of the present Statute exists, if the Security Council, having had the matter referred to it by the Court under paragraph 3 of the present article, does not reply within a reasonable time.

5. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed. (NB: This reproduces article 10, paragraph 3.)

6. The Court may request the assistance of the Security Council in conducting investigations into cases submitted to it, in arresting persons who are being prosecuted or have escaped from custody, or in enforcing its decisions.

DOCUMENT A/CONF.183/C.1/L.40

New Zealand: proposal regarding article 5

[Original: English]
[2 July 1998]

Definition of war crimes

Section B, subparagraph (b), option 2

Delete the word "overall" and add at the end of the subparagraph the words "from the attack considered as a whole".

Section B, subparagraph (b), option 2, would therefore read:

"intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated from the attack considered as a whole".

DOCUMENT A/CONF.183/C.1/L.46

[incorporating document A/CONF.183/C.1/L.46/Corr.1 of 7 July 1998]

Comoros and Madagascar: proposal regarding article 5

[Original: French]
[3 July 1998]

Crime of mercenarism

1. For the purpose of the present Statute, the crime of mercenarism is committed by a person who either recruits, uses, finances or trains mercenaries, or engages in mercenary activities with the aim of opposing by armed violence a process of self-determination or the stability or the territorial integrity of a State.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State in whose territory the act is undertaken.

DOCUMENT A/CONF.183/C.1/L.48

**Barbados, Dominica, Jamaica and Trinidad and Tobago:
proposal regarding article 5**

[Original: English]
[3 July 1998]

*Crimes involving the illicit traffic in narcotic drugs and
psychotropic substances*

For the purposes of the present Statute, crimes involving the illicit traffic in narcotic drugs and psychotropic substances are those crimes set out in article 3, paragraphs 1 and 2, of the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 when committed:

(a) On a large scale (and) (or) in a transboundary context;

(b) Within the framework of an organized and hierarchical structure;

(c) With the use of violence and intimidation against private persons, juridical persons or other institutions, or members of the legislative, executive or judicial arms of government, (thereby) creating fear or insecurity within a State or disrupting its economic, social, political or security structures or with other consequences of a similar nature; or

(d) In a context in which corrupt influence is exerted over the public, the media and public institutions.

DOCUMENT A/CONF.183/C.1/L.50

Turkey: proposal regarding article 19

[Original: French]
[6 July 1998]

Delete [article 19].

DOCUMENT A/CONF.183/C.1/L.51

Uruguay: proposal regarding article 13³⁹

[Original: Spanish]
[6 July 1998]

[Article 13

Information submitted to the Prosecutor

The following wording is suggested:

1. As in existing text.

2. Before deciding on the Prosecutor's request to proceed with an investigation, the Pre-Trial Chamber shall hear the State or States concerned with a view to taking their opinions into account, and must expressly pronounce on the opinions voiced by the said State or States.

3. If the Pre-Trial Chamber, upon examination of the request, the accompanying material and the opinions voiced by the State or States concerned, considers that there is a reasonable basis to proceed ... (continue with existing text to end of paragraph 2).

4. For the purposes of the decision referred to in paragraph 3 above, the membership of the Pre-Trial Chamber shall rotate so that successive requests to proceed with an investigation shall be ruled upon by Chambers with different members chosen by lot.

5. The State or States concerned may appeal against the decision to proceed with an investigation as provided in articles 81 and thereafter, the appeal not having suspensive effect unless the Appeals Chamber so rules at the request of the State or States concerned.

6. As in existing paragraph 5.]

DOCUMENT A/CONF.183/C.1/L.56

[incorporating document A/CONF.183/C.1/L.56/Corr.1 of 9 July 1998]

**Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait,
Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi
Arabia, Sudan, Syrian Arab Republic, United Arab
Emirates and Yemen: proposal regarding article 5**

[Original: Arabic]
[8 July 1998]

Crime of aggression

Option 2

Paragraphs 1 and 2 should read as follows:

³⁹ This is an attempt to move towards a compromise solution, establishing additional safeguards for the States concerned.

"1. For the purpose of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State against another State, or of depriving other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.

"2. Acts constituting aggression include the following:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State of the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

DOCUMENT A/CONF.183/C.1/L.62

Sierra Leone: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[13 July 1998]

Article 5 quater

Introductory paragraph to Section D, second sentence

Replace the sentence with the following:

"It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The word "Party" has been deleted, and the word "violence" has been changed to "conflict."

DOCUMENT A/CONF.183/C.1/L.69

United States of America: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[14 July 1998]

Article xx
Elements of crimes

1. Elements of crimes shall be formulated, interpreted and applied in a manner consistent with the terms of articles 5 bis, 5 ter, 5 quater and article 21, paragraph 2. They shall be applied by the Court in reaching determinations as to guilt.

2. Elements of crimes shall be adopted by the Preparatory Commission in accordance with its rules of procedure, and shall be an annex to this Statute.

3. Elements of crimes may be amended in accordance with the provisions of article 110 that concern amendments to articles 5 bis, 5 ter and 5 quater.

4. Elements of crimes shall be adopted before the Prosecutor commences an investigation.

DOCUMENT A/CONF.183/C.1/L.70

United States of America: proposal regarding article 7

[Original: English]
[14 July 1998]

Article 7

Where a situation has been referred to the Court by a State Party [or where the Prosecutor has initiated an investigation,] the Court shall have jurisdiction with respect to a crime referred to in article 5 provided that the following States have accepted the jurisdiction of the Court with respect to the crime in question in accordance with article 7 bis or ter:

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

(b) The State of nationality of the accused/suspect with respect to the crime.

DOCUMENT A/CONF.183/C.1/L.71

Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey: proposal regarding article 5 and the draft Final Act

[Original: English]
[14 July 1998]

Crimes of terrorism and drug crimes

1. Insert the crimes of terrorism and drug crimes as article 5 (d) and (e).
2. Insert the following as article 5 *quinquies*:

“The definition and element of the crimes of terrorism and drug crimes shall be elaborated by the Preparatory Commission.”⁴⁰

DOCUMENT A/CONF.183/C.1/L.72

India: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr. 1

[Original: English]
[15 July 1998]

Article 5 quater

Section B, subparagraph (o)

Add a new subparagraph (vi) as follows:

“Nuclear weapons.”

Consequently, current subparagraph (vi) is renumbered as (vii).

DOCUMENT A/CONF.183/C.1/L.74

Indonesia, Philippines, Thailand and Viet Nam: proposal regarding article 5 quater

[Original: English]
[14 July 1998]

War crimes

Sections C and D

The following provision is proposed to be included as the last paragraph of sections C and D.

“The provisions of the sections C and D shall not apply if there is any foreign interference in the situation of armed conflict not of an international character.”

DOCUMENT A/CONF.183/C.1/L.75

Movement of Non-Aligned Countries: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[14 July 1998]

1. Add a new subparagraph (d) to article 5, as follows:
(d) The crime of aggression.
2. Add a new article 5 *quinquies*, reading:

The Preparatory Commission shall elaborate the definition and elements of the crime of aggression and recommend its adoption to the Assembly of States Parties. The International Criminal Court shall not exercise its jurisdiction with regard to this crime until such a definition has been adopted. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the Statute.

DOCUMENT A/CONF.183/C.1/L.77

Republic of Korea: proposal regarding article 7 ter

[Original: English]
[15 July 1998]

With respect to the case in question over which that State has accepted jurisdiction, the accepting State shall comply with obligations under this Statute, in particular, the obligation to cooperate with the Court without any delay or exception in accordance with part 9.

DOCUMENT A/CONF.183/C.1/L.79

India: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[15 July 1998]

Article 6

Delete subparagraph (b).

Article 7

(a) In the chapeau of paragraph 1, delete the opening phrase “In the case of article 6 (a) or (c)”.

(b) In the chapeau of paragraph 2, option 1, delete the opening phrase “In the case of article 6 (a) or (c)”.

⁴⁰The mandate for the Preparatory Commission to elaborate the definition and elements will be included in the Final Act.

(c) In paragraph 2, options 2 and 3, delete the opening phrase “Where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation”.

Article 10

Delete the article.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

In any article of the draft Statute in which the words “the Security Council” are used, replace them by the words “the relevant principal organ of the United Nations”.

DOCUMENT A/CONF.183/C.1/L.89

Group of African States: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[16 July 1998]

Article 5 quater

Section B, subparagraph (o):

Delete the subparagraph and replace it with the following:

“Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate.”

DOCUMENT A/CONF.183/C.1/L.90

United States of America: proposal regarding article 7 ter⁴¹

[Original: English]
[16 July 1998]

Article 7 ter

1. With respect to States not Party to the Statute, the Court shall have jurisdiction over acts committed in the territory of a State not Party, or committed by officials or agents of a State not Party in the course of official duties and acknowledged by the State as such, only if the State or States in question have accepted jurisdiction in accordance with this article.

2. If the acceptance of a State that is not a Party to this Statute is required under article 7, that State may, by declaration

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

POSSIBLE PROTOCOL FOR OPT-IN

Article 7 bis – Option 1

Article X

1. The Protocol annexed to this Statute shall be open for acceptance by any State at the time it becomes Party to the Statute.

2. The application of this Statute with respect to a State Party which accepts the Protocol in accordance with paragraph 1 shall be subject to the terms of the Protocol and the declaration made thereunder by the State Party in question.

PROTOCOL

Article 1

1. A State accepting this Protocol may make a declaration, at the time of its acceptance, that it does not accept the application of article 7 with respect to a crime referred to in article 5 ter or article 5 quater, or both. The consent of the State in question shall thereupon be required, in accordance with the provisions of article 7 ter, before the Court may exercise its jurisdiction over the cases referred to in that paragraph.

2. A State Party to this Protocol shall not be able to refer a situation in accordance with article 11, except with respect to the crime of genocide.

[3. In the event that any additional crimes or category of crimes is added to this Statute, while this Protocol is in force, a State accepting this Protocol may make a further declaration with the same effect as the declaration referred to in paragraph 1 with respect to that additional crime or category of crimes.]
[NOTE: This could be superfluous if article 110, paragraph 5, is adopted without the bracketed text on applicability of new crimes to all States Parties.]

Article 2

1. This Protocol shall enter into force with the Statute and shall remain in force thereafter for a period of 10 years, and may not be amended. Its duration may, however, be prolonged by the normal procedures for an amendment to the Statute pursuant to article 110.

2. A declaration under article 1 of this Protocol shall remain valid and effective for the duration of this Protocol, but may be withdrawn in whole or in part at any time.

3. A State Party accepting this Protocol shall have the right, notwithstanding article 115, paragraph 1, of the Statute, to withdraw from the Statute with immediate effect on the expiry of this Protocol.

⁴¹ To be read together with A/CONF.183/C.1/L.70

DOCUMENT A/CONF.183/C.1/L.94

India: proposed amendments to the draft Statute in document A/CONF.183/C.1/L.76/Add.2 and Corr.1⁴²

[Original: English]
[17 July 1998]

Article 8 [5]⁴³

Article 8 [5 quater], paragraph 2 (b)

Before subparagraph (xx) [q], add a new subparagraph reading:

“Employing weapons of mass destruction, i.e. nuclear, chemical and biological weapons.”

In subparagraph (xx) [q] delete “the” after “employing” in the first line; replace with “other”.

DOCUMENT A/CONF.183/C.1/L.95

India: proposed amendments to the draft Statute in document A/CONF.183/C.1/L.76/Add.2 and Corr.1⁴²

[Original: English]
[17 July 1998]

Articles 12 [7], 13 [6] and 16 [10]³³

Article 12 [7, 7 bis, 7 ter]

In paragraph 2, delete “In the case of article 13 [6], paragraph (a) or (c)”

Article 13 [6]

Delete paragraph (b)

Article 16 [10]

Delete the article

DOCUMENT A/CONF.183/C.1/WGAL/L.4

Guatemala: proposal regarding article 20

[Original: Spanish]
[14 July 1998]

Applicable law

Paragraph 3:

Option 1:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.

Option 2:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights. The principle of non-discrimination shall be applied to men, women and children.

4. Part. 3. General principles of criminal law

(a) Documents of the Working Group on General Principles of Criminal Law

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGGP/L.1

Chairman’s suggestion for articles 21, 26 and 28

[Original: English]
[15 June 1998]

Article 21

Nullum crimen sine lege

Option 1 (jurisdiction only over the core crimes plus crimes against the integrity of the Court)

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime defined in this Statute.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy or be interpreted as proscribing conduct not clearly criminal under it.

3. Paragraph 1 shall not affect the character of such conduct as being criminal under international law apart from this Statute.

Option 2 (jurisdiction also over one or more treaty crimes)

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime defined in this Statute.

1 bis. With respect to a crime referred to in article 5, paragraph(s) (...), the treaty in question must be applicable to the conduct of the person at the time that the conduct occurred.

2. (same as option 1)

3. (same as option 1)

NB: The *nullum crimen* principle should extend to all crimes within the Court’s jurisdiction, including any treaty crimes and the crimes against the integrity of the Court. Since definitions have also been proposed for treaty crimes, the principle of treaty applicability has been reformulated.

⁴² This document is reproduced in the report of the Committee of the Whole (Part one, sect. C.)

⁴³ The number within brackets indicates the numbering of the corresponding article in document A/CONF.183/2/Add.1 and Corr.1.

Article 26
Age of responsibility

Option 1

A person under the age of 18 at the time of the alleged commission of a crime shall not be criminally responsible under this Statute.

Option 2 (article to be placed in part 2)

The Court shall have no jurisdiction over persons who were under the age of 18 at the time of the alleged commission of a crime (which would otherwise come within the jurisdiction of the Court).

Option 3

1. A person under the age of 15 at the time of the alleged commission of a crime shall not be criminally responsible under this Statute.

2. A person who is between the ages of 15 and 18 at the time of the alleged commission of a crime shall be evaluated by the Court as to his or her maturity to determine whether the person shall be deemed to be criminally responsible.

Article 28
Actus reus

1. Conduct for which a person can be criminally responsible under this Statute can constitute either an act or an omission or a combination thereof.

2. Unless otherwise provided, a person can only be criminally responsible for an omission under paragraph 1 where:

(a) The omission is part of the definition of the crime either expressly or by necessary implication; or

(b) That person has failed to perform an act that he has an obligation to perform in order to prevent the resulting crime.

NB: A third paragraph on causation could be added but seems unnecessary.

Another option could be to have no article dealing with omission. It seems that the substantive content of paragraph 2 (a) is largely covered by whatever is stated in the definitions of the crimes, and paragraph 2 (b) would to some extent be covered by article 25 on command responsibility at least if the approach is taken to state this as a responsibility rather than non-immunity.

DOCUMENT A/CONF.183/C.1/WGGP/L.8/REV.1

Chairman's suggestion for article 31, paragraph 1 (b)

[Original: English]
[25 June 1998]

Option 3

The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law. However, if the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, the commission by him or her of conduct constituting a crime under the jurisdiction of the Court was likely to occur, the person shall remain criminally responsible.

DOCUMENT A/CONF.183/C.1/WGGP/L.3

[incorporating document A/CONF.183/C.1/WGGP/L.3/Corr.1 of 9 July 1998]

Working paper on article 23, paragraph 7 (e)

[Original: English]
[18 June 1998]

Paragraph (7) (e)

(e) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and either:

- (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) be made in the knowledge of the intention of the group to commit the crime.

DOCUMENT A/CONF.183/C.1/WGGP/L.5/REV.2

Working paper on article 23, paragraphs 5 and 6

[Original: English]
[3 July 1998]

5. Without prejudice to any individual criminal responsibility of natural persons under this Statute,⁴⁴ the Court may also have jurisdiction over a juridical person for a crime under this Statute.

⁴⁴ This new phrase was inserted to replace former paragraph 6 of article 23 (A/CONF.183/2/Add.1 and Corr.1): "The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons ..."

Charges may be filed by the Prosecutor⁴⁵ against a juridical person, and the Court may render a judgement over a juridical person for the crime charged, if:

(a) The charges filed by the Prosecutor against the natural person and the juridical person allege the matters referred to in subparagraphs (b) and (c); and

(b) The natural person charged was in a position of control within the juridical person under the national law of the State where the juridical person was registered at the time the crime was committed; and

(c) The crime was committed by the natural person acting on behalf of and with the explicit consent of that juridical person and in the course of its activities; and

(d) The natural person has been convicted of the crime charged.

For the purpose of this Statute, "juridical person" means a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body⁴⁶ or an organization registered under the national law of a State as a non-profit organization.

6. The proceedings⁴⁷ with respect to a juridical person under this article shall be in accordance with this Statute and the relevant Rules of Procedure and Evidence. The Prosecutor may file charges against the natural and juridical persons jointly or separately. The natural person and the juridical person may be jointly tried.⁴⁸

If convicted, the juridical person may incur the penalties referred to in article 76.⁴⁹ These penalties shall be enforced in accordance with the provisions of article 99.⁴⁹

⁴⁵ Language will have to be consistent with the eventual language in part 5.

⁴⁶ The applicable law under this Statute is defined in article 20.

⁴⁷ Footnote 50 of CONF.183/2 states: "The term 'proceedings' covers both investigations and prosecutions."

⁴⁸ The Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (United Nations document IT/32/Rev.9 of 5 July 1996) include rule 48, Joinder of accused: "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Rule 82 A reads: "In joint trials, each accused shall be accorded the same rights as if he were being tried separately."

⁴⁹ Once there is final agreement on articles 76 and 99, references to these articles could be deleted.

DOCUMENT A/CONF.183/C.1/WGPP/L.6

Working paper on article 31

[Original: English]
[22 June 1998]

Grounds for excluding criminal responsibility

Paragraph 1 (d)

(d) the conduct, which is alleged to constitute a crime within the jurisdiction of the Court, is in response to duress resulting from:

- (i) A threat made by other persons, or
- (ii) Circumstances beyond that person's control that constitute a threat of imminent death or serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause either death or a greater harm than the one sought to be avoided. [However, in the case of subparagraph (i), if the person has voluntarily exposed himself or herself to a situation which was likely to lead to the threat, the person shall remain responsible.]

A/CONF.183/C.1/WGPP/L.7/REV.1

Working paper on article 25

[Original: English]
[25 June 1998]

*Responsibility of commanders and superiors*⁵⁰

In addition to the other forms of responsibility for crimes under this Statute:

(a) A military commander or person effectively acting as a military commander is criminally responsible for crimes under this Statute committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise properly control where:

- (i) That person either knew or, owing to the circumstances at the time should have known, that the forces were committing or about to commit such crimes; and
- (ii) That person failed to take all necessary and reasonable measures within his or her power to

⁵⁰ The Working Group draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior is criminally responsible for crimes under this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise properly control where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

DOCUMENT A/CONF.183/C.1/WGGP/L.9/REV.1

[incorporating document A/CONF.183/C.1/WGGP/L.9/Rev.1/Corr.1 of 9 July 1998]

Working paper on article 32

[Original: English]
[25 June 1998]

Superior orders and prescription of law

1. The fact that a crime referred to in article 5 has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the perpetrator of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question; and
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.⁵¹

⁵¹ Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an appropriately high level of *mens rea*, including knowledge of the gravity and scale of the offence.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGGP/L.4

[incorporating documents A/CONF.183/C.1/WGGP/L.4/Corr.1 of 19 June 1998, and Add.1/Rev.1 of 2 July 1998 and Add.1/Rev.1/Corr.1 of 9 July 1998, Add.2 of 2 July 1998 and Add.2/Corr.1 of 4 July 1998 and Add.3 of 7 July 1998]

Report of the Working Group on General Principles of Criminal Law

[Original: English]
[18 June 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on General Principles of Criminal Law, under the chairmanship of Mr. Per Saland (Sweden), the following articles of part 3:

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21. *Nullum crimen sine lege*

Article 22. Non-retroactivity

Article 23. Individual criminal responsibility

Article 24. Irrelevance of official position, paragraph 2

Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates]

Article 26. Age of responsibility

Article 27. Statute of limitations

Article 28. *Actus reus* (act and/or omission)

Article 29. *Mens rea* (mental elements), paragraph 4

Article 30. Mistake of fact or of law

Article 31. Grounds for excluding criminal responsibility

Article 32. Superior orders and prescription of law

Article 33. Possible grounds for excluding criminal responsibility specifically referring to war crimes and

Article 34. Other grounds for excluding criminal responsibility.

2. The Working Group held 6 meetings to consider these articles, from 17 to 19 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 21; article 22; article 23, paragraphs 1, 2, 4 and 7; article 24, paragraph 2; article X (former article 26); and article 27.

3. The Working Group held two additional meetings, on 29 June and on 2 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: articles 25, 30 and 31. The Working Group also

notes the deletion of article 23, paragraph 7 (c), [article 28], [article 33] and article 34.

4. The Working Group held three additional meetings, on 30 June, 2 and 4 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following article for its consideration: article 32.

5. The Working Group held one additional meeting, on 7 July 1998, to consider the remaining articles of part 3. The Working Group herewith transmits to the Committee of the Whole the following article for its consideration: article 31, paragraph 1 (c). The Working Group notes the deletion of article 23, [paragraphs 5 and 6].

6. The Working Group thereby has concluded its work.

II. Text of draft articles

Article 21⁵²

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, it shall be interpreted in favour of the person being investigated or prosecuted.⁵³

3. Paragraph 1 shall not affect the character of such conduct as being criminal under international law apart from this Statute.

Article 22

Non-retroactivity

1. A person shall not be criminally responsible under this Statute for conduct prior to its entry into force.⁵⁴

⁵² The Working Group may need to consider the inclusion of an additional paragraph if treaty crimes are included within the jurisdiction of the Court. Such a provision could read as follows:

“1 bis. With respect to a crime referred to in article 5, paragraph(s) (...), the treaty in question must be applicable to the conduct of the person at the time that the conduct occurred.”

However, this is more of a jurisdictional issue and should perhaps better be dealt with in part 2.

⁵³ Attention was drawn to the use of the phrase “the person being investigated or prosecuted” in article 21, paragraph 2, and the phrase “the accused” in article 22, paragraph 2. It was suggested that it may be useful for the Drafting Committee to consider this matter.

⁵⁴ This paragraph may have to be revisited depending upon the outcome of the discussion of other articles.

2. If the law as it appeared at the commission of the crime is changed prior to the final judgement in the case, the law more favourable to the accused shall be applied.⁵³

Article 23

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court is individually responsible and liable for punishment in accordance with this Statute.

3. (Deleted)

4. The fact that this Statute provides criminal responsibility for individuals does not affect the responsibility of States under international law.

[5.] (Deleted)

[6.] (Deleted)

7. In accordance with this Statute, a person is criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) (Deleted)

(d) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(e) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(f) In respect of the crime of genocide, directly and publicly incites others to commit genocide.⁵⁵

(g) Attempts to commit that crime by taking action that commences its execution by means of a substantial step, but that crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the accomplishment of the crime is not punishable under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

*Article 24
Irrelevance of official position*

...

2. Any immunities or special procedural rules attached to the official capacity of a person, whether under national or international law, may not be relied upon to prevent the Court from exercising its jurisdiction in relation to that person.

*Article 25
Responsibility of commanders and superiors^{56,57}*

In addition to the other forms of responsibility for crimes under this statute:

(a) A military commander or person effectively acting as a military commander is criminally responsible for crimes under this Statute committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise properly control where:

- (i) That person either knew or, owing to the circumstances at the time should have known, that the forces were committing or about to commit such crimes; and
- (ii) That person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior is

criminally responsible for crimes under this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise properly control, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

*Article X (former article 26)⁵⁸
Non-jurisdiction over minors (provisional title)*

The Court shall have no jurisdiction over persons who were under the age of eighteen at the time of the alleged commission of a crime.

*Article 27
Statute of limitations*

There is no statute of limitations for the crimes within the jurisdiction of the Court.⁵⁹

*[Article 28]⁶⁰
Actus reus (act and/or omission)*

(Deleted)

*Article 29
Mens rea (mental elements)*

...

4. **(Deleted).**

⁵⁵ The second paragraph of the definition of the crime of genocide in article 5 which appears between square brackets should be deleted.

⁵⁶ The Working Group draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

⁵⁷ The Working Group draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

⁵⁸ This article should be transferred to part 2.

⁵⁹ Two delegations were of the view that there should be a statute of limitations for war crimes. One delegation agreed to the above text in a show of flexibility, but stressed that there should be a possibility not to proceed if, due to the time that has passed, a fair trial cannot be guaranteed. The question of statute of limitations will need to be revisited if treaty crimes are included. There must also be a special regime for crimes against the integrity of the Court. The absence of a statute of limitations for the Court raises an issue regarding the principle of complementarity given the possibility that a statute of limitations under national law may bar action by the national courts after the expiration of a certain time period, whereas the Court would still be able to exercise jurisdiction.

⁶⁰ Some delegations were of the view that the deletion of article 28 required further consideration and reserved their right to reopen the issue at an appropriate time.

*Article 30*⁶¹
Mistake of fact or of law

A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. Mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court is not a ground for excluding criminal responsibility. However, a mistake of law may be a ground for excluding criminal responsibility if it negates the mental element required by such crime, or as provided in this part.⁶²

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:⁶³

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;⁶⁴

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to commit conduct constituting a crime within the jurisdiction of the Court;⁶⁵

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission,⁶⁶ against an imminent⁶⁷ and unlawful use of

force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.^{68,69,70}

(d) The conduct, which is alleged to constitute a crime within the jurisdiction of the Court, has been caused by duress resulting from:

- (i) A threat made by other persons; or
- (ii) Other circumstances beyond that person's control that constitute a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.⁷¹

2. The Court may determine the applicability of the grounds for exclusion of criminal responsibility permitted by this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 20. The procedures relating to the consideration of such ground shall be provided for in the Rules of Procedure and Evidence.⁷²

Article 32
Superior orders and prescription of law

1. The fact that a crime referred to in article 5 has been committed pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve the perpetrator of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question; and
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

⁶¹ For mitigation of punishment, see article 77.

⁶² Some delegations were of the view that mistake of fact or mistake of law does not relieve an individual of criminal responsibility for the crimes within the jurisdiction of the Court.

⁶³ Some delegations stressed that the chapeau of paragraph 1 should be read in conjunction with paragraph 2.

⁶⁴ The word "Law" has the meaning attributed to it by article 20.

⁶⁵ Some delegations have doubts about accepting voluntary intoxication as a ground for excluding criminal responsibility. It was the understanding that voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes. One delegation was of the view that one should not differentiate between different types of crimes.

⁶⁶ This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law.

⁶⁷ This provision is not intended to apply to international rules applicable to the use of force by States.

⁶⁸ Some delegations were of the view that this was applicable only in the context of a lawful operation.

⁶⁹ The Working Group draws the attention of the Drafting Committee to the fact that the text of this provision was the subject of extensive negotiations and represents quite delicate compromises.

⁷⁰ Cases of voluntary exposure are understood to be dealt with under paragraph 2 and are not understood to constitute a basis for applying this ground for excluding criminal responsibility.

⁷¹ One delegation considered that a threat in subparagraph (d) (i) means a threat that is illegal under international law.

⁷² Some delegations expressed the view that this paragraph gave too much latitude to the Court.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.⁷³

[Article 33]

Possible grounds for excluding criminal responsibility specifically referring to war crimes

(Deleted)⁷⁴

Article 34

Other grounds for excluding criminal responsibility

(Deleted)⁷⁴

(b) Documents of the Working Group on Penalties

(i) Working document

DOCUMENT A/CONF.183/C.1/WGP/L.8/REV.1

Chairman's working paper on article 21 bis

[Original: English]
[6 July 1998]

NOTE

The following text is proposed for consideration. It is suggested that it be included in part 3 of the draft Statute as article 21 bis.

Article 21 bis
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGP/L.14

Report of the Working Group on Penalties

[Original: English]
[4 July 1998]

NOTE

This document is reproduced under part 7.

(c) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Notes regarding articles 5, 22, X (former article 26) and 29 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 22 June 1998³⁰

Article 22

Non-retroactivity

NOTE

The Drafting Committee is requested to consider the question of the use of the phrase "the person being investigated or prosecuted" in article 21, paragraph 2, and the phrase "the accused" in article 22, paragraph 2.

Article X (former article 26)

Non-jurisdiction over minors (provisional title)

NOTE

Article X is transmitted to the Drafting Committee on the understanding that the article should be transferred to part 2 and that the Drafting Committee should consider the question of its placement in that part as well as its title.

Article 5. *Crime of genocide*

Article 29. *Mens rea* (mental elements)

NOTE

The Committee of the Whole further decided to delete the text which appears between brackets in the definition of the crime of genocide (article 5) and article 29, paragraph 4 (*Mens rea* (mental elements)).

Note regarding article 25 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 3 July 1998⁷⁵

Article 25

Responsibility of commanders and superiors

NOTE

The Committee of the Whole transmits the above articles to the Drafting Committee on the following understandings with respect to article 25:

⁷³ Some delegations are willing to accept the inclusion of crimes against humanity in this paragraph subject to the understanding that the definition of crimes against humanity will be sufficiently precise and will identify an appropriately high level of *mens rea*, including knowledge of the gravity and scale of the offence.

⁷⁴ This matter is addressed in article 31, paragraph 3.

⁷⁵ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.76. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

It draws the attention of the Drafting Committee to the need to review the title of the provision in relation to the revised text now before the Drafting Committee. Possible suggestions for the title included "Responsibility of superiors" or "Responsibility of commanders and other superiors".

It draws the attention of the Drafting Committee to the fact that the text of this article was the subject of extensive negotiations and represents quite delicate compromises.

Note regarding articles 21 bis and 31 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 21 bis
Nulla poena sine lege

Article 31
Grounds for excluding criminal responsibility

NOTE

Understandings of the Committee of the Whole with respect to part 3:

The Drafting Committee may consider the possibility of including the provision in article 21 bis as a separate article or as a provision of article 21.

The text of article 31, paragraph 1 (c), was the subject of extensive negotiations and represents quite delicate compromises.

(d) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.2

United States of America: proposal regarding article 25

[Original: English]
[16 June 1998]

In addition to other forms of responsibility for crimes under this Statute,

(a) A commander is criminally responsible for crimes under this Statute committed by forces under his or her command and effective control as a result of the commander's failure to exercise properly this control where:

- (i) The commander either knew or, owing to the circumstances at the time, should have known, that the forces were committing or intending to commit such crimes; and
- (ii) The commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission [or punish the perpetrators thereof];
- (b) A civilian superior is criminally responsible for crimes under this Statute committed by subordinates under his or her authority where:
 - (i) The superior knew that the subordinates were committing or intending to commit a crime or crimes under this Statute;
 - (ii) The crimes concerned activities that were within the official responsibility of the superior;
 - (iii) The superior had the ability to prevent or repress the crime or crimes; and
 - (iv) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission.

DOCUMENT A/CONF.183/C.1/L.3

France: proposal regarding article 23

[Original: English and French]
[16 June 1998]

Individual criminal responsibility

Legal persons

Paragraphs 5 and 6 (criminal organizations)

[5. When the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization.

6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in article 76, and the relevant provision of articles 73 and 79 are applicable.

In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any State Party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it.]

[Article 76

Penalties applicable to criminal organizations

A criminal organization shall incur one or more of the following penalties.

⁷⁶ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.119. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

- (i) Fines;
- (ii) (Deleted)
- (iii) (Deleted)
- (iv) (Deleted)
- (v) Forfeiture of [instrumentalities of crime and] proceeds, property and assets obtained by criminal conduct;] [and]
- [(vi) Appropriate forms of reparation].]

DOCUMENT A/CONF.183/C.1/WGGP/L.2

United States of America: proposal regarding a single provision covering issues currently governed by articles 31 to 34

[Original: English]
[16 June 1998]

1. In addition to other grounds for excluding criminal responsibility permitted by this Statute, a person is not criminally responsible if at the time of that person's conduct:⁷⁷

(a) [Retain current text of article 31, paragraph 1 (a)];

(b) The person acts reasonably to defend himself or herself or another person or property against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or property protected;

(c) The person was a member of forces acting pursuant to the order of a Government or of a military commander, unless the person knew the order to be unlawful or that the order was manifestly unlawful.⁷⁸

2. The Court may determine the applicability of the grounds for exclusion of criminal responsibility permitted by this Statute [to the case before it].

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such ground is derived from applicable law as set forth in article 20. The procedures relating to the assertion and application of such ground shall be provided for in the Rules of Procedure and Evidence.⁷⁹

DOCUMENT A/CONF.183/C.1/WGGP/L.10

Letter dated 2 July 1998 from Arab delegations to the Chairman of the Working Group on General Principles of Criminal Law

[Original: Arabic]
[2 July 1998]

The Arab delegations which have signed the present letter have the honour to inform you that, in document A/CONF.183/C.1/WGGP/L.4/Add.1, adopted on 2 July 1998, the Arabic version of article 31, paragraph 1 (c), differs from the English version.

Since the Arab delegations approved the above text in the form in which it appears in the document in Arabic, they would be grateful if you could kindly resubmit the paragraph in question for reconsideration so that it can be approved in a new Arabic version which takes account of all the changes which have been made and is in conformity with the English version.

LIST OF ARAB DELEGATIONS WHICH SIGNED THE LETTER RELATING TO DOCUMENT A/CONF.183/C.1/WGGP/L.4/ADD.1 DATED 2 JULY 1998

Syrian Arab Republic
(Signed)

Republic of Yemen
(Signed)

Republic of Iraq
(Signed)

Sultanate of Oman
(Signed)

Libyan Arab Jamahiriya
(Signed)

State of Qatar
(Signed)

Kingdom of Saudi Arabia
(Signed)

Kingdom of Morocco
(Signed)

People's Democratic Republic of Algeria
(Signed)

United Arab Emirates
(Signed)

Republic of the Sudan
(Signed)

State of Kuwait
(Signed)

Arab Republic of Egypt
(Signed)

⁷⁷ The text of current article 31, paragraphs 1 (b), (d) and (e) and article 33 would be deleted.

⁷⁸ This paragraph is derived from the text of current article 32.

⁷⁹ This paragraph is derived from the text of current article 34.

DOCUMENT A/CONF.183/C.1/WGP/L.4

Mexico: proposal regarding article 21 bis or article 74 bis

[Original: English]
[1 July 1998]

Article 21 bis
Nullum crimen sine lege

or

Article 74 bis
Sentencing

No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in this Statute and is applicable to the crime in question.

5. Part 4. Composition and administration of the Court

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.31/REV.1

[incorporating documents A/CONF.183/C.1/L.31/Rev.1/Add.1 and Add.1/Corr.1 of 1 July 1998]

Coordinator's rolling text on cluster 1 of part 4 (articles 35 (b), 36, 37 and 40)

[Original: English]
[30 June 1998]

Article 35
Organs of the Court

...

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

...

Article 36⁸⁰
Judges serving on a full-time basis

All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected. The Presidency may, in consultation with the

members of the Court, decide from time to time, on the basis of the workload of the Court, to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50.

Article 37

Qualification, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be:

Option 1:

17 judges of the Court.

Option 2:

19 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposals to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article [...]. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the States Parties and shall enter into force at such time as the Assembly may decide.

(c) (i) Once a proposal for an increase in the number of judges is adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 7 and article 38, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c)(i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges on the Court, provided that in no case may the proposal be to reduce the number of judges below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges on the Court shall be progressively decreased as the terms of

⁸⁰ This article was recognized to have a close connection with the independence of the judges (article 41) and the financial arrangements for salaries, allowances and expenses (article 50).

office of serving judges expire, until the necessary number has been reached.

3. (a) The judges of the Court 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.

(b) Every candidate for election to the Court shall:

Option 1:

(i) Have established competence in the field of criminal law and procedure or in relevant areas of international law such as international humanitarian law and the law of human rights;

(ii) Have extensive experience, which may be as judge, prosecutor or advocate or in some other professional capacity of relevance to the judicial work of the Court;

Option 2:

(i) Have established competence in criminal law and procedure, and extensive trial experience as judge, prosecutor or advocate; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of the Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b)

Option 1:

Each State Party may put forward one candidate for any given election

Option a: Who need not necessarily possess its own nationality.

Option b: Who need not necessarily possess its own nationality but shall in any case be a national of a State Party.

Option 2:

Each State Party may put forward for election one candidate who possesses the qualifications referred to in paragraph 3 (b) (i) and one candidate who possesses the qualifications referred to in paragraph 3 (b) (ii). The candidates need not necessarily possess the nationality of that State.

(c) (i) The Assembly of States Parties may establish an Advisory Committee. The Committee's composition and rules of procedure shall be laid down by the Assembly of States Parties;

(ii) The States Parties members of the Advisory Committee are encouraged to designate as their representative a senior judicial figure, preferably from within its criminal justice system;

(iii) No later than two months before any election to the Court, the members of the Advisory Committee shall be informed of all nominations received under subparagraph (a) together with the supporting documentation referred to in that subparagraph. The Committee shall within the following thirty days communicate to the States Parties, through the Registrar, its observations on the list of candidates. The Committee may for this purpose seek supplementary information from any nominated candidate;

(iv) In making its observations under subparagraph (iii), the Advisory Committee shall take into account, in addition to the terms of paragraphs 3, 4 (b), 6 and 7, the requirement that the trial and pre-trial functions of the Court shall be carried out by judges with the necessary practical and professional experience.

Additional paragraph:

4 bis. For the purpose of the election there shall be two lists of candidates: one containing the names of candidates with qualifications in the field of criminal law and procedure and one containing the names of candidates with qualifications in relevant areas of international law. [12] [13] judges shall be elected from the first list, and [5] [6] judges shall be elected from the second.

5. (a) The judges of the Court shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article [...]. The [17] [19]

candidates receiving the highest number of votes shall be declared elected, subject to the proviso that no candidate shall be considered elected who has not received the votes of two thirds of the States Parties present and voting and subject also to paragraph 6.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

6. No two judges may be nationals of the same State. A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which that person ordinarily exercises civil and political rights.

7. The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (a) (i) The representation of the principal legal systems of the world;
- (ii) Equitable geographical distribution; and
- (iii) A balance of female and male judges.

(b) States Parties shall also take into account the need to include judges with expertise on issues related to sexual and gender violence, violence against children and other similar matters.

8. (a) Judges shall hold office for a term of nine years and, subject to subparagraph (b) and to article 38, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges [on each of the lists referred to in paragraph 4 bis] elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

9. Notwithstanding paragraph 8, a judge assigned to a Trial or Appeals Chamber as specified in article 40 shall continue in office to complete any trial or appeal the hearing of which has already begun before that Chamber.

*Article 40
Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35. The Appeals Division shall be composed of the President and

Option 1:

four other judges,

Option 2:

six other judges,

the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law.⁸¹

2. (a) The judicial business of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all of the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division as set out in the Rules of Procedure and Evidence;

(iv) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter for the completion of any case the hearing of which has already commenced in the division concerned. Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges of the Appeals Division shall serve in that division alone. Nothing in this article shall however preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient conduct of the Court's workload so requires, provided that in no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

⁸¹ Several delegations wished that the Trial and Pre-Trial Divisions should be composed predominantly of judges with criminal trial experience.

(ii) Recommendation/Report

DOCUMENT A/CONF.183/C.1/L.45

[incorporating documents A/CONF.183/C.1/L.45/Corr.1 and 2 of 6 July 1998, Corr.3 of 9 July 1998 and Add.1 of 7 July 1998, Add.2 of 9 July 1998 and Add.2/Corr.1 of 10 July 1998 and Add.3 of 11 July 1998]

Recommendations of the Coordinator

*[Original: English]
[4 July 1998]*

I. Introduction

1. At its 14th and 15th meetings, on 24 June 1998, the Committee of the Whole considered part 4 entitled "Composition and administration of the Court" and entrusted Mr. Medard R. Rwelamira (South Africa) with the task of coordinating informal consultations on the following articles of part 4:

PART 4. COMPOSITION and ADMINISTRATION OF THE COURT

Article 35. Organs of the Court (subparagraph (b))

Article 36. Judges serving on a full-time basis

Article 37. Qualification and election of judges

Article 38. Judicial vacancies

Article 39. The Presidency (paragraphs 3 and 4)

Article 40. Chambers

Article 42. Excusing and disqualification of judges

Article 43. The Office of the Prosecutor

Article 44. The Registry

Article 45. Staff (paragraphs 3 and 4)

Article 47. Removal from office

Article 48. Disciplinary measures

Article 49. Privileges and immunities

Article 51. Working languages

Article 52. Rules of Procedure and Evidence

Article 53. Regulations of the Court

2. As a result of the informal consultations, the Coordinator for part 4 submits to the Committee of the Whole the following articles for its consideration: article 35 (b); article 36; article 37, paragraphs 2, 3 (a) and (c), 5, 6, 8 and 9; article 38; article 39, paragraphs 3 and 4; article 40, paragraphs 2 to 4; article 42; article 43, paragraphs 1 and 3 to 9; article 44; article 45, paragraph 3, article 47; article 48; article 49, paragraphs 2 to 5; article 51; article 52, paragraphs 2 and 4; and article 53.

3. As a result of further informal consultations, the Coordinator for part 4 herewith submits to the Committee of the Whole the following articles for its consideration: article 43, paragraph 2; article 45, paragraph 4; and article 52, paragraphs 1, 3 and 4 bis.

4. As a result of still further informal consultations, the Coordinator for part 4 herewith submits to the Committee of the Whole the following articles for its consideration: article 37, paragraphs 1, 3 (b), 4, 4 bis and 7; and article 40, paragraph 1.

5. As a result of yet further informal consultations, the Coordinator for part 4 submits to the Committee of the Whole the following article for its consideration: article 49, paragraph 1.

6. The Coordinator has thereby concluded his informal consultations on part 4.

II. Text of draft articles

Article 35

Organs of the Court

...

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

...

Article 36⁸⁰

Judges serving on a full-time basis

All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected. The Presidency may, in consultation with the members of the Court, decide from time to time, on the basis of the workload of the Court, to what extent the remaining judges shall be required to be available at the seat of the Court. Any such arrangement shall be without prejudice to the provisions of article 41. The financial arrangements for judges not required to be available full-time at the seat of the Court shall be made in accordance with article 50.

Article 37

Qualification, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposals to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article [...]. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the States Parties and shall enter into force at such time as the Assembly may decide.

(c) (i) Once a proposal for an increase in the number of judges is adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 7 and article 38, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges on the Court, provided that in no case may the proposal be to reduce the number of judges below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges on the Court shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached;

3. (a) The judges of the Court 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.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of the Court. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily possess its own nationality but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be laid down by the Assembly of States Parties.

4 bis. For the purpose of the election there shall be two lists of candidates: list A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and list B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii). A candidate with sufficient qualifications may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

5. (a) The judges of the Court shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article [...]. The 18 candidates receiving the highest number of votes shall be declared elected, subject to the proviso that no candidate shall be considered elected who has not received the votes of two thirds of the States Parties present and voting and subject also to paragraph 6.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

6. No two judges may be nationals of the same State. A person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which that person ordinarily exercises civil and political rights.

7. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall take into account the need to include judges with legal expertise on specific issues, including but not limited to, violence against women or children.

8. (a) Judges shall hold office for a term of nine years and, subject to subparagraph (b) and to article 38, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges [on each of the lists referred to in paragraph 4 bis] elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

9. Notwithstanding paragraph 8, a judge assigned to a Trial or Appeals Chamber as specified in article 40 shall continue in office to complete any trial or appeal the hearing of which has already begun before that Chamber.

*Article 38
Judicial vacancies*

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 37.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and, if that period is less than three years, is eligible for re-election for a further term.

*Article 39
The Presidency*

...

3. The President and the First and Second Vice-Presidents shall constitute the Presidency, which shall be responsible for:

(a) The due administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred on it by this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

*Article 40
Chambers*

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 35. The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and

procedure and in international law. The Trial and Pre-Trial Divisions⁸² shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial business of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all of the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division as set out in the Rules of Procedure and Evidence;

(iv) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter for the completion of any case the hearing of which has already commenced in the division concerned.

Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges of the Appeals Division shall serve in that division alone. Nothing in this article shall however preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient conduct of the Court's workload so requires, provided that in no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

*Article 42
Excusing and disqualification of judges*

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. Judges shall not participate in any case in which their impartiality might reasonably be doubted on any ground. A judge shall be excluded from a case in accordance with this paragraph if, inter alia, he or she previously has been involved

⁸² Some delegations expressed the view that the predominance of judges with criminal trial experience should be reflected in the composition of the Chambers.

in any capacity in that case before the Court or in a related criminal case involving the accused at the national level. A judge may also be excluded on such other grounds for disqualification as provided in the Rules of Procedure and Evidence.⁸³

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges of the Court. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 43

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving [...],⁸⁴ for examining them and for conducting investigations and prosecutions before the Court. A member of the Office of the Prosecutor shall not seek or act on instructions from any external source.

2. The Office of the Prosecutor shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who are entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution [or trial]⁸⁵ of criminal cases. They shall, furthermore, have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each Deputy Prosecutor position to be filled. Unless a shorter term is otherwise decided on at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and not be eligible for re-election.

5. The Prosecutor and the Deputy Prosecutor shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at his or her request from acting in a particular case.

7. Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be excluded from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case involving the accused at the national level.⁸⁶

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber. The accused may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this paragraph. The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

10. **(Deleted)**

Article 44

The Registry

1. Subject to article 43, the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court.

2. The judges shall by an absolute majority by secret ballot elect a Registrar, who, under the authority of the President of the Court,⁸⁷ shall be the principal administrative officer of the Court. They shall take into account any recommendation by the Assembly of States Parties. They may in the same manner,

⁸³ Some delegations were of the view that "nationality grounds" should be included in the Rules of Procedure and Evidence (i.e. a national of a complainant State, of the State on whose territory the offence is alleged to have been committed or of a State of which the accused is a national). Other delegations were opposed to the inclusion of nationality grounds. The view was also expressed that the first sentence in this paragraph was sufficient, and that the grounds in the Rules of Procedure and Evidence should not be exhaustive.

⁸⁴ The options contained in the draft Statute in this place refer to the questions of trigger mechanism. They will be re-examined in the light of the outcome of discussions on these issues.

⁸⁵ There was an emerging consensus among the delegations present at the informal meeting that trial experience - whether as a judge or as a defence counsel - should be also considered as practical experience for the purposes of this article and that the brackets should be dropped. However, as the proposing delegation was not present, the brackets were kept for the time being.

⁸⁶ Further grounds for disqualifications might be set out in the Rules of Procedure and Evidence.

⁸⁷ It was decided that this was the proper place for such language and that the corresponding provision in article 39 should be dropped.

upon the recommendation of the Registrar, elect a Deputy Registrar, if the need arises.⁸⁸

3. The Registrar shall hold office for a term of five years, is eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar is willing to serve as required. The Registrar and the Deputy Registrar shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and for others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.⁸⁹

*Article 45
Staff*

...

3. The Staff Regulations, including the terms and conditions upon which the staff of the Court shall be appointed, remunerated or dismissed shall be proposed by the Registrar with the agreement of the Presidency and Prosecutor. Such Staff Regulations and terms and conditions shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer for the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.⁹⁰

*Article 47
Removal from office⁹¹*

1. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who is found to have committed serious

⁸⁸ Some delegations felt that the Registrar should appoint his own Deputy, but this concern might now be addressed by the insertion of the requirement of a recommendation.

⁸⁹ The language of this paragraph should be brought in line with that of article 68, paragraph 5.

⁹⁰ Some delegations suggested that this paragraph should take into account the discussion on article 105, dealing with the funding of the Court.

⁹¹ The view was expressed that a provision dealing with resignation should be contained in either the Rules of Procedure and Evidence or the Regulations of the Court.

misconduct or a serious breach of his or her duties under this Statute, as provided in the Rules of Procedure and Evidence, or to be unable to exercise the functions required by this Statute, shall cease to hold office if a decision to this effect is made in accordance with paragraph 2.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties further to a recommendation adopted by a two-thirds majority of the other judges of the Court;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of States Parties upon the recommendation of the Prosecutor;

(d) In the case of the Registrar or Deputy Registrar, by an absolute majority of the judges.

3. The judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability otherwise to hold office is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence, but shall not otherwise participate in the consideration of the matter.

*Article 48
Disciplinary measures*

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 47, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

*Article 49
Privileges and Immunities⁹²*

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.⁹³

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged in, or with respect to, the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their term of office, continue to be accorded immunity from legal process of every kind in respect of words

⁹² A reference may need to be included in article 86, paragraph 4, concerning the relevant privileges and immunities to be accorded by non-states Parties.

⁹³ This paragraph is based on the assumption that the question of a Privileges and Immunities Agreement will be dealt with in the Final Act and that such Agreement will thus be drafted by the Preparatory Commission.

spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions,⁹⁴ in accordance with the Rules of Procedure and Evidence.⁹⁵

4. Counsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the Rules of Procedure and Evidence.

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 Presidency;

(c) The Deputy Prosecutors and 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.

Article 51

Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court as well as intermediary decisions resolving fundamental issues before the Court shall be published in the official languages. The Presidency shall, in accordance with the criteria to be established by the Rules of Procedure and Evidence, determine which intermediary decisions may be considered fundamental for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. The Court shall, at the request of any party to a proceeding or a State allowed to intervene in a proceeding, authorize a language other than English or French to be used by such party or State, provided that the Court considers such authorization to be adequately justified.

⁹⁴ This should include, *inter alia*, immunity from personal arrest and detention and, in respect of words spoken or written and acts performed by them in their official capacity, immunity from legal process of every kind. Immunity from legal process should continue to be accorded notwithstanding that the persons concerned are no longer discharging their official functions.

⁹⁵ The question of the instrument in which the privileges and immunities will be specified is still under discussion.

Article 52

Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall come into force upon adoption by a two-thirds majority of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

They shall enter into force upon adoption by a two-thirds majority of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the court, the judges may, by two-thirds majority, draw up Rules to be applied provisionally until adopted, amended or rejected, at the next ordinary or special meeting of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto or any provisional rule, shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules adopted in accordance with paragraph 3 shall not be applied retroactively to the detriment of the person who is being investigated, prosecuted or who has been convicted.

4 bis. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.⁹⁶

Article 53

Regulations of the Court

1. As far as provided in this Statute or the Rules of Procedure and Evidence or otherwise necessary for the routine functioning of the Court, the judges shall by an absolute majority adopt the Regulations of the Court. The Regulations of the Court shall be consistent with the Statute and the Rules of Procedure and Evidence.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect immediately upon adoption by the judges unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments and if within six months there are no objections from a majority of States Parties, they shall remain in force.⁹⁷

⁹⁶ It was suggested that the essence of this paragraph could be included in paragraph 4, in which case this paragraph would fall away. Some delegates also expressed the wish to point out, possibly in the Final Act, the need to ensure that the Rules will be adopted before the Court begins to operate.

⁹⁷ It may be necessary to consider the relevant provisions under article 108 dealing with the settlement of disputes.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding articles 37, 43, 44 and 49 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 37

Qualification, nomination and election of judges

Article 43

The Office of the Prosecutor

Article 44

The Registry

Article 49

Privileges and immunities

NOTE

Understandings of the Committee of the Whole with respect to part 4:

With respect to article 43, paragraph 1, the blanks within square brackets will be examined in the light of the outcome of discussions on the question of trigger mechanism.

The bracketed text in article 43, paragraph 3, will be examined in light of the formulation of article 37, paragraph 3 (b).

The blanks in square brackets in article 37, paragraphs 2 (b) and 5 (a), refer to article 102 on the Assembly of States Parties.

With respect to article 44, the language of paragraph 4 should be brought in line with that of article 68, paragraph 5.

With respect to article 49, it is understood that the question of the instrument in which privileges and immunities will be specified is still under discussion.

⁹⁸ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.87. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Note regarding article 52 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 52

Rules of Procedure and Evidence

NOTE

Understanding of the Committee of the Whole with respect to part 4:

The essence of article 52, paragraph 4 bis, could be included in paragraph 4.

Note regarding article 37 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10 July 1998⁹⁹

Article 37

Qualification, nomination and election of judges

NOTE

Understandings of the Committee of the Whole with respect to part 4:

The opening clause of article 37, paragraph 1, provides for 18 judges. Consequently, paragraph 5 (a), of the same article should be amended.

In light of the text of article 37, paragraph 4 bis, the phrase within square brackets in paragraph 8 (b) of the same article should be deleted.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]
[23 June 1998]

Proposals relating to official and working languages

A. Word article 51 as follows:

⁹⁹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.145 and Corr.1. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

1 The official languages of the Court shall be those of the United Nations: Arabic, Chinese, English, French, Russian and Spanish.

2 The working languages of the Court shall be English and French, subject to what the Regulations of the Court may determine. The Regulations of the Court shall determine the cases in which another official language or other official languages may be used as working languages.

3 In all cases, the right of a person under investigation to be interrogated and to express himself or herself in his or her own language, without charge whatsoever to that person, shall be preserved.

4 The Court shall authorize parties or interveners, at the request of any one of them, to use a language other than English or French.

5 The decisions of the Court terminating proceedings and, in every case, the judgements of the Court shall be published in the official languages of the United Nations.

B. Amendment to article 102 (Assembly of States Parties).

Add the following paragraph:

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

C. Amendment to the annex (Resolution of the Diplomatic Conference relating to the establishment of a Preparatory Commission)

Add the following paragraph:

3 bis. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations.

DOCUMENT A/CONF.183/C.1/L.19

Japan: proposal regarding article 49

[Original: English]
[25 June 1998]

Privileges and immunities

Paragraph 2

Amend the paragraph to read:

The Registrar, the Deputy Registrar and the staff of the Office of the Prosecutor and the Registry shall enjoy such privileges and immunities as are accorded to officials of the United Nations under article V of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

DOCUMENT A/CONF.183/C.1/L.21

United Arab Emirates: proposal for the simplification of the text of article 47

[Original: Arabic]
[25 June 1998]

Removal from office

Paragraph 1

Delete the phrases between brackets and replace them by the words "and its annexes".

Paragraph 2

Replace the entire paragraph by the following:

"A decision as to the loss of office under paragraph 1 shall be made by secret ballot by the same authority and in the same manner as was employed to fill the office."

DOCUMENT A/CONF.183/C.1/L.24

Switzerland: proposal regarding article 37 (Qualification and election of judges), article 110 (Amendments), and article 111 (Review of the Statute)

[Original: English]
[29 June 1998]

Replace article 37, paragraph 2, and articles 110 and 111 of the draft of the Preparatory Committee by the following:

*Article 110
Amendments*

1. Any State Party may propose amendments to the present Statute. Amendment proposals shall be submitted to the depositary, who shall promptly notify all States Parties of them. No sooner than three months from the date of notification, the next Assembly of States Parties shall, by a simple majority of those present and voting, decide on whether to take up the proposal. The Assembly may deal with the proposal directly or convene a special Review Conference if the issue involved so warrants.

2. The adoption of an amendment at a meeting of the Assembly of States Parties shall require a majority of three quarters of the States Parties present and voting, representing an absolute majority of all States Parties.

3. When adopting an amendment, the Assembly of States Parties shall decide whether the amendment shall enter into force for all States Parties once it has been accepted by [five sixths] of them or whether it shall enter into force only with regard to States Parties which have accepted it. In the latter case, the Assembly may also specify how many States Parties must have accepted the amendment before it enters into force for any of them.

4. If an amendment enters into force for all States Parties, any State Party which has not accepted it may withdraw from the Statute with immediate effect, notwithstanding paragraph 1 of article 115, by giving notice no later than one year after the entry into force of such amendment.

Article 111

Amendments to provisions of an institutional nature

1. Amendments to provisions of an exclusively institutional nature of the present Statute [or enumeration of the relevant provisions] may be proposed by any State Party or by the President of the Court acting on behalf of the latter. Proposals falling under the present paragraph shall be processed in accordance with article 110, paragraph 1.

2. Amendments under the present article shall be adopted by a majority of [three quarters] of the States Parties present and voting. They shall enter into force for all States Parties [six] months after their adoption by the Assembly of States Parties.

[3. Disputes on the interpretation or application of the present article shall be settled by the International Court of Justice upon the request of any State Party.]

DOCUMENT A/CONF.183/C.1/L.42

Ukraine: proposed amendment to article 37, paragraph 7, as reproduced in document A/CONF.183/C.1/L.31/Rev.1/Add.1

[Original: Russian]
[3 July 1998]

Article 37

Qualification and election of judges

Paragraph 7

7. The States Parties shall, in the election¹⁰⁰ of judges, take into account the need, within the membership of the Court, for:

- (a) (i) ...
- (ii) Equitable representation of each geographical group, as defined by the General Assembly of the United Nations;¹⁰¹
- (iii) ...
- (b) ...

¹⁰⁰ It is important to stipulate equitable geographical representation at the stage when judges are being elected, and not when candidates are put forward or at other stages in advance of the elections.

¹⁰¹ Specific quantitative criteria to give expression to the principle of equitable geographical representation should in this case be determined in a special resolution to be adopted by the Conference.

DOCUMENT A/CONF.183/C.1/L.43

Republic of Congo and Niger: proposal regarding article 44

[Original: English and French]
[3 July 1998]

The Registry

Paragraph 4

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. The Unit shall act in accordance with article 68. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

6. Part 5. Investigation and prosecution

(a) Documents of the Working Group on Procedural Matters

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGPM/L.1

Working paper on article 54

[Original: English]
[18 June 1998]

Article 54

Initiation of an investigation

1. The Prosecutor shall initiate an investigation upon ...,¹⁰² unless he or she determines there is no reasonable basis for a prosecution under this Statute. In making such a determination, the Prosecutor shall consider whether:

¹⁰² This draft does not attempt to prejudge the resolution of the number of proposals to be considered by the Committee of the Whole regarding the starting point for the Prosecutor's investigative authority. These include, among others, referrals by States, referrals by the Security Council, *proprio motu* authority and *proprio motu* authority subject to approval by the Pre-Trial Chamber. In the event the last proposal is among those accepted, the text might read "... shall initiate an investigation upon ... or shall seek the approval of the Pre-Trial Chamber to initiate an investigation in a case under article 13, unless ..."

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

[(c) A prosecution under this Statute would be in the interests of justice, taking into account the interests of victims; and]

[(d) An investigation would be consistent with the terms of any Security Council decision].

[2. RESERVED.¹⁰³]

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

[(c) A prosecution is not in the interests of justice, having taken into account the interests of victims,]

he or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1] of his or her decision and the reasons for the decision. [At the request of such State [or the Security Council], the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or this paragraph and may request the Prosecutor to reconsider that decision. [In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed based solely on paragraph 1 (c) or 3 (c), in which case the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.]]

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 bis

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor may:

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect and examine evidence;

(c) Seek the cooperation of any State or intergovernmental organization [or, subject to its mandate, any peacekeeping force that may be present in the territory where an investigation is to be undertaken];

(d) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization, or person;

(e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take the necessary measures to ensure the confidentiality of information or the protection of any person.

[1 bis. The Prosecutor may conduct investigations on the territory of a State.

(a) In accordance with the provisions set forth in part 9;¹⁰⁴ or

(b) As authorized by the Pre-Trial Chamber under article 57 (x).¹⁰⁵

2. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute and, in doing so, investigate equally incriminating and exonerating circumstances;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, shall respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute and the Rules of Procedure and Evidence.

¹⁰³ This paragraph would address the issues of whether and to whom the Prosecutor should give notice of there being a potential basis for an investigation, and whether and the extent to which he or she should defer initiating an investigation pending responses by States regarding their own investigative activity and possible intent to seek rulings on admissibility. However, these issues are closely related to the questions of the trigger mechanism, the *proprio motu* powers of the Prosecutor and procedures regarding admissibility which arise under articles 15 to 17. Therefore, it is recommended that the Working Group reserve the treatment of these matters until the larger issues are resolved in the Committee of the Whole.

¹⁰⁴ Two issues arise in the text of article 54 regarding investigations on the territory of a State which are better addressed in the context of cooperation of States under article 90. The first is whether the consent of a State is required for such investigations, and the second is whether notice to the State is sufficient for the Prosecutor to conduct such an investigation.

¹⁰⁵ See the proposed amendment to article 57, set forth below.

Article 54 ter

Rights of suspects and other persons during an investigation

1. A person in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under part 9, shall have the right:

(a) Prior to being questioned, to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and of the rights under subparagraphs (b) to (d) hereinafter;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing [, or to have legal assistance assigned by the Court where the interests of justice so require and the person lacks sufficient means to pay for such assistance, and legal assistance has not otherwise been provided by national authorities]; and

[(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.]

2. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

* * *

Provisions to be moved to article 57

1. In lieu of the current article 54, paragraph 5, article 57, paragraph 2, would be amended to add the following subparagraph:

“(f) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation.”

2. Add to article 57 a procedure by which the Pre-Trial Chamber authorizes the Prosecutor to conduct investigations within the territory of a State outside the cooperative framework of part 9, which might appear as follows:

“The Pre-Trial Chamber may authorize the Prosecutor to take specific investigative steps within the territory of a State without having secured the cooperation of that State under part 9 if, having regard whenever possible to the views of the State concerned, it has determined that it is manifestly apparent that the State is unable to execute a request for cooperation due to the total or partial collapse or unavailability of its national judicial system.”

If such a provision is incorporated, issues of enforcement will have to be addressed.

3. In lieu of the current article 54, paragraph 13, add to article 57 a provision as follows:

“Upon the request of a person who has been arrested or appeared pursuant to a summons under article 58, the Pre-Trial Chamber may issue such orders or seek cooperation pursuant to part 9 as may be necessary to assist the person in the preparation of his or her defence.”

DOCUMENT A/CONF.183/C.1/WGPM/L.5

[incorporating document A/CONF.183/C.1/WGPM/L.5/Corr.1 of 9 July 1998]

Working paper on article 59

*[Original: English]
[24 June 1998]*

Arrest

Paragraph 3

3. The person arrested shall have the right to apply to the competent judicial authority in the custodial State for interim release pending surrender. In reaching a decision on any such application, the authorities in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. In determining an application for interim release, it shall not be open to the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraphs 1 (a) and (b). The Pre-Trial Chamber shall be notified of any requests for interim release and shall make recommendations to the national authorities. The competent judicial authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

DOCUMENT A/CONF.183/C.1/WGPM/L.6

Working paper on article 54 ter

[Original: English]
[24 June 1998]

Investigation of alleged crimes

Paragraph 1 (c)

1. (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.

Footnote to paragraph 2

Some delegations proposed that a provision be inserted into the Rules of Procedure of Evidence granting a person being questioned the opportunity to be medically examined.

DOCUMENT A/CONF.183/C.1/WGPM/L.7

[incorporating document A/CONF.183/C.1/WGPM/L.7/Corr.1 of 9 July 1998]

Working paper on article 58

[Original: English]
[24 June 1998]

*Issuance by the Pre-Trial Chamber of an arrest warrant
or a summons to appear*

Paragraph 6

6. As an alternative to seeking a warrant of arrest, the prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person's appearance,¹⁰⁶ it shall issue the summons, with or without conditions, for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.

¹⁰⁶ Some delegations stated that the provision should not be considered to give the Pre-Trial Chamber the power to issue an arrest warrant instead of a summons as applied for by the Prosecutor when it finds a summons insufficient to ensure the presence of the person.

DOCUMENT A/CONF.183/C.1/WGPM/L.9

[incorporating document A/CONF.183/C.1/WGPM/L.9/Corr.1 of 9 July 1998]

Working paper on article 61

[Original: English]
[24 June 1998]

Confirmation of the charges before trial

Paragraph 3

Add the following sentence:

"In case of a withdrawal of proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal."

DOCUMENT A/CONF.183/C.1/WGPM/L.10

[incorporating document A/CONF.183/C.1/WGPM/L.10/Corr.1 of 9 July 1998]

Working paper on article 54 bis

[Original: English]
[24 June 1998]

*Duties and powers of the Prosecutor with respect to
investigations*

Paragraph 1 (f)

(f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information or the protection of any person or the preservation of evidence;

DOCUMENT A/CONF.183/C.1/WGPM/L.38/REV.1

[incorporating documents A/CONF.183/C.1/WGPM/L.38/Rev.1/Corr.1 and 2 of 7 and 8 July 1998]

**Working paper: new draft proposal for articles 57
and 57 bis**

[Original: English]
[4 July 1998]

Article 57

*Role of the Pre-Trial Chamber in relation to a unique
investigative opportunity*

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall inform the Pre-Trial Chamber and the Pre-Trial Chamber may, upon request of the Prosecutor [or on its own motion],¹⁰⁷ take such measures as may be necessary to ensure

¹⁰⁷ If this bracketed text is retained, paragraph 3 may not be required.

the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(b) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall also inform the person who has been arrested or appeared in response to a summons in connection with the investigation, in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (a) may include the power to:

(a) Make recommendations or orders, in its discretion, regarding procedures to be followed;

(b) Direct that a record be made of the proceedings;

(c) Appoint an expert to assist;

(d) Authorize counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appoint a lawyer to attend and represent the interests of the defence;

(e) Name one of its members or, if necessary, an available judge of the Court, to observe and make recommendations or orders, in its discretion, regarding the collection and preservation of evidence and the questioning of persons;

(f) Take such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures under paragraph 2, but the Pre-Trial Chamber is of the view that such measures are required to preserve evidence it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may act on its own initiative.

(b) A decision of the Pre-Trial Chamber may act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.¹⁰⁸

4. Evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be admitted at trial in accordance with article 69, and given such weight as determined by the Trial Chamber.¹⁰⁹

¹⁰⁸ A decision of the Pre-Trial Chamber to act on its own initiative would become a ground for appeal under article 81, paragraph 1. The provision might appear as follows: "(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3."

¹⁰⁹ From Chairman's text on article 63.

NB: The ability of the arrested or summoned person to use this article would be provided for in article 57 bis, paragraph 3 (b).

Article 57 bis

Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for by this Statute, functions of the Pre-Trial Chamber shall be exercised in accordance with the provisions of this article.¹¹⁰

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis, paragraph 1 bis],¹¹¹ 61, paragraph 6 [and 71] must be concurred in by a majority of its judges.¹¹²

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for under this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(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 under article 58, issue such orders (including measures such as those described in article 57, paragraph 2), or seek such cooperation pursuant to part 9, as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and 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 under part 9 if, whenever possible, having regard to the views of the State concerned, it had determined in that case that the State is clearly

¹¹⁰ To assist the reader, a list of potential functions to be exercised by the Pre-Trial Chamber has been issued as a discussion paper in document A/CONF.183/C.1/WGPM/L.40 in the present volume.

¹¹¹ This citation refers to the text of the working paper on article 54 set forth in A/CONF.183/C.1/WGPM/L.1 in the present volume.

¹¹² References in this text to the potential functions conferred on the Pre-Trial Chamber in articles 13, 16, 54 bis, paragraph 1 (b), are without prejudice to the separate discussion regarding the merits of those articles. Should these provisions (or a number of other functions also remaining in brackets; see discussion paper A/CONF.183/C.1/WGPM/L.40) ultimately not be included in the Statute, the text of this subparagraph would have to be adjusted accordingly.

unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under part 9.¹¹³

(e) Having regard to the strength of the evidence, seek the cooperation of States pursuant to article 90 for the purpose of taking protective measures, strictly necessary to preserve the possibility for the Court to order reparations to, or in respect of, victims, in accordance with article 73.¹¹⁴

DOCUMENT A/CONF.183/C.1/WGPM/L.40

Discussion paper: functions of the Pre-Trial Chamber

[Original: English]
[1 July 1998]

NOTE. The following potential functions are listed in the approximate order in which they might be exercised during the course of the Court's proceedings. Where agreement has not been reached in the Statute on whether the Pre-Trial Chamber should be provided with a particular power, this has been reflected through the use of square brackets. No effort has been made in this paper to resolve these substantive issues.

1. Determination of challenges to the jurisdiction of the Court or the admissibility of the case prior to the confirmation of the charges. Articles [16], 17, paragraph 5 and 87, paragraph 5.

[2. Authorization of an ex officio investigation upon request of the Prosecutor. Article 13.]

3. Review of a decision by the Prosecutor not to initiate or continue an investigation or prosecution. Article 54, paragraph 8.

4. Issuance of warrants requested by the Prosecutor for the purpose of investigation. Article 54, paragraph 5 [also article 54, paragraph 4 (c), option 2 (iii).]

[5. Issuance of orders, or requests for State cooperation, on behalf of the defence. Article 54, paragraph 13; see also article 67, paragraph 1, chapeau, and article 67, paragraph 1 (i).]

[6. Involvement in questions of disclosure of national security information. Article 71, options 2 and 3.]

[7. Approval of on-site investigations where no domestic competent authority is available or functioning. Article 54, paragraph 4 (c), option 2 (i) (b) and (ii).]

[8. Involvement in an investigation in relation to unique opportunities. Article 57.]

9. Issuance of warrants for arrest or summons to appear. Article 58.

[10. Issuance of orders for interim release prior to surrender. Article 59, paragraph 3.]

11. Issuance of orders for interim release after surrender. Article 60, paragraph 2.

[12. Determination of lawfulness of arrest pending surrender. Article 59, paragraph 4.]

13. Review of decisions on detention or release after surrender. Article 60, paragraphs 3 and 4.

14. Informing the person about his or her rights. Article 60, paragraph 1.

[15. Appointing counsel prior to trial. Article 54, paragraph 10 (c); see also article 67, paragraph 1 (d).]

16. Confirmation of the charges before trial and issuance of related orders, including for disclosure or amendment of charges.¹¹⁵ Article 61.

[17. Ordering of provisional measures to preserve the Court's ability to order compensation to victims (references to the Court in article 73 may include the Pre-Trial Chamber;¹¹⁶ see also article 61, footnote 33.)

18. Exercising functions in connection with cooperation under part 9 (depending on the stage of the proceedings and the functions to be performed, references to the "Court" may include the Pre-Trial Chamber).¹¹⁶

[19. Resolving issues referred to it by the Trial Chamber. Article 64, paragraph 7.]

DOCUMENT A/CONF.183/C.1/WGPM/L.43

[incorporating document A/CONF.183/C.1/WGPM/L.43/Corr.1 of 9 July 1998]

Working paper on article 61

[Original: English]
[4 July 1998]

NOTE: This text should be read with the new version of article 64.¹¹⁷

¹¹³ Some delegations expressed the view that, given the absence of enforcement powers, the Prosecutor would, in most cases contemplated by this article, be unable to act upon the authority conferred by the Pre-Trial Chamber. Other delegations expressed the opposite view. It was, moreover, noted that the draft Statute did not confer any authority for the use of military force.

¹¹⁴ In deciding whether to grant protective measures, the Court will have to take into account the interests and rights of the (unconvicted) person(s) in respect of whose property protective measures are sought. The view was expressed that the proposed text did not provide a clear threshold in relation to these measures. The close connection between this proposal and article 73 was also pointed out.

¹¹⁵ These functions could be taken over by the Trial Chamber following confirmation of the charges.

¹¹⁶ It appears that there is no need to distinguish between the different organs of the Court in this article.

¹¹⁷ See document A/CONF.183/C.1/WGPM/L.41 reproduced under part 6.

Notification of the indictment

Paragraph 9

9. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber¹¹⁸ which, subject to paragraph 7 of this article and to article 64 [paragraph 4], shall be responsible for the conduct of subsequent proceedings and may exercise any functions of the Pre-Trial Chamber that are relevant and capable of application in those proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.64

Working paper on article 57 bis

[Original: English]
[9 July 1998]

Functions and powers of the Pre-Trial Chamber

Paragraph 3 (e)

3. (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (I), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.

DOCUMENT A/CONF.183/C.1/WGPM/L.75

Working paper on article 61

[Original: English and French]
[12 July 1998]

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 1 bis, within a reasonable time after the person's surrender of voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.

1 bis. When:

- (a) The person has waived his right to be present; or
- (b) The person has fled or cannot be found and all reasonable steps have been made to inform the person of the proposed charges and that a hearing to confirm those charges will be held,

the Pre-Trial Chamber shall hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In this case, the accused may be represented by a counsel of his or her own choosing or appointed by the Court.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPM/L.2

[incorporating documents A/CONF.183/C.1/WGPM/L.2/Corr.1 and 2 of 29 June and 6 July 1998, and Add.1 of 29 June 1998 and Add.1/Corr.1 of 30 June 1998, Add.2 of 4 July 1998 and Add.2/Corr.1 and 2 of 6 and 9 July 1998, Add.3 of 7 July 1998, Add.4 of 8 July 1998, Add.5 of 9 July 1998 and Add.5/Corr.1 of 11 July 1998, Add.6 of 11 July 1998 and Add.6/Corr.1 of 13 July 1998, Add.7 of 13 July 1998 and Add.7/Corr.1 of 14 July 1998 and Add.8 of 15 July 1998 and Add.8/Corr.1 of 17 July 1998]

Report of the Working Group on Procedural Matters

[Original: English]
[24 June 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Procedural Matters, under the chairmanship of Silvia Fernández de Gurmendi (Argentina), the following articles of parts 5, 6 and 8:

PART 5. INVESTIGATION AND PROSECUTION

Article 54. Investigation of alleged crimes

[Article 55]. Information on national investigations or proceedings

[Article 56]. Deferral of an investigation by the Prosecutor

[Article 57]. Functions of the Pre-Trial Chamber in relation with investigation

Article 58. Commencement of prosecution

Article 59. Arrest

Article 60. Pre-trial detention or release

Article 61. Notification of the indictment

PART 6. THE TRIAL

Article 62. Place of trial

Article 63. Trial in presence of the accused

Article 64. Functions and powers of the Trial Chamber

Article 65. Proceedings on an admission of guilt

Article 66. Presumption of innocence

Article 67. Rights of the accused

¹¹⁸ The drafting of this part of this provision will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial Chamber.

Article 68. Protection of the [accused], victims and witnesses [and their participation in the proceedings]

Article 69. Evidence

Article 70. Offences or acts against the integrity of the Court

[Article 71]. Sensitive national security information

Article 72. Quorum and judgement

[Article 73]. Reparations to victims

Article 74. Sentencing

PART 8. APPEAL AND REVIEW

Article 80. Appeal against judgement or sentence

Article 81. Appeal against interlocutory decision

Article 82. Proceedings on appeal

Article 83. Revision of conviction or sentence

[Article 84]. Compensation to a suspect/accused/convicted person

2. The Working Group on Procedural Matters held eight meetings to consider these articles, from 19 to 24 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 54, paragraphs 1 (a) and (b), paragraphs 3 (a) and (b), paragraph 4; article 54 bis, paragraphs 1 (a), (b), (d) and (f), and paragraph 2; article 54 ter, paragraph 1, paragraphs 2 (a), (b), (c) and (d), paragraph 3; article 58, paragraphs 1 to 4; article 59, paragraphs 1 to 5; article 60, paragraphs 1 to 5; article 61, paragraphs 2 to 8.

3. The Working Group held seven additional meetings to consider the remaining articles, from 25 to 29 June 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54, paragraph 4; article 54 ter, paragraph 3 (d); article 58, paragraph 6; and article 61, paragraph 6 bis. The Working Group also transmits the following articles of part 6: article 62, paragraph 1; article 65; and article 69, paragraphs 2 to 4, 4 bis, 5, 6 and 8.

4. The Working Group held five additional meetings to consider the remaining articles of parts 5, 6 and 8 from 2 to 4 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54 bis, paragraph 1 (e), and article 61, paragraph 9. The Working Group also transmits the following articles of part 6: articles 64, 66; 67, paragraph 1 (b), (c), (d), (e), (g), (h) and (i); and 74. The Working Group further transmits the following articles of part 8: article 80, paragraphs 1, 2, 4 and 5; and article 81, paragraphs 1 (a) and (b) and 2. The Working Group also notes the deletion of article 80, paragraph 1 (c).

5. The Working Group held four additional meetings to consider the remaining articles of parts 5, 6 and 8, on 6 and 7 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 8 for its consideration: article 82, paragraphs 1 to 3, first subparagraph of paragraph 4, and paragraph 5; and article 83, paragraphs 1 and 3. The Working Group also notes the deletion from part 8 of article 83, paragraphs 1 [(d)] and [(e)], paragraph [2] and paragraph [4].

6. The Working Group held two additional meetings to consider the remaining articles of parts 5, 6 and 8, on 8 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 57; and article 57 bis, paragraphs 1, 2, 3 (a), (b), and (c).

7. The Working Group held two additional meetings, on 9 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following article of part 5 for its consideration: article 54 bis, paragraph 1 (c). The Working Group also transmits the following article of part 6: article 72. The Working Group further notes the deletion of the following article of part 6: article 72, paragraph 4.

8. The Working Group held three additional meetings, on 10 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 57 bis, paragraphs 3 (d) and (e); article 58, paragraph 5; and the complete text of article 60, paragraph 2. The Working Group also transmits the following articles of part 6: article 67, paragraphs 1 (a) and (f) and paragraph 2; article 68, paragraphs 3, 4, 5 and 7; and article 69, paragraphs 1 and 4 ter. The Working Group further transmits the following article of part 8: article 81, paragraph 1 (e). The Working Group also notes the deletion of the following articles of part 6: article 68, paragraphs 8 and 9; and article 69, paragraph 7.

9. The Working Group held one additional meeting, on 13 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54, complete text of chapeau of paragraph 1, paragraph 1 (c), second subparagraph of paragraph 1 (d), paragraph 3 (c) and final subparagraph thereof; and paragraph 5. The Working Group also transmits the following articles of part 6: article 70; article 70 bis.; article 72, paragraph 1, second sentence; and article 73. The Working Group further transmits the following articles of part 8: article 81, paragraph 3; article 82, paragraph 4, last two sentences; and article 84. The Working Group also notes the deletion of the following articles: article 73, paragraphs 7 and 8; and article 81, paragraph 1 (d) bis. The Working Group further notes that articles 55 and 56 are being addressed by the Committee of the Whole in relation to article 16.

10. The Working Group held two additional meetings, on 14 and 15 July 1998, to consider the remaining articles of parts 5, 6 and 8. The Working Group herewith transmits to the Committee of the Whole the following articles of part 5 for its consideration: article 54 bis, paragraph 1 bis; and article 61, paragraphs 1 and 1 bis. The Working Group also transmits the following articles of part 6: article 63, paragraphs 1 and 2; article 67, paragraph 1 (*d*), opening phrase; article 68, paragraphs 1 and 2; article 74, paragraph 4, concluding phrase. The Working Group further transmits the following article of part 8: article 81, paragraphs 1 (*f*) and 1 bis. The Working Group also notes the deletion of the following articles: article 63, paragraph 3; article 68, paragraph 6; and article 80, paragraph 3.

11. The Working Group also refers to the Committee of the Whole the following pending articles: article 54, paragraphs 1 [(*d*)] and [2]; article 71 and article 71 bis; and article 83, paragraph 1, chapeau, the phrase "...".

12. The Working Group has thereby concluded its consideration of parts 5, 6 and 8.

II. Text of draft articles

PART 5. INVESTIGATION AND PROSECUTION

Article 54 *Initiation of an investigation*

The complete text of the chapeau of paragraph 1, previously transmitted to the Committee of the Whole with the phrase "investigation upon ...", reads as follows:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(*a*) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(*b*) The case is or would be admissible under article 15;

(*c*) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice;¹¹⁹ and

¹¹⁹ Some delegates expressed concern regarding the reference to the interests of justice

[(*d*)] (**Pending**^{120,121})

If the Prosecutor determines that there is no reasonable basis to proceed and his or her detention is based solely on subparagraph (*c*) above, he or she shall inform the Pre-Trial Chamber.

[2.] (**Pending**^{122,121})

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(*a*) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(*b*) The case is inadmissible under article 15; or

(*c*) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crimes, the interests of victims and the age or infirmity of the alleged perpetrator, and his role in the alleged crime.

He or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1,] of his or her conclusion and the reasons for the conclusion.

3 bis. (*a*) At the request of the State making a referral under article 11 [or the Security Council under article 10¹²³] the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or 3 of this article and may request the Prosecutor to reconsider that decision.

(*b*) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (*c*) or 3 (*c*). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

¹²⁰ Pending decision on trigger mechanism. The proposed text reads as follows:

"[(*d*) An investigation would be consistent with the terms of any Security Council decision]."

¹²¹ The Working Group referred this pending provision to the Committee of the Whole.

¹²² Pending decision on trigger mechanism. The proposed text reads as follows:

"2. Before initiating an investigation, the Prosecutor shall notify States in accordance with article 16."

¹²³ Pending a decision on trigger mechanism.

Article 54 bis
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor may:

(a) Request the presence of and question suspects, victims and witnesses;

(b) Collect and examine evidence;

(c) Seek the cooperation of any State or inter-governmental organization or arrangement in accordance with their respective competences and/or mandates.

(d) Enter into such arrangements or agreements, not otherwise inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose at any stage of the proceedings documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents;¹²⁴ and

(f) Take necessary measures or request that necessary measures be taken to ensure the confidentiality of information or the protection of any person or the preservation of evidence.

1 bis. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions set forth in part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57 bis, paragraph 3 (d).

2. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate equally incriminating and exonerating circumstances;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, shall respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular, but not limited to, where it involves sexual or gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute and the Rules of Procedure and Evidence.

Article 54 ter
Rights of suspects and other persons during an investigation

1. A person in respect of whom there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court and who is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under part 9, shall have the rights set out in paragraph 2 and shall be informed of those rights prior to being questioned.

2. The rights referred to in paragraph 1 are:

(a) Prior to being questioned, to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her by the Court in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it.¹²⁵

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

3. In respect of an investigation under this Statute, a person

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture, or to any form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness.

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute and the Rules of Procedure and Evidence.

¹²⁴ Some delegations considered that the information provided for under this subparagraph should take into account the rights of the accused.

¹²⁵ Some delegations proposed that a provision be inserted into the Rules of Procedure and Evidence granting a person being questioned the opportunity to be medically examined.

[Article 55]
*Information on national investigations or proceedings*¹²⁶

[Article 56]
*Deferral of an investigation by the Prosecutor*¹²⁶

Article 57
Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber and the Pre-Trial Chamber may, upon request of the Prosecutor, 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 defence.

(b) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall also inform the person who has been arrested or appeared in response to a summons in connection with the investigation, in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (a) may include the power to:

(a) Make recommendations or orders, in its discretion, regarding procedures to be followed;

(b) Direct that a record be made of the proceedings;

(c) Appoint an expert to assist;

(d) Authorize counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appoint a lawyer to attend and represent the interests of the defence;

(e) Name one of its members or, if necessary, an available judge of the Court, to observe and make recommendations or orders, in its discretion, regarding the collection and preservation of evidence and the questioning of persons;

(f) Take such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures under paragraph 2, but the Pre-Trial Chamber is of the view that such measures are required to preserve evidence it deems would

be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may act on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 bis
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided for by this Statute, functions of the Pre-Trial Chamber shall be exercised in accordance with the provisions of this article.

2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles [13], [16], 17, [54 bis, paragraph 1 bis], 61, paragraph 6 [and 71] must be concurred in by a majority of its judges;

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for under this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(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 under article 58, issue such orders (including measures such as those described in article 57, paragraph 2), or seek such cooperation pursuant to part 9, as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and 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 under part 9 if, whenever possible having regard to the views of the State concerned, it had 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

¹²⁶ The Working Group noted that articles 55 and 56 were being addressed by the Committee of the Whole in relation to article 16.

system competent to execute the request for cooperation under part 9;^{127,128}

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in the Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 90, paragraph 1 (I), to take protective measures for the purpose of forfeiture in particular for the ultimate benefit of victims.¹²⁹

Article 58

Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear

1. At any time after an investigation has been initiated, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant for the arrest of a person if satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) It appears that the arrest of the person is necessary to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or where applicable to prevent the person from continuing with the commission of that crime or a related crime being committed which is within the jurisdiction of the Court and arises out of the same circumstances.

2. The application shall specify:

(a) The name of the person or persons, and any other relevant identifying information;

(b) The specific crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which form reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes the arrest of the person is necessary.

¹²⁷ Some delegations expressed the view that, given the absence of enforcement powers, the Prosecutor would, in most cases contemplated by this article, be unable to act upon the authority conferred by the Pre-Trial Chamber. Other delegations expressed the opposite view. It was additionally noted that the draft Statute did not confer any authority for the use of military force.

¹²⁸ This provision needs to be read with article 7 ter; article 86, paragraph 5; article 102, and other relevant provisions.

¹²⁹ This provision should be read in connection with article 79.

3. The Pre-Trial Chamber shall examine the application and the evidence or other information submitted by the Prosecutor and, if satisfied that there are reasonable grounds to believe that the person named committed the crimes alleged and that the arrest of the person appears necessary, shall issue a warrant for the arrest of the person. The warrant of arrest shall identify the person to be arrested and the crimes for which the person's arrest is sought, and shall contain a concise statement of the facts which are alleged to constitute those crimes. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

4. Based on the arrest warrant, the Court may request the provisional arrest, or the arrest and [surrender] [extradition] of the person under part 9.¹³⁰

5. The Prosecutor may request that the Pre-Trial Chamber amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe the person committed the modified or additional crimes.

6. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person's appearance,¹³¹ it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear on a specified date. The summons shall identify the person summoned and the crimes which the person is alleged to have committed, and shall contain a concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person.¹³²

Article 59

Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and [surrender] [extradition] shall immediately take steps to arrest the suspect in accordance with its laws and the provisions of part 9.

2. A person arrested shall be brought promptly before a competent judicial authority in the custodial State who shall

¹³⁰ The Working Group draws the attention of the Drafting Committee to the need to consider the terms that appear in brackets in various provisions contained in part 5 in the light of part 9.

¹³¹ Some delegations stated that the provision should not be considered to give the Pre-Trial Chamber the power to issue an arrest warrant instead of a summons as applied for by the Prosecutor when it finds a summons insufficient to ensure the presence of the person.

¹³² The Working Group draws the attention of the Drafting Committee to a problem with the Arabic version of this provision.

determine, in accordance with the law of that State, that the warrant applies to that person, that the person has been arrested in accordance with the proper process, and that the person's rights have been respected.

3. The person arrested shall have the right to apply to the competent judicial authority in the custodial State for interim release pending surrender. In reaching a decision on any such application, the authorities in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. In determining an application for interim release, it shall not be open to the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraphs 1 (a) and (b). The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the national authorities. The competent judicial authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

4. (Deleted)

5. Once ordered to be [surrendered] [extradited] by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60

Initial proceedings before the Court

1. Upon the [surrender][extradition] of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1,¹³³ are present, the person shall be detained. Otherwise the Pre-Trial Chamber shall release the person, with or without conditions.¹³⁴

¹³³ Some delegations considered that the reference to article 58, paragraph 1 (a), was inapt.

¹³⁴ The Working Group notes that with respect to article 60, paragraph 2, previously referred to the Committee of the Whole with the phrase "conditions set forth in article 58, ...", the reference should be to article 58, paragraph 1.

3. The Pre-Trial Chamber shall periodically review¹³⁵ its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the accused. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period¹³⁵ prior to trial due to unexcusable delay by the Prosecutor. If such delay has occurred, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released.

Article 61

Confirmation of the charges before trial

1. Subject to the provisions of paragraph 1 bis within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the accused, as well as his or her counsel.

1 bis. When:

(a) The person has waived his right to be present; or

(b) The person has fled or cannot be found and all reasonable steps have been made to secure his or her appearance before the Court and to inform the person of the proposed charges and that a hearing to confirm those charges will be held, the Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the accused to confirm the charges on which the Prosecutor intends to seek trial. In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

2. A reasonable time¹³⁵ before the hearing, the person shall be provided with a copy of the charges on which the Prosecutor intends to seek trial, and be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Pre-Trial Chamber may make orders regarding the disclosure of information for purposes of the hearing as may be appropriate under the Statute and the Rules of Procedure and Evidence.

3. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any proposed charges. The accused shall be given reasonable notice before the hearing of any amendment or withdrawal of proposed charges.

¹³⁵ The Working Group noted that this time period should be addressed in the Rules of Procedure and Evidence.

In case of a withdrawal of proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

4. At the hearing, the Prosecutor shall have the burden of presenting, for each charge on which he seeks trial, sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

5. At the hearing, the accused person may object to the proposed charges, challenge the evidence presented by the Prosecutor and present evidence on his or her own behalf.

6. The Pre-Trial Chamber shall determine whether, considering the presentations by both the Prosecutor and the accused, there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determinations, the Pre-Trial Chamber may:

(a) Confirm those proposed charges as to which it has determined there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Refuse to confirm those proposed charges as to which it has determined there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conduct further investigation with respect to a particular charge; or

(ii) Amending a proposed charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

6 bis. The refusal of the Pre-Trial Chamber to confirm a proposed charge shall not preclude the Prosecutor from subsequently asking again for its confirmation, if it is supported by additional evidence.¹³⁶

7. After the charges are confirmed and before the trial has begun, the Prosecutor may amend the charges, but only with the permission of the Pre-Trial Chamber and after notice to the accused. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may withdraw the charges only with the permission of the Trial Chamber. In case of a withdrawal of

proposed charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

8. A previously issued warrant shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

9. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber¹³⁷ which, subject to paragraph 7 of this article and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any functions of the Pre-Trial Chamber that are relevant and capable of application in those proceedings.¹³⁷

PART 6. THE TRIAL¹³⁸

Article 62
Place of trial

1. Unless otherwise decided, the place of the trial will be the seat of the Court.

2. **(Deleted)**

3. **(Deleted)**

4. **(Deleted)**

5. **(Deleted)**

Article 63

Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and instruct counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

3. **(Deleted)**

¹³⁶ Nothing precluding the Pre-Trial Chamber from exercising any of its functions and powers in conjunction with that request, including to secure the presence of the accused person

¹³⁷ The drafting of this part of this provision will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial Chamber.

¹³⁸ The Working Group decided that the word "indictment" should be replaced by the word "charges" throughout part 6.

Article 64

Functions and powers of the Trial Chamber

1. The functions and powers set out in this article are to be exercised in accordance with the Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber 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.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial;

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Chamber.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6.¹³⁹ In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 9;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided for in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims;

(f) Rule on any other relevant matters.

¹³⁹ The term "witnesses" includes expert witnesses.

7. The trial shall be held in public. However, the Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.¹⁴⁰

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings in an objective and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence;¹⁴¹

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt under article 64, paragraph 1 (d), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt and whether the admission is voluntarily made after sufficient consultation with defence counsel; and

(b) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges and in any supplementary materials presented by the Prosecutor, and which the accused admits; and

(ii) Any other evidence, including the testimony of witnesses, presented by the Prosecutor or the accused.

¹⁴⁰ The view was expressed that the principle in paragraph 7 is sufficiently important for the matter to be dealt with in a separate article.

¹⁴¹ The Working Group draws the attention of the Drafting Committee to the fact that there may be some duplication of article 69, paragraph 4.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall consider the admission of guilt, together with any additional evidence presented and admitted, as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided for by this Statute, and shall consider the admission of guilt not to have been made and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, in particular the interests of the victims, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided for by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, acceptance of the admission of guilt by the accused or the penalty to be imposed shall not be binding on the Court.

*Article 66
Presumption of innocence*

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the law applicable to it.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond reasonable doubt.

*Article 67
Rights of the accused*

1. In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:

(a) To be informed promptly and in detail in a language the accused fully understands and speaks of the nature, cause and content of the charge;¹⁴²

¹⁴² It is understood that this expression means the language for which the accused, in good faith, has clearly expressed his or her preference.

(b) To have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused's choosing, in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) If any of the proceedings of or documents presented to the Court are not in a language the accused fully understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence;

(i) Not to have imposed on him or her any reverse onus of duty of rebuttal.

2. In addition to any other disclosure provided for under this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

*Article 68
Protection of the victims and witnesses and their participation in the proceedings*

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims¹⁴³ and witnesses. In so doing, the Court shall

¹⁴³ Delegations took the view that the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses. Some delegations did not agree with this.

have regard to all relevant factors, including age, gender¹⁴⁴ and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all of the circumstances, particularly the views of the victim or witness.

3. The Court shall permit the views and concerns of the victims to be presented and considered at stages of the proceedings determined to be appropriate by the Court where their personal interests are affected, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 44, paragraph 4.

5. In respect of any evidence or information to be disclosed pursuant to this Statute, if disclosure of such evidence or information may lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and submit a summary of such evidence or information. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. **(Deleted)**¹⁴⁵

7. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

8. **(Deleted)**

9. **(Deleted)**

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.¹⁴⁶

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.¹⁴⁷ These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may call evidence relevant to the case, in accordance with article 64, paragraphs 3 and 6. However, the Court has the authority to call all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence in accordance with the Statute and the Rules of Procedure and Evidence.

4 bis. The Court shall address and observe privileges on confidentiality as set forth in the Rules of Procedure and Evidence.¹⁴⁸

4 ter. The Court may rule on the relevance and admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial of an accused or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

6. Evidence obtained by means of a violation of this Statute or internationally recognized human rights and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.

7. **(Deleted)**

¹⁴⁴ As defined in article [5 ter].

¹⁴⁵ In the exercise of its powers under this article, the Court shall take into consideration the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁴⁶ The Rules of Procedure and Evidence could in some cases exempt persons from giving an undertaking as to the truthfulness of the evidence given.

¹⁴⁷ The Working Group noted that the requirements for the admissibility of recorded testimony should be addressed in the Rules of Procedure and Evidence.

¹⁴⁸ These may include privileges relative to doctor-patient, lawyer-client and priest-penitent relationships and other similar privileges.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70

Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be as set forth in the Rules of Procedure and Evidence.¹⁴⁹ The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to acts against the administration of justice committed on its territory, or by one of its nationals.

(b) Upon request by the Court, whenever it deems it proper the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

¹⁴⁹ The Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction misconduct of persons present before it, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures, other than imprisonment, such as temporary or permanent removal from the courtroom, a fine, or other similar measure as set forth in the Rules of Procedure and Evidence.¹⁵⁰

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be set forth in the Rules of Procedure and Evidence.

*Article 71*¹⁵¹

Protection of national security information

(Pending)

*Article 71 bis*¹⁵¹

Third-party information or documents pending

(Pending)

Article 72

*Requirements for the decision*¹⁵²

1. All of the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, an alternate judge or judges also to be present at each stage of the trial and replace a member of the Trial Chamber if any of its judges is unable to continue attendance.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges or its amendment, if any. The Court may base its decision only on evidence submitted and discussed before it at the trial.¹⁵³

3. The judges shall attempt to achieve unanimity in their decision, failing which it shall be taken by a majority of the judges.¹⁵⁴

4. **(Deleted)**

¹⁵⁰ The Working Group draws the attention of the Drafting Committee to the need to align the Arabic version to the English version.

¹⁵¹ The Working Group referred articles 71 and 71 bis to the Committee of the Whole.

¹⁵² The Working Group informs the Drafting Committee that the phrase "final decision of acquittal or conviction and sentence" should be used to refer to the final decision of the Trial Chamber throughout the Statute.

¹⁵³ The Working Group informs the Drafting Committee that this paragraph should come after paragraph 5 and before paragraph 6.

¹⁵⁴ The Working Group noted that the Rules of Procedure and Evidence should address the question of how a majority decision is to be achieved.

5. The deliberations of the Trial Chamber shall remain secret.

6. The decision shall be in writing and shall contain a full and reasoned statement of the findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

*Article 73¹⁵⁰
Reparations to victims*

1. The Court shall establish principles relating to reparations to, or in respect of victims,¹⁵⁵ including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.¹⁵⁶

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the trust fund provided for in article 79.

3. Before making an order under the present article, the Court may invite and shall take account of representations from

¹⁵⁵ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors. For the purposes of interpretation of the terms "victims" and "reparations", definitions are contained in the text of article 44, paragraph 4 of the draft Statute, article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17, annex).

¹⁵⁶ Some delegations had the following view:

This provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.

In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative.

It was understood that the Rules of Procedure and Evidence would have to address such issues.

or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under the present article, the Court may, after a person is convicted of a crime under this Statute, determine whether, in order to give effect to an order it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

7. (Deleted)

8. (Deleted)

*Article 74
Sentencing*

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence.

2. Except where article 65 applies, the Trial Chamber may on its own motion, and shall at the request of the Prosecutor or the accused, made before the completion of the trial, hold a further hearing to hear any additional evidence or submissions relevant to sentence, in accordance with the Rules of Procedure and Evidence.¹⁵⁷

3. Where paragraph 2 applies, any representations under article 73 shall be heard during the further hearing referred to in paragraph 2, and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, whenever possible, in the presence of the accused.

PART 8. APPEAL AND REVIEW¹⁵⁸

*Article 80
Appeal against decision or sentence*

1. A decision under article 72 may be appealed, in accordance with the Rules of Procedure and Evidence, as provided for below:

(a) The Prosecutor may make such an appeal on the following grounds:

¹⁵⁷ The Working Group noted that notice to the parties should be dealt with under the Rules of Procedure and Evidence.

¹⁵⁸ The Working Group notes that the term "decision" or "sentence", as appropriate, should be used consistently throughout part 8 rather than the term "judgement".

- (i) Procedural error;
- (ii) Error of fact; or
- (iii) Error of law;

(b) The convicted person or the Prosecutor on that person's behalf may make such an appeal on the following grounds:

- (i) Procedural error;
- (ii) Error of fact;
- (iii) Error of law; or
- (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

[(c)] **(Deleted)**

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence.

(b) If on an appeal against sentence, the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 80, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 82.

The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under article 80, paragraph 2 (a).

[3.] **(Deleted)**

4. (a) Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

When his time in custody exceeds the sentence of imprisonment imposed, he shall be released, but if the Prosecutor is also appealing, his release may be subject to the conditions under (b) below.

(b) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under (a) above may be appealed in accordance with the Rules of Procedure and Evidence.

5. Subject to the provisions of paragraph 4 (a), execution of the judgement shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.¹⁵⁹

Article 81

Appeal against other decisions

1. Either party¹⁶⁰ may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the defendant;¹⁶¹

[(c)] **(Deleted)**

[(d)] **(Deleted)**

(d bis) **(Deleted)**

(e) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹⁶²

(f) A decision of the Pre-Trial Chamber to act on its own initiative under article 57, paragraph 3.

1 bis. A decision of the Pre-Trial Chamber under article 57 bis, paragraph 3 (d), may be appealed by the State concerned or the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

2. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the Rules of Procedure and Evidence.

3. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations. To that end, specific provision shall be made in the Rules of Procedure and Evidence.

¹⁵⁹ It was suggested that it would be useful to include the phrase "Subject to article 80, paragraph 5" at the beginning of article 93, paragraph 1.

¹⁶⁰ The Working Group draws the attention of the Drafting Committee to the fact that the word "Parties" should not be capitalized in French.

¹⁶¹ The Working Group notes that the word "defendant" should not appear in the English text.

¹⁶² Subject to the final drafting of article 71, it was suggested to include within this provision a right to appeal orders of the Court related to the disclosure of national security information.

Article 82¹⁶³
Proceedings on appeal

1. For the purposes of proceedings under article 80 and this article, the Appeals Chamber also has all the powers of the Trial Chamber.

2.¹⁶⁴ If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the accused, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with part 7.

4. The decision of the Chamber shall be taken by a majority of the judges and shall be delivered in open court.¹⁶⁵ ¹⁶⁶The decision shall state the reasons on which it is based. When there is no unanimity, the decision of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the accused.

¹⁶³ The Working Group notes that the term "decision" or "sentence", as appropriate, should be used consistently throughout part 8 rather than the term "judgement". The Working Group notes that the term "sentence" should be translated as *pena* in Spanish and the corresponding term in Arabic.

¹⁶⁴ The Working Group notes that the submission of new evidence to the Appeals Chamber should be addressed in the Rules of Procedure and Evidence.

¹⁶⁵ If a decision is taken to include the death penalty, then consideration should be given in the pertinent part of the Statute as to whether a different majority should be required in such cases.

¹⁶⁶ The Working Group agreed that details concerning quorum for parts 5, 6 and 8 could be addressed in the Rules of Procedure and Evidence and that a general provision to that effect should be added to the Statute.

Article 83
Revision of conviction or sentence

1. The convicted person or, after death, ...¹⁶⁷ or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it likely would have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation has committed in that case an act of serious misconduct or serious breach of duty of sufficient gravity to justify their removal from office under article 47.

[(d)] **(Deleted)**

[(e)] **(Deleted)**

[2]: **(Deleted)**

3. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

[4]: **(Deleted)**

Proposed paragraph 5: **(Pending)**

Article 84¹⁶⁸
Compensation to an arrested or convicted person

1. Anyone who has been victim of unlawful arrest or detention shall have an enforceable¹⁶⁹ right to compensation.

¹⁶⁷ The Working Group referred this pending phrase to the Committee of the Whole.

¹⁶⁸ The Working Group draws the attention of the Drafting Committee to the need to follow the wording of the relevant provisions of the International Covenant on Civil and Political Rights in all of the language versions.

¹⁶⁹ The Rules of Procedure and Evidence shall address the procedures for enforcing this right.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,¹⁷⁰ unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation according to the criteria set forth in the Rules of Procedure and Evidence to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.¹⁷⁰

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 5 and articles 54 and 60 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 26 June 1998¹⁷¹

*Article 54
Initiation of an investigation*

*Article 60
Initial proceedings before the Court*

NOTE

The Committee of the Whole transmits the above articles to the Drafting Committee on the following understandings:

The use of terms that appear within square brackets in part 5 should be considered in the light of the use of those terms in part 9.

¹⁷⁰ There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriage of justice. Other delegations considered this text to be too restrictive.

¹⁷¹ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.29 and Cor.1. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

The term “indictment” has been replaced by the term “charges”. The term “suspect” should not be used in the Statute.

In article 54, the words “reasonable basis” and “sufficient basis” are used intentionally in different paragraphs.

The structure of the articles of this part should remain unchanged.

The Committee of the Whole will consider the exact reference to article 58 in article 60, paragraph 2 at a later stage.

Note regarding part 6 and articles 61, 64, 67 and 74 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

NOTE

This document is reproduced under part 6.

Note regarding article 58 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 13 July 1998³¹

*Article 58
Issuance by the Pre-Trial Chamber of an arrest warrant or a summons to appear*

NOTE

Understanding of the Committee of the Whole with respect to part 5:

The reference left pending in article 60, paragraph 2, previously transmitted to the Drafting Committee should be to “article 58, paragraph 1”.

Note regarding article 54 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

*Article 54
Initiation of an investigation*

NOTE

Understanding of the Committee of the Whole with respect to part 5:

The text that appears within brackets in article 54, paragraph 3 (c), should be reviewed in the light of the outcome of the discussions on part 2;

¹⁷² The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.188. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

The complete text of the chapeau of article 54, paragraph 1, previously transmitted to the Drafting Committee with the phrase "investigation upon...", reads as follows:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/WGPM/L.3

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 54 quater**

[Original: English]
[23 June 1998]

(a) Notwithstanding the Prosecutor's decision to defer an investigation under [article 16] [article 56] or the deferral of investigation pending a challenge under [article 16 or] article 17, the Prosecutor may, with the specific authority of the Pre-Trial Chamber, pursue investigative acts in exceptional circumstances where there exists a unique opportunity to obtain important evidence or where there is a significant risk that such evidence will not be subsequently available if action is not undertaken. These acts may include:

- (i) The taking of testimony or a statement from a witness;
- (ii) The examination or collection of evidence;

(b) To that end, the Prosecutor may seek the cooperation of any State or intergovernmental organization or, subject to its mandate, any peacekeeping force that may be present in the territory where an investigation is to be undertaken.

DOCUMENT A/CONF.183/C.1/WGPM/L.4

France: working paper regarding article 54

[Original: French]
[23 June 1998]

Investigation of alleged crimes

Paragraphs 2 and 3

2. Prior to initiating an investigation the Prosecutor shall:

(a) Notify the States Parties of any complaint or any decision of the Security Council referred to in article 10, paragraph 1, and those States Parties shall so inform the persons within their jurisdiction who are referred to by name in the submission. The content of the notification shall not prejudice the requirements of the investigation or the protection of witnesses and victims.

3. The Prosecutor shall not initiate an investigation where the submission of the case to the Court is challenged under article 15 within one month of notification under article 54, paragraph 2 (a), until the final ruling of the Court. The Prosecutor may however take all appropriate measures to ensure the preservation of evidence or to prevent the escape of any person suspected of being involved. To that end, the Prosecutor may seek the cooperation of the States concerned.

DOCUMENT A/CONF.183/C.1/WGPM/L.8

France: proposal regarding article 57

[Original: English]
[24 June 1998]

*Functions of the Pre-Trial Chamber in relation with
investigation*

Paragraph 4

4. At the request of victims or in respect of victims, the Pre-Trial Chamber may order protective measures which may be necessary for the purposes of preserving property and assets in order to enable a Trial Chamber, upon a subsequent conviction, to give effect to an award of reparation pursuant to article 73, paragraph 2. For that purpose, the Pre-Trial Chamber may seek the cooperation of the interested States in accordance with part 9 of the Statute. Such provisions shall also apply when the person who has been summoned or against whom a warrant of arrest has been issued in accordance with article 58 has fled or cannot be found.

DOCUMENT A/CONF.183/C.1/WGPM/L.11

France: proposal regarding article 54 ter

[Original: English]
[24 June 1998]

Rights of suspects and other persons during an investigation

Paragraph 2

Add a new subparagraph (d), as follows:

“(d) Shall not be subjected to arbitrary arrest or detention, and not be deprived of his or her liberty except on such grounds and in accordance with the Statute and the Rules of Procedure and Evidence.”

DOCUMENT A/CONF.183/C.1/WGPM/L.18

[incorporating document A/CONF.183/C.1/WGPM/L.18/Corr.1 of 30 June 1998]

Informal working group composed of the delegations of Argentina, Belgium, Canada, Finland, France, Germany, Israel, Italy, Japan, Malawi, New Zealand, Poland, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America: working paper on article 54, paragraphs 1 (c) and 3 (c)

[Original: English]
[25 June 1998]

Article 54
Initiation of an investigation

1. The Prosecutor shall, *having evaluated the information made available to him*, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to him provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 15; and

(c) *Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice;* [and

(d) An investigation would be consistent with the terms of any Security Council decision.]

If the Prosecutor determines that there is no reasonable basis to proceed, he shall inform the Pre-Trial Chamber.

2. ...

3. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 15; or

(c) *A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crimes, the interests of victims and the age or infirmity of the alleged perpetrator, and his role in the alleged crime,*

he or she shall inform the Pre-Trial Chamber and the State making a referral under article 11 [or the Security Council in a case under article 10, paragraph 1,] of his or her conclusion and the reasons for the conclusion.

4. (a) *At the request of the State making a referral under article 11 [or the Security Council under article 10], the*

Pre-Trial Chamber may review a decision of the Prosecutor not to proceed under paragraph 1 or 3 of this article and may request the Prosecutor to reconsider that decision.

(b) *In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 3 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.*

5. The Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

DOCUMENT A/CONF.183/C.1/WGPM/L.19

Austria: proposal regarding article 61

[Original: English]
[25 June 1998]

Confirmation of the charges before trial

New paragraph 6 bis

6 bis. The refusal of the Pre-Trial Chamber to confirm a proposed charge shall not preclude the Prosecutor from subsequently asking again for its confirmation, if it is supported by additional evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.20

United Kingdom of Great Britain and Northern Ireland: proposal regarding article 61

[Original: English]
[25 June 1998]

Confirmation of the charges before trial

New paragraph 9

9. Subject to paragraph 7 above, after the Pre-Trial Chamber has confirmed the charges, the Pre-Trial Chamber shall have no further function in relation to the case unless, in accordance with this Statute, the Trial Chamber requests the Pre-Trial Chamber to perform specific functions.

DOCUMENT A/CONF.183/C.1/WGPM/L.31

Poland: proposal to clarify the relationship between article 57, paragraph 3, and 69, paragraph 6

[Original: English]
[29 June 1998]

1. Delete article 57, paragraph 3.

2. Add the following sentence at the end of the current paragraph 6 of article 69:

“The Court may refuse to admit evidence obtained as a result or consequence of a breach of

or non-compliance with an [order] [recommendation][order and recommendation] of the Pre-Trial Chamber.”¹⁷³

DOCUMENT A/CONF.183/C.1/WGPM/L.61

Philippines: proposal regarding article 57 (as set forth in document A/CONF.183/C.1/WGPM/L.38/Rev.1)

[Original: English]
[8 July 1998]

Functions of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. Paragraph 1 (a), line 4, should read:
“the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber and”
2. Paragraph 4, lines 2 and 3, should read:
“the record thereof, may be admitted at trial in accordance with article 69, as determined by the Trial Chamber.”

DOCUMENT A/CONF.183/C.1/WGPM/L.77

France: proposal regarding article 54

[Original: English]
[13 July 1998]

Investigation of alleged crimes

Paragraph 2

Before initiating an investigation, the Prosecutor shall notify States in accordance with article 16.

7. Part 6. The trial

(a) Documents of the Working Group on Procedural Matters

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGPM/L.42

Chairman’s draft proposal for article 67

[Original: English]
[3 July 1998]

Rights of the accused

1. In the determination of any charge, the accused is entitled to a public hearing, having regard to the provisions of

this Statute, and to a fair hearing conducted impartially, and to the following minimum guarantees in full equality:

(a) To be informed promptly and in detail in a language the accused understands or in his or her own language of the nature, cause and content of the charge;

(b) To have adequate time and facilities for the preparation of the defence, and to communicate freely with counsel of the accused’s choosing, in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial to conduct the defence ..., and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for such assistance;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) If any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn statement or any other depositions in his or her defence;

[(i)] **(Deleted)**

(j) Not to have imposed on him any reverse onus or duty of rebuttal.

2. The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

¹⁷³ Other consequences of such a breach or non-compliance, affecting the probative value of evidence, may be attached by the Court under its general discretionary powers vis-à-vis assessing and evaluating evidence and, therefore, need not be articulated separately.

DOCUMENT A/CONF.183/C.1/WGPM/L.37

[incorporating document A/CONF.183/C.1/WGPM/L.37/Corr.1 of 9 July 1998]

Working paper on article 66

[Original: English]
[4 July 1998]

*Presumption of innocence*¹⁷⁴

1. Everyone shall be presumed innocent until proved guilty *before the Court* in accordance with *the law applicable to it*.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court *must* be convinced of the guilt of the accused beyond a reasonable doubt.

DOCUMENT A/CONF.183/C.1/WGPM/L.41

[incorporating document A/CONF.183/C.1/WGPM/L.41/Corr.1 of 9 July 1998]

Working paper on article 64

[Original: English]
[4 July 1998]

Functions and powers of the Trial Chamber

1. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules of Procedure and Evidence, with full respect for the rights of the accused, including his/her protection, and due regard for the protection of victims and witnesses.
2. The functions and powers set out in this article are to be exercised in accordance with the Rules of Procedure and Evidence.

NOTE: There was general agreement that this article would be supplemented by a number of more detailed provisions in the Rules of Procedure and Evidence, in particular regarding disclosure of documents and information between the parties. But it was thought unnecessary to repeat the reference to "in accordance with the Rules of Procedure and Evidence"; hence the introduction of the general wording in paragraph 2 above. This is, however, a wider problem which will need to be addressed throughout the procedures parts.

Preparation for trial

NOTE: The sub-headings in this text are included for guidance only. They will be deleted from the final text.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case may:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial;

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber, or if necessary, to another available judge.

5. The Trial Chamber may direct that there be joinder or severance in respect of charges against more than one accused arising out of the same or related factual situations.

Preparation for trial and during the trial

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 9;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of further evidence to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of witnesses and victims;

(f) Rule on any other relevant matters.

The trial

7. The trial shall be held in public. However, the Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

NOTE: The view was expressed that the principle in paragraph 7 is sufficiently important for the matter to be dealt with in a separate article.

¹⁷⁴ In connection with this text, it was also suggested that the following provision should be added to article 67 or article 69:

"The accused shall have the right to raise defences under the provisions of this Statute, and to present evidence in their support."

8. The deliberations of the Court shall remain confidential.

9. (a) At the commencement of the trial, the Trial Chamber shall read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber will satisfy itself that the accused understands the nature of the charges. It will afford the opportunity to the accused to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings. Subject to any directions of the presiding judge, the parties may adduce evidence in accordance with the provisions of this Statute.

NOTE: The provisions of paragraph 9 are subject to the outcome of debate on article 63.

10. The Trial Chamber shall have, inter alia, the power on application of a party or of its own motion to:

(a) Rule on the admissibility or relevance of evidence;

(b) Take all necessary steps to maintain order in the course of a hearing.

11. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

DOCUMENT A/CONF.183/C.1/WGPM/L.51

[incorporating document A/CONF.183/C.1/WGPM/L.51/Corr.1 of 9 July 1998]

Working paper on article 63

[Original: English]
[4 July 1998]

Trial in presence of the accused

1. The accused shall be present during the trial.

NB: The accused person's right to legal assistance during the trial is dealt with in articles 64 and 67.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and assist counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Preservation of evidence

No provision would be contained in this article. Instead, a provision along the following lines could be inserted into article 57:

“4. Evidence preserved for trial pursuant to this article, or the record thereof, shall be admitted at trial in accordance with article 69, and given such weight as determined by the Trial Chamber.”

[3.

*Option 1*¹⁷⁵

(a) Notwithstanding paragraph 1, the Trial Chamber may, in exceptional circumstances, order that the trial proceed in the absence of the accused, if the accused, having been present at the commencement of the trial, thereafter flees [, after being previously advised that the trial could continue if he or she did so].

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular, that the accused is legally represented, if necessary by a lawyer appointed by the Court.

(c) Where the Trial Chamber has conducted proceedings in accordance with this paragraph, its judgement under article 72 may be appealed in accordance with the provisions of part 8.

*Option 2*¹⁷⁶

NB: The proposals contained in documents A/CONF.183/C.1/WGPM/L.15 and L.17 are abbreviated versions of this option. In substance, the proposal in document L.15 deviates from option 2 only in respect of subparagraphs (a) n exceptional circumstances n and (c).

(a) Notwithstanding paragraph 1, in exceptional circumstances, the Trial Chamber may, in the interests of justice, *proprio motu* or at the request of one of the parties, order that the trial proceed in the absence of the accused, if the latter, having been duly informed of the opening of the trial:

- (i) Requests to be excused from appearing for reasons of serious ill-health;
- (ii) Does not appear on the day of the hearing; or
- (iii) Under detention has, when summoned for the date of the trial, refused to appear without good reason, and made it particularly difficult to bring him to the Court.

In the event that the accused is convicted following a trial held in his absence, the Trial Chamber may issue a warrant for the arrest and transfer of the accused for the purposes of executing the judgement. The decision taken under the provisions of this

¹⁷⁵ Option 1 is derived from the original text of article 63, option 2.

¹⁷⁶ Option 2 is in essence the original text of article 63, option 3.

paragraph shall be communicated to the accused and may be appealed.

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular:

- (i) That all reasonable steps have been taken to inform the accused of the charge; and
- (ii) That the accused is legally represented, if necessary by a lawyer appointed by the Court.

(c) When the accused has not been duly informed of the opening of the trial and when all reasonable steps have been taken to inform the accused of the charges, the Trial Chamber may also, in very exceptional circumstances, *proprio motu* or at the request of one of the parties, order that the trial proceed in the absence of the accused when required in the interests of justice or the interests of the victims.

The accused may not then be represented by a lawyer of the accused's choosing, but the judge presiding over the Trial Chamber may appoint a lawyer on his own motion.

(d) When the accused, having been judged in accordance with the above provisions, is taken prisoner or is arrested, the decisions taken in his absence by the Trial Chamber shall be null and void in all their provisions. The evidence submitted during the trial held in the absence of the accused may not be used, during the second trial, to establish the charges levelled against the accused, except where it is impossible for the depositions to be made a second time or where the evidence cannot again be produced.

Nevertheless, the accused may agree to the decision if the sentence pronounced in his absence is less than or equal to 10 years of imprisonment.]

DOCUMENT A/CONF.183/C.1/WGPM/L.63/REV.1

Working paper on article 73

[Original: English]
[11 July 1998]

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of victims,¹⁷⁷ including restitution,

¹⁷⁷ Such a provision refers to the possibility for appropriate reparations to be granted not only to victims but also to others such as the victims' families and successors (in French *ayants droit*). For the purposes of interpretation of the terms "victims" and "reparations", definitions are contained in the text of article 44, paragraph 4 of the draft Statute, article 68, paragraph 1, and its accompanying footnote, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985, annex) and the examples in paragraphs 12 to 15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law (E/CN.4/Sub.2/1996/17, annex).

compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or upon its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate the Court may order that the award for reparations be made through the trust fund provided for in article 79.

3. Before making an order under the present article, 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.

4. In exercising its power under the present article, the Court may, after a person is convicted of a crime under this Statute, determine whether, in order to give effect to an order it may make under this article, it is necessary to seek measures under article 90, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 99 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

* * *

In article 81, add the following new paragraph:

"3. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 73 may appeal against the order for reparations. To that end, specific provision shall be made in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.67

Working paper on article 63

[Original: English]
[9 July 1998]

Trial in the presence of the accused

1. The accused shall be present during the trial.¹⁷⁸

¹⁷⁸ After having further reflected upon the provisions in articles 64 and 67, it has been concluded that the text of paragraph 1 in document A/CONF.183/C.1/WGPM/L.51 should be retained.

2. If the accused, being present before the Court, is continuing to disrupt the trial, the Trial Chamber may remove the accused and shall provide for him or her to observe and instruct counsel from outside the courtroom, through the use of communications technology if required. Such measures shall be taken only in exceptional circumstances, after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

[3.^{179, 180}

(a) Notwithstanding paragraph 1, the Trial Chamber may, on its own motion, or at the request of one of the parties, order that the trial proceed in the absence of the accused, if it is satisfied that the rights of the accused to a fair trial will not be prejudiced by so proceeding, and if the accused:¹⁸¹

- (i) Having been present at the commencement of the trial, thereafter flees in order to avoid prosecution;¹⁸² or
- (ii) Having been duly informed in person of the opening of the trial, and all reasonable steps having been taken to secure his or her appearance, does not appear on the day of the hearing, and the Trial Chamber, having regard to all surrounding circumstances, has substantial grounds to believe that the person has fled in order to avoid prosecution.

(b) The Trial Chamber shall, if it makes an order under subparagraph (a), ensure that the rights of the accused under this Statute are respected, and in particular, that the accused is legally represented, if necessary by a lawyer appointed by the Court.]

¹⁷⁹ The informal working group could not find provisions in paragraph 3 acceptable to all delegations participating in this work. Therefore, three different alternatives emerge in the text:

- (a) No paragraph 3 (i.e. no trials *in absentia* are possible);
- (b) A trial in the absence of the accused will only be possible under the conditions set out in subparagraph (i); or
- (c) A trial in the absence of the accused will be possible under the conditions set out both in subparagraph (i) and in subparagraph (ii).

Some delegations expressed the view that a prerequisite for accepting trials to be conducted in the absence of the accused, under subparagraph (i) and/or subparagraph (ii), is that sufficient safeguards are provided for in the appeals proceedings or that the accused is given an automatic right to a trial *de novo*. Other delegations, however, questioned the utility of having a trial in the absence of the accused if such an automatic right is provided for.

¹⁸⁰ The accused should be entitled to appeal a judgement rendered after a trial in his or her absence in accordance with the provisions on appeal in Part 8 and, therefore, no reference is needed in this article.

¹⁸¹ The Rules of Procedure and Evidence should address the question of advising the accused that trial may be held in his or her absence.

¹⁸² The view was expressed that additional conditions, such as reasonable attempts to find the person, should also be included.

DOCUMENT A/CONF.183/C.1/WGPM/L.68/REV.2

Working paper on article 70

[Original: English]
[11 July 1998]

Article 70

Offences against the integrity of the Court

1. The Court shall have jurisdiction over the following offences against its integrity, when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- (e) Retaliating against an official of the Court on account of duties performed by that or another official;
- (f) Soliciting or accepting a bribe as an official of the Court in conjunction with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be as set forth in the Rules of Procedure and Evidence.¹⁸³ The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to acts against the integrity of the Court committed on its territory, or by one of its nationals.

(b) Upon request by the Court, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

¹⁸³ The Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes.

Article 70 bis

Sanctions for misconduct before the Court

1. The Court may sanction misconduct of persons present before it, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures, other than imprisonment, such as temporary or permanent removal, a fine, or other similar measure as set forth in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be set forth in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.71

Working paper on article 72

[Original: English]
[10 July 1998]

Quorum and judgement

Paragraph 1

Proposed second sentence:

The Presidency may, on a case-by-case basis, designate an alternate judge or judges to also be present at each stage of the trial and replace a member of the Trial Chamber if any of its judges is unable to continue attendance.

DOCUMENT A/CONF.183/C.1/WGPM/L.76/REV.1

Working paper on article 71

[Original: English]
[15 July 1998]

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 57, paragraphs 2 and 3 (powers of the Pre-trial Chamber), article 61, paragraph 2 (indictment proceedings), article 64, paragraph 3 (powers of the Trial Chamber), article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), or the application of article 71 bis.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence or the Pre-Trial Chamber or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under part 9 of this Statute or the circumstances described in paragraph 2 of this article, and the State has invoked the grounds for refusal found under article 90, paragraph 2 (d):

F. Documents of the Committee of the Whole

- (i) The Court may, before making any conclusion referred to in paragraph 7 (a) (ii), request further consultations for the purpose of hearing the State's representations. The Court shall, if so requested by the State, hold the consultations in camera and ex parte;
- (ii) If the Court concludes that, by invoking the ground for refusal under article 90, paragraph (2) (d), in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 86, paragraph 7, specifying the reasons for its conclusion; and
- (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
- (i) Order disclosure; or
- (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPM/L.2 Report of the Working Group on Procedural Matters

[Original: English]
[24 June 1998]

NOTE

This document is reproduced under part 5.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 6 and articles 61, 64, 67 and 74 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 61
Notification of the indictment

Article 64
Functions and powers of the Trial Chamber

Article 67
Rights of the accused

Article 74
Sentencing

NOTE

Understandings of the Committee of the Whole with respect to part 6:

The Working Group decided that the word "indictment" should be replaced by the word "charges" throughout part 6.

The drafting of article 61, paragraph 9, will need to be reconsidered when a decision has been taken about how, under the Statute, a Trial Chamber is to become seized of a case, whether by way of "assignment" or "constituting" of a Trial chamber.

With respect to article 64, paragraph 9 (a), the Committee of the Whole draws the attention of the Drafting Committee to the fact there may be some duplication of article 69, paragraph 4.

The bracketed text in article 67, paragraph 1 (d), and article 74, paragraph 4, will be examined in the light of the decision to be taken concerning trials in absentia.

Note regarding part 6 and article 72 contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10⁹⁹ and 11 July 1998

Article 72
Requirements for the decision

NOTE

Understandings of the Committee of the Whole with respect to part 6:

Paragraph 2 of article 72 should come after paragraph 5 and before paragraph 6.

The Committee of the Whole informs the Drafting Committee that the phrase "final decision of acquittal or conviction and sentence" should be used to refer to the final decision of the Trial Chamber throughout the Statute.

Note regarding articles 70 bis and 73 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

Article 70 bis
Sanctions for misconduct before the Court

Article 73
Reparations to victims

NOTE

Understanding of the Committee of the Whole with respect to part 6:

The Arabic version of article 70 bis, paragraph 1, and article 73 should be aligned with the English version.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/11

Holy See: proposal regarding article 69

[Original: English]
[17 July 1998]

Evidence

Paragraph 5

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence. *Add: These may include privileges relative to doctor-patient, lawyer-client and priest-penitent relationships and other privileges.*

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/WGPM/L.12

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 71**

[Original: English]
[25 June 1998]

NOTE. This is an amended version of the proposal submitted by the United Kingdom in March 1998 (article 71, option 2). The amendments have been made after consultations with other delegations and are intended to clarify and develop the existing text. This text would replace option 2.

Article 71

Protection of national security information

1. (a) This article applies in any case where the disclosure of the information or documents of a State would, in

the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

(b) Where a person has been asked to provide information or give evidence the disclosure of which would prejudice the national security interests of a State, the provisions of this article shall also apply.

(c) If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that such disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

(d) Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f).

2. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the Defence, the Pre-Trial or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

3. Once all reasonable steps have been taken to resolve the matter through cooperative means and the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its view, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

4. Thereafter, the Court shall not make a determination that disclosure should be made except in accordance with the provisions set out below.

5. The Court may hold a hearing for the purpose of hearing the State's representations on non-disclosure. If so, notice to the State will be given in accordance with the Rules. The Court shall, if so requested by the State, hold in camera and ex parte hearings, and may make other special arrangements, including, as appropriate:

(a) Designating a single judge to examine documents or hear submissions;

(b) Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

(c) Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

(d) Ordering that no transcripts be made of the proceedings, and that documents not required by the Court be returned directly to the State without being deposited or filed in the Registry of the Court.

6. The Court shall not make a determination that disclosure should be made unless:

(a) It is clear from the State's actions that it is not acting in good faith towards the Court; in determining the State's bona fides, the Court shall have regard to the following factors:

(i) Whether efforts have been made to secure the State's assistance through cooperative means and without recourse to measures of compulsion;

(ii) Whether the State has expressly refused to cooperate;

(iii) Whether there is clear evidence that the State does not intend to cooperate either because there has been excessive delay in complying with a request for assistance or because there are other circumstances clearly indicating an absence of good faith on its part;

(b) The information or evidence is relevant to an issue before the Court and is necessary for the efficient and fair conduct of the proceedings; and

(c) Having regard to the State's claim that its national security interests would be prejudiced by disclosure, the Court is satisfied that the claim, considered in conjunction with any submission that may have been made by the State, is, on its face, manifestly unfounded.

In making its determination under subparagraph (c) of this paragraph, the Court may take account of evidence that the purpose of the State in making the claim is to shield one of the defendants from criminal responsibility for the crime being investigated or prosecuted.

DOCUMENT A/CONF.183/C.1/WGPM/L.13

Japan: proposal regarding article 70

[Original: English]
[25 June 1998]

Offences or acts against the integrity of the Court

Add a new paragraph 1 bis, as follows:

"1 bis. An official of the Court who receives, demands or agrees to receive a bribe in connection with his or her duties shall also be punished."

DOCUMENT A/CONF.183/C.1/WGPM/L.14

Holy See: proposal regarding article 69

[Original: English]
[25 June 1998]

Evidence

Paragraph 5

Add the following sentence at the end of the paragraph:

"The Court shall respect and observe the classic privileges on confidentiality relative to doctor-patient, lawyer-client and priest-penitent relationships."

DOCUMENT A/CONF.183/C.1/WGPM/L.15

Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic: proposal regarding article 63

[Original: Arabic]
[25 June 1998]

Trial in presence of the accused

1. The trial shall not be held except in the presence of the accused and his lawyer.

2. Notwithstanding the preceding paragraph, the accused may be tried *in absentia*, by decision of the Trial Chamber, if he has been notified of the date set for the trial and:

(a) Refuses to attend or is prevented from attending;

(b) Escapes from lawful custody and does not attend the trial on the date set for it.

3. Notwithstanding paragraphs 1 and 2, the accused may be tried *in absentia*, by decision of the Trial Chamber, if circumstances of *force majeure* [to be determined by the Court] in which he has no hand and which are not expected to end within a reasonable time prevent his attendance.

In such a case, his lawyer shall attend the trial proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.16

Malawi: proposal regarding article 63

[Original: English]
[25 June 1998]

Trial in presence of the accused

1. The accused shall have the right to be present at the trial, unless the Trial Chamber, having heard such submissions and evidence as it deems necessary, concludes that the absence of the accused is deliberate.
2. Where the Trial Chamber decides to proceed in the absence of the accused, it shall, after taking all reasonable steps to inform the accused of the charge, request the Pre-Trial Chamber to convene for purposes of recording evidence; in which case, as appropriate, the provisions of article 61 shall apply.
3. If the accused is subsequently tried under the present Statute, the record of evidence shall, subject to article 69 and the Rules of Procedure and Evidence, be admissible.

DOCUMENT A/CONF.183/C.1/WGPM/L.17

Colombia: proposal regarding article 63

[Original: Spanish]
[25 June 1998]

Trial in presence of the accused

1. As a general rule, the accused shall be tried in his presence.
2. The foregoing shall not prevent the accused from being tried *in absentia* if, all the necessary steps having been taken to secure his appearance, he does not appear for any reason.
3. In every case counsel shall stand bail, informally or otherwise, for the accused.

DOCUMENT A/CONF.183/C.1/WGPM/L.21

United States of America: reference paper

[Original: English]
[26 June 1998]

Rules of Evidence of the International Criminal Court

The attached reference paper (which was previously submitted to the Preparatory Committee as document A/AC.249/1998/DP.15) is submitted to the Working Group as an illustration of how rules of evidence, contained within the Court's rules promulgated under article 52 of the Statute, might appear.

Article 69 of the draft Statute addresses the law of evidence to be applied by the Court. Following extended debate on article 69 during the past week, it now appears that many of the criteria for determining the relevance and admissibility of evidence will not be set forth in the Statute, but instead will be

deferred to the Rules. The present paper is intended to suggest potential structure and content of the Rules of Evidence.

A number of the draft provisions are derived, with appropriate modifications, from the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia ("ICTY rules") and the Draft Set of Rules of Procedure and Evidence for the International Criminal Court prepared by the delegations of Australia and the Netherlands (A/AC.249/L.2) ("A/NL rules"), and these sources are noted. In addition, we have included explanatory notes where we thought it appropriate to highlight significant issues that will need to be considered in preparing the Rules.

Annex

Rules of evidence

(see draft Statute, article 69)

Rule 1. General provisions

(derived from ICTY rule 89; A/NL rule 105)

1. The Rules of Evidence set forth in this section, together with article 69 of the Statute, shall govern the proceedings before a Chamber.
2. These Rules shall be interpreted to ensure fairness to the parties and to the end that the truth may be ascertained and cases justly decided.
3. Where not otherwise provided for in this section, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it.
4. A Chamber may admit any relevant evidence that it deems to be reliable and have probative value. Irrelevant evidence shall not be admitted.
5. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of unduly cumulative evidence.
6. A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
7. A Chamber may request verification of the authenticity of evidence.

Rule 2. Testimony of witnesses

(derived from ICTY rule 90; A/NL rule 106)

1. Before testifying, every witness shall make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

NB: This rule governs a solemn declaration made by a witness, other than the accused. A number of delegations expressed support for a provision ensuring that an accused may make an unsworn statement at trial. This rule does not

seek to address this issue, which would have to be treated in the Statute or separately in the Rules.

2. A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration may testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which he has knowledge and that he understands the duty to tell the truth. [A judgement cannot be based on such testimony alone.]

3. If scientific, technical or other specialized knowledge will assist the Chamber in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

4. Other than an expert or an investigator responsible for a party's investigation, a witness who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

5. A witness may decline to make any statement that might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than [contempt or] perjury, and the Chamber may order such protective measures as may be necessary to effect this result.

Rule 3. Live testimony by means of video or audio link

1. Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber permits otherwise under this rule or rule 4.

2. In the interests of justice and to facilitate the orderly and efficient progression of the proceedings, a Chamber may permit an out-of-court witness to testify, notwithstanding his physical absence, by live audio link, video link or other technology.

3. The examination of the out-of-court witness shall be conducted in accordance with the provisions of the rules governing examination of witnesses at trial. If the State in which the out-of-court witness is located restricts the procedures under which the testimony is given, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Statute and the Rules.

Rule 4. Recorded testimony
(derived from ICTY rule 71)

1. In exceptional circumstances and in the interests of justice, a Chamber may order that testimony be taken and recorded, by audiotape, videotape, transcript or other similar means in advance of trial. The recorded testimony may be

admitted at trial if, for good cause shown, the witness cannot be present at the time of trial.

2. The party seeking to take and preserve testimony shall apply to the Chamber in writing and shall state the name and whereabouts of the person whose recorded testimony is sought, the date and place at which the recorded testimony is to be taken, the matters on which the person is to be examined and the exceptional circumstances involved.

3. If the Chamber grants the application, the party at whose request the recorded testimony is to be taken shall give reasonable notice to the other party, who shall have the opportunity to cross-examine the person to be examined. The parties shall attend the examination, or participate by means of audio link, video link or other similar technology.

4. The Chamber may appoint a judge to preside over the examination, which shall be conducted pursuant to the rules governing testimony of a witness at trial. If the State in which the witness is located restricts the procedures under which the examination proceeds, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Rules.

5. When recorded testimony is taken at the request of the Prosecutor or an indigent accused, [the Chamber may order that the Court will] [the Court shall] bear the expense involved.

Rule 5. Written and oral statements

1. Where a witness is unavailable or where the interests of justice otherwise so require, the Chamber may in its discretion admit prior written or oral witness statements, and give them such weight as it deems appropriate. A judgement cannot be based on such statement alone.

2. When a written or recorded statement or part thereof is introduced by a party, the Chamber may consider any other part or any other written or recorded statement of the witness which in fairness also ought to be considered.

Rule 6. Documentary and other evidence

1. The Chamber may admit documents, including records reflecting official acts or regularly conducted activity, so long as the records have substantial guarantees of trustworthiness.

2. The Chamber may admit summaries, charts or other demonstrative evidence if such evidence will assist in clarifying the issues under consideration.

Rule 7. Confessions
(derived from ICTY rule 92; A/NL rule 108)

1. A confession or admission by the accused given during questioning by the Prosecutor and recorded pursuant to

rule _¹⁸⁴ shall be presumed to have been given voluntarily unless the contrary is proved.

2. A confession or admission by the accused that has not been recorded pursuant to rule _ shall not be excluded if the circumstances establish that it was voluntarily given.

Rule 8. Evidence of consistent pattern of conduct
(derived from ICTY rule 93; A/NL rule 108)

Evidence of a consistent pattern of conduct by the accused may be admitted in the interests of justice.

NB: Other provisions in the Statute or the Rules will provide for disclosure of such evidence prior to trial.

Rule 9. Evidence in cases of sexual assault
(derived from ICTY rule 96; A/NL rule 113)

In cases of sexual assault:

(a) Corroboration of the victim's testimony shall not be required;

(b) Past sexual conduct of the victim shall not be admitted in evidence, except where exclusion would violate the fundamental rights of the accused. Before admitting evidence of a victim's past sexual conduct, the Chamber shall satisfy itself through an offer of proof made in camera that the evidence meets the requirements of this paragraph;

(c) Sexual conduct of the accused may be admitted [if relevant to show motive, opportunity, intent, identity, plan or absence of mistake].

NB: ICTY rule 96 (ii) permits consent as a defence in certain limited circumstances. Limitations on consent as a defence may more properly be treated in relation to defining crimes of sexual violence or general principles of criminal law.

Rule 10. Lawyer-client privilege
(derived from ICTY rule 97; A/NL rule 115)

All communications between lawyer and client shall be regarded as privileged and consequently not subject to disclosure, unless:

(a) The client consents to such disclosure; or

(b) The client disclosed the content of the communication to a third party.

Rule 11. Agreements as to admission
(derived from A/NL rule 111)

1. The defence and the prosecution may agree that a fact, the contents of a document or the expected testimony of a witness should be considered as evidence by the Chamber.

2. In the interest of justice, the Chamber may decline to accept an agreement under paragraph 1.

3. After an agreement has been accepted, a party may withdraw from it only if permitted to do so by the Chamber.

4. An agreement between the defence and the prosecution that a witness, if called to testify, would give certain testimony or that a document, if offered in evidence, has certain contents does not constitute an admission of the truth of the testimony or the contents of the document.

DOCUMENT A/CONF.183/C.1/WGPM/L.22

Syrian Arab Republic: proposal regarding article 69

[Original: Arabic]
[26 June 1998]

Evidence

Paragraph 5

Add the following sentence at the end of the paragraph:

"The Court shall respect and observe the obligations relating to the maintenance of confidentiality, showing due regard for national laws and customary practices such as the physician-patient, lawyer-client and confessor-penitent relationship, and shall respect and observe the confidentiality of private life."

DOCUMENT A/CONF.183/C.1/WGPM/L.23

Canada: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 3

Add a new sentence at the beginning of the paragraph and revise the current sentence, so that the paragraph will read as follows:

"3. *The parties may call evidence relevant to the case, in accordance with article 64, paragraph 3. However, the Court has the authority to call all evidence that it considers necessary for the determination of the truth.*"

¹⁸⁴ The Rules of Procedure could require the Prosecutor to record statements of the accused, in the same manner as ICTY rule 43. If such a rule is promulgated, a presumption in favour of voluntariness could be provided for as above.

DOCUMENT A/CONF.183/C.1/WGPM/L.24

Iraq: proposal regarding article 69

[Original: Arabic]
[26 June 1998]

Evidence

Paragraph 7

7. The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt. With regard to defences open to the accused under the general principles of criminal law in the present Statute, the onus of proof shall be on the accused.

NOTE. This proposal will require the deletion of the second sentence from article 66, which reads: "The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt."

DOCUMENT A/CONF.183/C.1/WGPM/L.25

Colombia: proposal regarding article 69, paragraph 7

[Original: Spanish]
[25 June 1998]

Evidence

Paragraph 7

7. The accused shall have the right to plead defences to trial under the provisions of this Statute, and to present evidence in their support.

DOCUMENT A/CONF.183/C.1/WGPM/L.26

Canada: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 7

7. Where a defence is not already raised by the evidence presented to the Court, the accused may raise such defence and has the right to prove such defence.

DOCUMENT A/CONF.183/C.1/WGPM/L.27

Philippines: proposal regarding article 69

[Original: English]
[26 June 1998]

Evidence

Paragraph 7 should be reformulated as follows:

"7. The accused shall have the burden of proof in availing himself or herself of the defences in his or her favour under the general principles of criminal law in the

present Statute, subject to the requirements of article 66."

DOCUMENT A/CONF.183/C.1/WGPM/L.28

France and United Kingdom of Great Britain and Northern Ireland: proposal regarding article 73

[Original: English]
[26 June 1998]

Reparations to victims

NOTE. This is a simplified text which narrows the focus of the current "Reparations" text and which would replace the present article 73

1. The Court may establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its judgement the Court will determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. In its judgement, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims. Reparations may include restitution, compensation and rehabilitation.

3. Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in article 79.

4. In exercising its power under the present article, the Court may determine whether, in order to give effect to any order it may make, it is necessary to request protective measures under article 90, paragraph 1.¹⁸⁵

5. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims, other interested persons or interested States.

6. In relation to a judgement under this article, the national authorities of a State Party shall either:

(a) Enforce the judgement in accordance with national procedural law if victims, their successors or assigns seek enforcement of the judgement by its competent national authorities; or

¹⁸⁵ As regards the reference to article 90, paragraph 1, and part 10 in general, the sponsors consider that it is necessary to ensure that the property and assets referred to in that article include both crime" and non-crime" related property and assets.

(b) Enforce the judgement in accordance with parts 9 and 10 of the Statute if the Court, upon request from victims, their successors or assigns, seeks enforcement of its judgement.

7. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

8. Victims or any person acting on their behalf, the convicted person or other interested persons may appeal against a judgement under the article in accordance with part 8 of the Statute and the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.29

Switzerland: proposal regarding article 65

[Original: English]
[27 June 1998]

Proceedings on an admission of guilt

Paragraph 5 should read as follows:

“5. Any discussions between the Prosecutor and the defence regarding modification of the charges in the indictment, acceptance of the admission of guilt by the accused or the penalty to be imposed shall in no way be binding on the Court.”

DOCUMENT A/CONF.183/C.1/WGPM/L.30

Japan: proposal regarding article 73

[Original: English]
[28 June 1998]

Reparations to victims

1. The Court may establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and compensation for the purpose of rehabilitation. The Court may, upon request, determine, in its judgement, the scope and extent of any damage, loss and injury to, or in respect of, victims.

2. In accordance with the principles established by the Court, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

3. Before making a decision under the present article, the Court shall take account of and may invite any written or oral representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. Victims or their successors or assigns may seek enforcement of a judgement under the present article by competent national authorities. The national authorities of a State Party shall give effect to the judgement in accordance with its national law.

5. Nothing in the present article shall be interpreted as prejudicing the rights of victims under national or international law.

6. Victims or any person acting on their behalf and the convicted person may appeal against judgement under this article.

7. Rules necessary to give effect to the provisions of the present article shall be made in accordance with article 52.

DOCUMENT A/CONF.183/C.1/WGPM/L.31

Poland: proposal to clarify the relationship between article 57, paragraph 3 and article 69, paragraph 6

[Original: English]
[29 June 1998]

Evidence

NOTE

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DOCUMENT A/CONF.183/C.1/WGPM/L.32

Croatia: proposal regarding article 71

[Original: English]
[29 June 1998]

Sensitive national security information

Option 2

Add a new paragraph 1, as follows:

“1. States cannot claim national defence or security interests for withholding documents or evidentiary materials unless the legitimacy of their concerns has been established by a Pre-Trial Chamber or Trial Chamber.”

Paragraphs 1 to 6 thus are renumbered as paragraphs 2 to 7.

This new paragraph 1 can also be added in other options of article 71.

The present proposal corresponds to the Appeals Chamber decision of the International Tribunal for the Former Yugoslavia concerning *subpoena duces tecum* in the *Blaskic* case and relevant norms of the Statute and the Rules of Procedure and Evidence of the ICTY.

The Security Council has established this standard for the efficient functioning of the International Tribunals for the Former Yugoslavia and for Rwanda. There is no reason to apply different practices to the International Criminal Court.

DOCUMENT A/CONF.183/C.1/WGPM/L.33

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 67**

[Original: English]
[29 June 1998]

Rights of the accused

1. Amend the chapeau of paragraph 1 as follows:

"Subject to the provisions of this Statute, in the determination of any charge brought under it the accused is entitled to a fair and public hearing, conducted impartially, and to the following minimum guarantees in full equality;"
2. Amend paragraph 1 (g) as follows:

"Neither to be compelled to testify nor to confess guilt and to be permitted to remain silent without any inference as to guilt or innocence being drawn from such silence;"
3. Replace the word "Procuracy" by the word "Prosecution" throughout this provision.

DOCUMENT A/CONF.183/C.1/WGPM/L.34

Israel: proposal regarding article 69

[Original: English]
[29 June 1998]

Evidence

Paragraph 2

2. Before deciding on the subject of the admission of recorded evidence (video or audio), the Court has to be satisfied that the following preliminary conditions are met to ensure that the testimony is authentic and has been properly recorded. The recorder must testify about the following issues:
 - (a) The record is the original record;
 - (b) The person recorded is identified by the recorder as the witness-recorded;
 - (c) The record is authentic and has not been interfered with;
 - (d) The testimony recorded had been given out of free will without any duress, torture or other unlawful means, and there is no risk that the testimony is not reliable.

DOCUMENT A/CONF.183/C.1/WGPM/L.35

Australia: proposal regarding article 67

[Original: English]
[29 June 1998]

Rights of the accused

Paragraph 2

2. The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the [Pre-Trial Chamber/Trial Chamber] shall decide.

DOCUMENT A/CONF.183/C.1/WGPM/L.36

**Egypt, Oman and Syrian Arab Republic: proposal
regarding article 67**

[Original: Arabic]
[29 June 1998]

Rights of the accused

Paragraph 1

- (a) to be informed immediately and in detail, in his or her own language or in a language of his or her choice, of the nature ...;
- (b) ...
- (c) to be tried without unreasonable delay and speedily;
- (d) ...
- (e) to be entitled to present whatever evidence he or she sees fit, and in particular to examine personally or through an intermediary the prosecution witnesses and to compel the appearance and examination of witnesses for the defence upon the same conditions as for prosecution witnesses;
- (f) ...
- (g) ...
- (h) to make an unsworn statement or any other deposition in his or her defence.

Paragraph 2

It is necessary to identify the person or the body who is to furnish the exculpatory evidence.

Paragraph 3

The paragraph should be retained once the square brackets have been deleted.

Paragraph 4

The paragraph should be placed elsewhere.

DOCUMENT A/CONF.183/C.1/WGPM/L.39

**France and United States of America:
proposal regarding article 71**

[Original: English]
[1 July 1998]

NOTE. This an amended version of the proposals submitted by France and the United States in March 1998 (A/CONF.183/2/Add.1 and Corr.1, article 71, options 1 and 3). This proposal incorporates much of the amended proposal of the United Kingdom of Great Britain and Northern Ireland on article 71, which has been circulated as document A/CONF.183/C.1/WGPM/L.12. Where this proposal sets forth additions to or amendments of provisions in the United Kingdom's proposal, the text is italicized. An integral part of this proposal is the proposal amending article 90, paragraph 2 (c), which is set out at the beginning of article 71, option 3, in A/CONF.183/2/Add.1 and Corr.1 (see footnote 186 below).

Article 71

Protection of national security information

1. (a) This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraph 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

(b) *This article shall also apply when a person who has been requested to give information or evidence has refused to do so on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that the disclosure would prejudice its national security interests.*

(c) If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that such disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

(d) Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), nor shall this article be interpreted as requiring a State to disclose information obtained under a pre-

existing agreement of confidentiality from another State or an intergovernmental organization.

2. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence, or the Pre-Trial or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, is cumulative;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

3. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests. *If a State has complied with the provisions of paragraph 2 and this paragraph, it may deny a request for assistance, in whole or in part, in accordance with article 90, paragraph 2 (c).*¹⁸⁶

4. *If, in the opinion of the Court, the State's decision may have been made in bad faith, it may consider the matter further, as set forth in the provisions below.*

5. The Court may hold a hearing for the purpose of hearing the State's representations on non-disclosure. If so, notice to the State will be given in accordance with the Rules of Procedure and Evidence. The Court shall, if so requested by the State, hold

¹⁸⁶ This citation refers to article 90, paragraph 2 (c), as amended in the text at the beginning of option 3, article 71, in document A/CONF.183/2/Add.1 and Corr.1. That text reads:

"2. A State Party may deny a request for assistance, in whole or in part, only if: ...

"(c) having complied with the provisions of article [71], it determines that there are no conditions under which it can comply with the request, including requests for information or evidence arising under article 71 (option 1), without seriously prejudicing its national security interests."

F. Documents of the Committee of the Whole

in camera and ex parte hearings and may make other special arrangements, including, as appropriate:

(a) Designating a single judge to examine documents or hear submissions;

(b) Allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;

(c) Allowing the State to provide its own interpreters for the hearing and its own translations of sensitive documents; and

(d) Ordering that no transcripts be made of the proceedings, and that documents not required by the Court be returned directly to the State without being deposited or filed in the Registry of the Court.

6. *The Court shall not conclude that the State's decision not to disclose is made in bad faith unless:*

(a) It is clear from the State's actions that it *has engaged in a pattern of* not acting in good faith towards the Court. In determining the State's bona fides, the Court shall have regard to *the State's conduct in present and previous dealings with the Court, including:*

(i) Whether efforts to secure the State's assistance through cooperative means and without recourse to measures of compulsion *have been successful;*

(ii) Whether the State has expressly refused to cooperate; and

(iii) Whether there is clear evidence that the State *did* not intend to cooperate either because there *was* excessive delay in complying with a request for assistance or because there *were* other circumstances clearly indicating an absence of good faith on its part;

(b) The information or evidence is relevant *and necessary for the resolution of an important issue in the case;* and

(c) *The Court is satisfied that the State's claim that its national security interests would be prejudiced by disclosure is manifestly without foundation, based on a determination that:*

(i) *Upon consideration of the nature of the information sought (including the manner or likely manner in which the State obtained the information), and any submission the State may have made in support of its claim, there is no apparent as is for the claim; or*

(ii) *It is clear that the purpose of the State in making the claim is to shield one of its nationals or*

agents from criminal responsibility for the crime being investigated.

7. *If, pursuant to the procedure set out above, the Court concludes that the State is not acting in conformity with the provisions of the present Statute, the Court may refer the matter as provided in article 86, paragraph 6.*¹⁸⁷

DOCUMENT A/CONF.183/C.1/WGPM/L.48/REV.1

Canada: proposal regarding article 69

[Original: English]

[7 July 1998]

Evidence

Paragraph 4

4. The Court may rule on the relevance and admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial of an accused or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.49

Singapore: proposal regarding article 71

[Original: English]

[3 July 1998]

Protection of national security information

NOTE. Italicized portions denote differences from the paper submitted by France and the United States of America (A/CONF.183/C.1/WGPM/L.39).

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 67, paragraphs 2 (relating to disclosure of exculpatory evidence), article 68, paragraph 9 (relating generally to protective measures sought by a State), article 86, paragraph 5 (relating to requests for information in the possession of intergovernmental organizations) and article 90 (relating to requests for assistance), as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so on the ground that disclosure would prejudice the national

¹⁸⁷ This citation refers to the paragraph appearing in A/CONF.183/2/Add.1 and Corr.1, concerning referral by the Court of matters involving non-cooperation by States Parties.

security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54 bis, paragraphs 1 (e) and (f), nor shall this article be interpreted as requiring a State to disclose information obtained from another State or an intergovernmental organization under an agreement to protect classified information exchanged between the parties.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber (as the case may be), to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, is cumulative;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. *Thereafter, where disclosure of the information or document is other than pursuant to a request for cooperation under part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, order disclosure.*

8. *Where the disclosure of the information or document is sought pursuant to a request for cooperation under part 9, the Court may, if it determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused:*

(a) *Refer the matter in accordance with article 86, paragraph 6; and*

(b) *Make such inferences that relate to the guilt or innocence of the accused as may be appropriate in the circumstances.*

DOCUMENT A/CONF.183/C.1/WGPM/L.52

Israel: proposal regarding article 64

[Original: English]
[6 July 1998]

Functions and powers of the Trial Chamber

Proposed new paragraph

11. (a) The Prosecutor or the arrested/accused person may appeal to the Trial Chamber against a decision given by the Pre-Trial Chamber.

(b) The appeal shall be heard before a quorum of three judges other than those who hear the trial.

(c) The appeal shall be brought to the Trial Chamber by leave of the Trial Chamber.

DOCUMENT A/CONF.183/C.1/WGPM/L.58/REV.1

Canada: proposal regarding article 68

[Original: English]
[6 July 1998]

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims¹⁸⁸ and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or

¹⁸⁸ Delegations took the view that the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses. Some delegations did not agree with this.

inconsistent with the rights of the accused and a fair and impartial trial.

2. Notwithstanding the principle of public hearings in article 67, the Chambers of the Court may, to protect victims and witnesses, conduct closed proceedings or allow the presentation of evidence by electronic or other special means. Such measures shall be implemented where requested by a child witness or victim, or a victim of sexual violence, unless otherwise ordered by the Court.

3. The Court shall permit the views and concerns of the victims to be presented and considered at stages of the proceedings determined to be appropriate by the Court where their personal interests are affected, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance referred to in article 44, paragraph 4.

5. In respect of any evidence or information to be disclosed pursuant to this Statute, if disclosure of such evidence or information may lead to the security of any witness or his/her family being gravely endangered, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and submit a summary of such evidence or information. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁸⁹

¹⁹⁰[6. In the exercise of its powers under this article, the Court shall take into consideration the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.]

7. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of sensitive information.

DOCUMENT A/CONF.183/C.1/WGPM/L.65

Netherlands: proposal regarding article 70

[Original: English]
[9 July 1998]

Offences or acts against the integrity of the Court

4. (a) The Court's jurisdiction shall be governed by the rule of territoriality.

(b) In case the territorial State has preferent jurisdiction in accordance with paragraph 1 of this article, the Court shall refer the case to that State and provide assistance to that State in accordance with article 90, paragraph 7. On request of the Court, the territorial state shall prosecute a crime under article 70 as expeditiously as possible.

5. The Rules of Procedure and Evidence shall address the procedural provisions regarding the Court's exercise of jurisdiction under this article in accordance with articles 63 to 67, article 69, article 72 and article 74 of this Statute.

DOCUMENT A/CONF.183/C.1/WGPM/L.69

United States of America: proposal regarding article 73, paragraph 1

[Original: English]
[10 July 1998]

*Reparations to victims*¹⁹¹

DOCUMENT A/CONF.183/C.1/WGPM/L.70/REV.1

Belgium, Italy and United Kingdom of Great Britain and Northern Ireland: proposal regarding article 71 bis

[Original: English]
[10 July 1998]

Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it

¹⁸⁹ The Drafting Committee should be advised that this paragraph could either be included within article 68 or as a new paragraph 10 of article 61, although there was a preference expressed by many delegations to retain it in article 68.

¹⁹⁰ *Option 1:* Paragraph 6, as amended, to be included in the text.

Option 2: The text of paragraph 6, as amended, to be included as a footnote.

¹⁹¹ This provision intends that where there are only a few victims the Trial chamber may make findings about their damage, loss and injury. Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.

In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative.

shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 71. If the originator is not a State Party and refuses consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

DOCUMENT A/CONF.183/C.1/WGP/L.4

Mexico: proposal regarding article 21 bis or article 74 bis

[Original: English]
[1 July 1998]

NOTE

This document is reproduced under part 3.

8. Part 7. Penalties

(a) Documents of the Working Group on Penalties

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGP/L.2

Chairman's working paper on article 79

[Original: English]
[30 June 1998]

NOTE. The following text is proposed for consideration, without prejudice to the question of inclusion of fines or confiscated assets.

Fines and assets collected by the Court

Fines and assets collected by the Court may be transferred, by order of the Court, to a trust fund established by the Secretary-General of the United Nations for the benefit of victims of the crime and their families.

DOCUMENT A/CONF.183/C.1/WGP/L.3/REV.1

Chairman's working paper on article 75

[Original: English]
[6 July 1998]

Applicable penalties

Paragraph 1

The Court may impose on a person convicted of a crime under article [5] of this Statute a term of life imprisonment, where justified by the particular circumstances of the crime, or

imprisonment for a specified number of years, which may not exceed a maximum of 30 years.^{192,193}

¹⁹² To meet the concerns of a number of delegations regarding the severity of a life sentence or a long sentence of imprisonment, it would be necessary to provide for a *mandatory* mechanism in part 10, article 100, by which the prisoner's sentence would be re-examined *by the Court* after a certain period of time, in order to determine whether he or she should be released. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question. Among such criteria several delegations emphasized that evidence of the prisoner's early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgements in other cases, and in particular providing information as to the location of assets which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.

With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at: (i) not less than 20 years in case of life imprisonment, and (ii) not less than two thirds of the term in case of imprisonment for a specified number of years. With regard to the period for life imprisonment, it is noted that some delegations supported this period being set at not less than 25 years.

Consideration should also be given to the issue of subsequent mandatory reviews following the initial one. In subsequent reviews other grounds besides those listed above may become more relevant, while the relevance of the stated grounds may diminish. For the purposes of establishing a system of periodic review, there would appear to be a need to distinguish between life imprisonment and imprisonment for a specified number of years. In the case of the former, it is suggested that subsequent reviews take place at three-year intervals. In relation to other terms of imprisonment, in view of the technical complexity of similar provisions, it is suggested that subsequent mandatory reviews take place according to a schedule specified in the Rules of Procedure and Evidence.

¹⁹³ The Coordinator would like to stress the following:

Extensive consultations, as well as statements in the plenary of the Conference and in the Working Group on Penalties, have shown that a number of delegations strongly favour an inclusion of the death penalty as one of the penalties to be applied by the Court. On the other hand, the consultations as well as statements in the plenary and in the Working Group have also shown that a number of other delegations are strongly opposed to such an inclusion. In this context, a number of delegations have stressed that cooperation between States and the Court would effectively be hindered should the Statute provide either directly or indirectly for an inclusion of the death penalty.

On the basis of these consultations it is the opinion of the Coordinator that there are no grounds for establishing a consensus on this issue. At the same time, a very substantial number of interventions of delegations in the course of the work in the Working Group have indicated a strong desire to achieve a balanced compromise on the main penalties to be included in the Statute. All delegations have indicated a willingness to find solutions which may be conducive to the shared goal of an early establishment of an International Criminal Court with a broad basis of support from the international community.

It should be noted that not including the death penalty in the Statute would have no bearing on national legislations and practices in this field. States have the primary responsibility for prosecuting and punishing individuals for crimes falling under the subject-matter jurisdiction of the Court. In accordance with the principle of complementarity between the Court and national jurisdictions, the Court would clearly have no say on national policies in this field.

DOCUMENT A/CONF.183/C.1/WGP/L.7

Chairman's working paper on article 79

[Original: English]
[2 July 1998]

Fines collected by the Court

1. A trust fund shall be established by decision of the Assembly of States Parties, for the benefit of victims of crimes within the jurisdiction of the Court and of their families.
2. Money and the proceeds of other property collected by the Court through fines or forfeiture may be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

DOCUMENT A/CONF.183/C.1/WGP/L.9/REV.1

Chairman's working paper on article 77

[Original: English]
[6 July 1998]

Determination of the sentence

Paragraph 3

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and may not exceed the maximum prescribed in article 75, paragraph ..., which may only be applied where justified by the circumstances of the crimes.

DOCUMENT A/CONF.183/C.1/WGP/L.10

Chairman's working paper on article 75

[Original: English]
[2 July 1998]

Applicable penalties

Paragraph 2

2. In addition to imprisonment, the Court may order
 - (a) A fine, which, having regard to the circumstances and means of the convicted person, is not excessive;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

In the event of refusal to comply with an order imposed by the Court to pay a fine or a forfeiture, the convicted person may be re-sentenced by the Court in accordance with the Rules of Procedure and Evidence.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGP/L.14

[incorporating documents A/CONF.183/C.1/WGP/L.14/Corr.1 and Corr.2 of 6 July 1998 and Add.1 of 7 July 1998 and Add.1/Corr.1 of 8 July 1998, Add.2 of 9 July 1998 and Add.3/Rev.1 of 17 July 1998]

Report of the Working Group on Penalties

[Original: English]
[4 July 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Penalties, under the chairmanship of Mr. Rolf Einar Fife (Norway), the following articles of part 7:

PART 7. PENALTIES

Article 75. Applicable penalties

[Article 76]. Penalties applicable to legal persons

Article 77. Determination of the sentence

[Article 78]. Applicable national legal standards

[Article 79]. Fines [and assets] collected by the Court

2. The Working Group held four meetings to consider the articles contained in part 7, from 30 June to 3 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 7 for its consideration: article 75, paragraph 2; article 77, paragraphs 1 and 2; and article 79. The Working Group also notes the deletion of article 75, last two subparagraphs of paragraph 1 (a) subparagraph [(b)], subparagraph [(c)] and subparagraph [(d)]; and article 78.

3. The Working Group held one additional meeting to consider the remaining articles contained in part 7, on 7 July 1998. The Working Group herewith transmits to the Committee of the Whole the following article for inclusion in part 3: article 21 bis. The Working Group further notes the deletion of [article 76].

4. The Working Group held one additional meeting, on 9 July 1998, to consider the remaining articles contained in part 7. The Working Group herewith transmits to the Committee of the Whole the following articles of part 7 for its consideration: article 75, paragraph 1; and article 77, paragraph 3.

5. The Working Group held two additional meetings, on 11 and 16 July 1998, to consider the remaining article contained in part 7. The Working Group herewith transmits to the Committee of the Whole the following article of part 7, as well as the accompanying statement, for its consideration:

article 79 bis. The Working Group also notes the deletion of article 75, paragraph 1 (e).¹⁹⁴ The Working Group thereby concluded its consideration of part 7.

II. Text of draft articles

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

*Article 21 bis*¹⁹⁵ *Nulla poena sine lege*

A person convicted by the Court may be punished only in accordance with this Statute.

PART 7. PENALTIES¹⁹⁶

Article 75 *Applicable penalties*

1.¹⁹⁷ The Court may impose on a person convicted of a crime under article [5] of this Statute one of the following penalties, subject to article 100:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹⁹⁸

[(b)]: **(Deleted)**

[(c)]: **(Deleted)**

[(d)]: **(Deleted)**

(e): **(Deleted)**

2.¹⁹⁹ In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for by the Rules of Procedure and Evidence;

¹⁹⁴ Some delegations do not agree with the decision to exclude the death penalty but they have decided to permit the Conference to proceed on the basis of the Chairman's proposal while reserving the right to put their views on record at appropriate stages of the Conference.

¹⁹⁵ The Working Group draws the attention of the Drafting Committee to the possibility of including this provision as a separate article or as a provision of article 21.

¹⁹⁶ The Working Group informs the Drafting Committee that the term "forfeiture" is to be translated as follows throughout the Statute: French: confiscation; Spanish: decomiso; and Arabic: مصادرة

¹⁹⁷ The Working Group notes that the adoption of this paragraph is without prejudice to the structure of this article and without prejudice to the issue of the inclusion or the non-inclusion of the death penalty.

¹⁹⁸ Some delegations expressed concerns about an explicit reference to life imprisonment.

¹⁹⁹ The Working Group draws the attention of the Drafting Committee to the need to consider this article in conjunction with article 99, Enforcement of fines and forfeiture measures.

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

NOTE

To meet the concerns of a number of delegations regarding the severity of long sentences of imprisonment, it would be necessary to provide for a *mandatory* mechanism in part 10, article 100, by which the prisoner's sentence would be re-examined *by the Court* after a certain period of time. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.

However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question. Among such criteria several delegations emphasized that the behaviour of the prisoner, including in particular early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgements in other cases, and in particular providing information as to the location of assets which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.

With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at not less than two thirds of the term of imprisonment. In case of life imprisonment, the period to be served before a review may take place would be not less than 25 years.

Article 100 should also provide for subsequent mandatory reviews following the initial one. In view of the technical complexity of such rules, it is suggested that subsequent mandatory reviews take place according to modalities specified in the Rules of Procedure and Evidence.

[Article 76

Penalties applicable to legal persons]

(Deleted)

Article 77

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into

account such factors as the gravity of the crime and the individual circumstances of the convicted person.²⁰⁰

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with article 75, paragraph 1 (b).²⁰¹

[Article 78
Applicable national legal standards]

(Deleted)

Article 79²⁰²
Fines and assets collected

1. A Trust Fund shall be established by decision of the Assembly of States Parties, for the benefit of victims of crimes within the jurisdiction of the Court and of their families.

2. Money and other property collected through fines or forfeiture may be transferred by order of the Court, to the Trust Fund.

3. The Trust fund shall be managed according to criteria to be determined by the Assembly of States Parties.

²⁰⁰ It may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage. Many delegations felt that factors should be elaborated and developed in the Rules of Procedure and Evidence, while several other delegations expressed the view that a final decision on this approach would depend upon the mechanism agreed for adopting the Rules. Among the factors suggested by various delegations as having relevance were: the impact of the crime on the victims and their families; the extent of damage caused or the danger posed by the convicted person's conduct; the degree of participation of the convicted person in the commission of the crime; the circumstances falling short of exclusion of criminal responsibility such as substantially diminished mental capacity or, as appropriate, duress; the age of the convicted person; the social and economic condition of the convicted person; the motive for the commission of the crime; the subsequent conduct of the person who committed the crime; superior orders; the use of minors in the commission of the crime.

²⁰¹ The Working Group draws the attention of the Drafting Committee to the future need to finalize the paragraph numbers of article 75.

²⁰² The Working Group draws the attention of the Drafting Committee to the need to ensure consistency in the use of terms in this article and article 73, Reparations to victims.

Article 79 bis²⁰³

Nothing in this part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this part.

NOTE

The Working Group recommends that the President of the Conference make the following statement and that this statement be included in the official records of the Conference:

With regard to the non-inclusion of the death penalty in the Statute, I should like to make the following statement:

“Statement

“The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes.”

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 7 and articles 75 and 79 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 75
Applicable penalties

Article 79
Fines and assets collected

NOTE

Understandings of the Committee of the Whole with respect to part 7:

²⁰³ The Drafting Committee may wish to consider the placement of this article in part 7.

The Committee of the Whole informs the Drafting Committee that the term “forfeiture” is to be translated as follows throughout part 7: French: *confiscation*; Spanish: *decomiso*; and Arabic: مصادرة

The Committee of the Whole draws the attention of the Drafting Committee to the need to consider article 75 in conjunction with article 99, Enforcement of fines and forfeiture measures.

The Committee of the Whole draws the attention of the Drafting Committee to the need to ensure consistency in the use of terms in article 79 and article 73, Reparations to victims.

Note regarding article 75 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 10 July 1998⁹⁹

*Article 75
Applicable penalties*

NOTE

Understandings of the Committee of the Whole with respect to part 7:

The Committee of the Whole draws the attention of the Drafting Committee to the future need to finalize the paragraph numbers of article 75.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/WGP/L.1

Italy: proposed amendments regarding articles 75, 76 and 77

*[Original: French]
[30 June 1998]*

*Article 75
Applicable penalties*

Subparagraph (a)

Delete the words “[a maximum term of imprisonment of [30] years;]”

Delete the subsequent square brackets, leaving the succeeding wording as it is, throughout.

Subparagraph (b)

Insert the following wording, leaving the present text as it is and deleting the square brackets:

“(a fine) ... set at an amount representing the maximum pecuniary penalty prescribed by the criminal law of the State in which the Court has its seat”.

Subparagraph (c)

Delete the entire subparagraph.

*Article 76
Penalties applicable to legal persons*

Subparagraph (v)

Retain the entire wording and delete the square brackets.

*Article 77
Determination of the sentence*

Paragraph 1

After the words “of the convicted person”, insert the wording in note 13 describing the circumstances.

Paragraph 2

In the second sentence, replace the word “may” by the word “shall”.

DOCUMENT A/CONF.183/C.1/WGP/L.5

Austria: proposal regarding article 77

*[Original: English]
[1 July 1998]*

Determination of the sentence

Paragraph 3

3. When a person had been convicted of more than one crime, the Court shall pronounce a single sentence of imprisonment, not exceeding the maximum sentence provided for in article 75, while indicating the portion of the sentence relating to each of the crimes.

DOCUMENT A/CONF.183/C.1/WGP/L.6

Ukraine: proposal regarding article 77

*[Original: Russian]
[1 July 1998]*

Determination of the sentence

Paragraph 3

The text should read as follows:

“When a person has been convicted of more than one crime, the Court shall pronounce a separate sentence for each crime and shall determine a definitive sentence for the several crimes by merging the lesser sentence in the greater sentence or by adding the whole or part of the sentences together, provided that the total duration of punishment shall not exceed the penalties prescribed for the gravest crime.”

DOCUMENT A/CONF.183/C.1/WGP/L.11

[incorporating documents A/CONF.183/C.1/WGP/L.11/Corr. 1 and 2 of 3 and 8 July 1998]

Algeria, Bahrain, Comoros, Egypt, Iran (Islamic Republic of), Iraq, Kuwait, Libyan Arab Jamahiriya, Nigeria, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal regarding article 75

[Original: Arabic]
[3 July 1998]

Applicable penalties

The Court may impose on a person convicted under this Statute one or more of the penalties provided for by the national law of the State in which the crime was committed.

In cases where national law does not regulate a specific crime, the Court may apply one or more of the following penalties:

- (a)
- (b)
- (c)
- (d)

DOCUMENT A/CONF.183/C.1/WGP/L.12

Belgium, Benin, Brazil, Burundi, Dominican Republic, Egypt, France, Oman, Portugal, Republic of Korea, Romania, Samoa, Slovenia, South Africa, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United Republic of Tanzania: proposal regarding article 76

[Original: English]
[2 July 1998]

Penalties applicable to juridical persons

A juridical person shall incur one or more of the following penalties:

- (a) Fines;
- (b) Forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.²⁰⁴

²⁰⁴ To be made consistent with article 75.

DOCUMENT A/CONF.183/C.1/WGP/L.13

Barbados, Dominica, Jamaica, Singapore and Trinidad and Tobago: proposal regarding article 75

[Original: English]
[3 July 1998]

Applicable penalties

The Court may impose upon a person convicted under this Statute one or more of the following penalties:

- (a) The death penalty;
- (b) A term of life imprisonment;
- (c) A term of imprisonment not exceeding thirty (30) years.

The Court may attach to any sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of the Statute].

DOCUMENT A/CONF.183/C.1/WGP/L.15

Mexico: proposal regarding article 75

[Original: English]
[7 July 1998]

Applicable penalties

Paragraph 1

1. The Court may impose on a person convicted of a crime under article [5] of this Statute one of the following penalties:

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

9. Part 8. Appeal and review

- (a) **Documents of the Working Group on Procedural Matters**
- (i) **Working documents**

DOCUMENT A/CONF.183/C.1/WGPM/L.72

Working paper on article 81

[Original: English]
[10 July 1998]

Appeal against other decisions

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) An order granting or denying release of the defendant on bail;

(c) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.²⁰⁵

2. Unless the Appeals Chamber so orders upon request in accordance with the Rules of Procedure and Evidence and unless otherwise provided for in this Statute, an interlocutory appeal shall not of itself have suspensive effect.

After a decision is taken on article 73, *add* to article 81 a paragraph 3 as follows:

“3. Victims or any person acting on their behalf, the convicted person or a person adversely affected by an order under article 73, may appeal against that order. To that end, specific provisions shall be made in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.74

Working paper on article 84

[Original: English]
[11 July 1998]

Compensation to an arrested or convicted person

1. Anyone who has been victim of unlawful arrest or detention shall have an enforceable¹⁶⁹ right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed, or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law,⁶⁴ unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. Under exceptional circumstances, the Court in its discretion may award compensation, according to the criteria set forth in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of

acquittal or a termination of the proceedings, where the Court finds conclusive facts showing that there had been a grave and manifest miscarriage of justice.²⁰⁶

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGPM/L.2
Report of the Working Group on Procedural Matters

[Original: English]
[24 June 1998]

NOTE

This document is reproduced under part 5.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding part 8 and article 81 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 7 July 1998⁹⁸

Article 81
Appeal against decisions

NOTE

Understandings of the Committee of the Whole in respect of part 8:

The term “decision” or “sentence”, as appropriate, should be used consistently throughout part 8 rather than the term “judgement”.

In connection with the opening clause of paragraph 1 of article 81, the Committee of the Whole draws the attention of the Drafting Committee to the fact that the word “Parties” should not be capitalized in French.

With respect to article 81, paragraph 1 (b), the word “defendant” should not appear in the English text.

²⁰⁵ Subject to the final drafting of article 71, it was suggested to include within this provision a right to appeal orders of the Court related to the disclosure of national security information. It was also suggested to grant the same right to affected persons for activities of the Prosecutor performed under article 57 bis, paragraph 3 (d).

²⁰⁶ There are delegations which believe that there should not be an unfettered right to compensation where a person is acquitted or released prior to the end of the trial. The text of paragraph 3 is intended to limit the right to compensation to cases of grave and manifest miscarriages of justice. Other delegations considered this text to be too restrictive.

Note regarding part 8 and articles 82 and 83 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 82
Proceedings on appeal

Article 83
Revision of conviction or sentence

NOTE

Understandings of the Committee of the Whole with respect to part 8:

The term “decision” or “sentence”, as appropriate, should be used consistently throughout part 8 rather than the term “judgement”. The term “sentence” should be translated as *pena* in Spanish and the corresponding term in Arabic.

In article 82, paragraph 5, a cross-reference to article 63 may be necessary depending on the decision taken on that article.

The blank in article 83, paragraph 1, will be considered at a later stage.

Note regarding article 84 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

Article 84
Compensation to an arrested or convicted person

NOTE

Understanding of the Committee of the Whole with respect to part 8:

The wording of article 84 should follow the wording of the relevant provisions of the International Covenant on Civil and Political Rights in all of the language versions.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/WGPM/L.44
Netherlands: proposal regarding article 81

[Original: English]
[2 July 1998]

Appeal against interlocutory decisions

Paragraph 1

After subparagraph [d], add a new subparagraph d bis reading as follows:

“(d bis) A decision under article 71 with a view to disclosure of information or documents;”

DOCUMENT A/CONF.183/C.1/WGPM/L.45

Japan: proposal regarding article 83

[Original: English]
[3 July 1998]

Revision of conviction or sentence

Paragraph 5

5. Execution of the judgement of the Court may, upon its motion if the interest of justice so requires or at the request of the State of enforcement, be delayed or suspended during the period allowed for revision and for the duration of the revision proceedings.

DOCUMENT A/CONF.183/C.1/WGPM/L.46

Kenya: proposal regarding article 81

[Original: English]
[3 July 1998]

Appeal against interlocutory decisions

New paragraph 3

3. Other decisions may be appealed with leave of the Chambers concerned, and in the event of refusal, such refusal may be appealed.

DOCUMENT A/CONF.183/C.1/WGPM/L.47

Canada: proposal regarding article 81

[Original: English]
[3 July 1998]

Appeal against interlocutory decisions

Paragraph 1 (e)

(e) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the trial.

DOCUMENT A/CONF.183/C.1/WGPM/L.50

United States of America: proposal regarding article 81

[Original: English]
[3 July 1998]

Appeal against interlocutory decisions

Footnote for paragraph 2

In the event that the final version of article 17 addresses the suspension of a trial proceeding when there is an appeal

from a decision on admissibility or jurisdiction, the matter of the non-suspensive effect of an appeal under article 81, paragraph 2, should be revisited to ensure consistency.

DOCUMENT A/CONF.183/C.1/WGPM/L.53

Syrian Arab Republic: proposal regarding article 82

[Original: Arabic]
[6 July 1998]

Proceedings on appeal

Paragraphs 4 and 5

4. The decision shall be taken unanimously by all the judges and shall be delivered in open court. Any of the judges may dissent from the opinion of the majority provided that they explain the reasons for their dissent, to which the majority must reply.

5. The Appeals Chamber may deliver its judgement in the absence of the accused if the latter's absence is in conformity with the provisions of article 63 of this Statute.

DOCUMENT A/CONF.183/C.1/WGPM/L.54

Israel: proposal regarding article 82

[Original: English]
[6 July 1998]

Proceedings on appeal

Paragraph 2 (c)

(c) New evidence will not be allowed to be brought to the Appeals Chamber unless the party so appealing shows that the new evidence was not available prior to this time, and that there was no negligence on the part of the party that seeks the acceptance of the new evidence.

DOCUMENT A/CONF.183/C.1/WGPM/L.55

Kenya: proposal regarding article 84

[Original: English]
[6 July 1998]

Compensation to a suspect/accused/convicted person

Paragraph 3

3. The Court may also award compensation to a person who was held in detention if such detention is found to have been based on no reasonable grounds, or when the proceedings against him or her have concluded with a decision to release him or her because the evidence upon which the proceedings were based was unreasonable and tainted with malice.

DOCUMENT A/CONF.183/C.1/WGPM/L.56

Canada: proposal regarding article 84

[Original: English]
[6 July 1998]

Compensation to a suspect/accused/convicted person

[Paragraph 3]

[3. The Court may also award compensation to a person who was held in detention, based on the prejudice caused to him by such detention, when the proceedings against him have concluded with a decision to release him because of insufficient evidence to support charges against him or because of a final decision of acquittal, provided that the Court determines that the prosecution was undertaken for malicious or *mal fides* purposes.]

DOCUMENT A/CONF.183/C.1/WGPM/L.57

**United Kingdom of Great Britain and Northern Ireland:
proposal regarding article 83**

[Original: English]
[6 July 1998]

Revision of conviction or sentence

Option 1 (two-step process)

Paragraph 1 (c)

Delete the current text for the subparagraph and substitute the following text:

(c) One or more of the judges who participated in conviction or confirmation has committed an act of serious misconduct or serious breach of duty of sufficient gravity to justify their removal from office under article 47;

DOCUMENT A/CONF.183/C.1/WGPM/L.59

Argentina: proposal regarding article 83

[Original: English]
[6 July 1998]

Revision of conviction or sentence

Option 1 (two-step process)

Paragraph 2

2. If a majority of the judges of the Appeals Chamber is disqualified pursuant to article 42, the functions of the Appeals Chamber under this article shall be performed by the Presidency.

DOCUMENT A/CONF.183/C.1/WGPM/L.60

Philippines: proposal regarding article 82

[Original: English]
[7 July 1998]

Proceedings on appeal

Paragraph 4, second paragraph, second sentence

Any judge may deliver a separate or dissenting opinion.

DOCUMENT A/CONF.183/C.1/WGPM/L.62

Syrian Arab Republic: proposal regarding article 83

[Original: Arabic]
[8 July 1998]

Revision of conviction or sentence

Paragraph 5

5. A death sentence imposed by the Court may be suspended during the period of time allowed for revision of the sentence. This shall also apply to a prison sentence, if it is not already being served, on the basis of a decision by the Court, if the Court finds that the evidence warrants a modification of the sentence on the application of the convicted person.

DOCUMENT A/CONF.183/C.1/WGPM/L.73

Canada: proposal regarding article 82

[Original: English]
[11 July 1998]

Proceedings on appeal

The decision of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The decision shall state the reasons on which it is based. When there is no unanimity, the decision of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

10. Part 9. International cooperation and judicial assistance

(a) Documents of the Working Group on International Cooperation and Judicial Assistance

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGIC/L.5

Chairman 's discussion paper regarding articles 87 and 88

[Original: English]
[26 June 1998]

Article 87

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 5

A State Party [having received a request under this part may, in accordance with the Rules of Procedure and Evidence,]

file a written application with the Court to [set aside] [withdraw] [or amend] the request on specified grounds [including those mentioned in articles 15 and 18] [, including that execution of the request in its current form would require the requested State to breach an existing treaty obligation undertaken to another State] [or in the case of a request for surrender, that the person named in the warrant is not the person in the custodial State or that the person cannot be located] or that there is insufficient information to execute the request.] (the rest of the paragraph as in current article 87, paragraph 5).

or

Article 88

Contents of request for [surrender] [transfer] [extradition]

Paragraph 2

Where a State receives a request under this part and identifies problems with the request which may impede or prevent its execution, including but not limited to:

(a) Insufficient information to execute the request;
or

(b) In the case of a request for surrender, despite best efforts, that the person sought cannot be located or that investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) That execution of the request in its current form would require the requested State to breach an existing treaty obligation undertaken to another State,

the requested State shall, without delay, consult with the Court to resolve the matter.

DOCUMENT A/CONF.183/C.1/WGIC/L.6

Chairman 's discussion paper regarding article 87

[Original: English]
[26 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 6

(a) A State Party shall give priority to a request from the Court under paragraph 1, over requests from other States Parties, whether the request from the State Party relates to the same offence or a different offence from that for which the Court seeks the surrender of the person.

(b) If the requested State also receives a request from a non-State Party with which it has an extradition relationship, for the extradition of the same person, for the same offence for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or extradite the person to the State. In making its decision the requested State shall consider all the relevant factors, including but not limited to:

- (i) The respective dates of the requests;
 - (ii) The interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the alleged offender and the victims;
 - (iii) The possibility of subsequent surrender between the Court and the State requesting extradition.²⁰⁷
- (c) If the requested State also receives a request from a non-State Party with which it has an extradition relationship, for the extradition of the same person, for a different offence from that for which the Court is seeking the person's surrender, the appropriate authority of the requested State shall determine whether to surrender the person to the Court or extradite the person to the State. In making its decision the requested State shall consider all the relevant factors, including those set out in (b) above, but in particular the relative nature and gravity of the offences.

DOCUMENT A/CONF.183/C.1/WGIC/L.16

Chairman's discussion paper regarding article 90

[Original: English]
[10 July 1998]

National law/Grounds for refusal

Option 1

No reference to national or procedural law in the chapeau of article 90, paragraph 1;

and

Deletion of ground for refusal (b) in article 90, paragraph 2, option 2.

Option 2 (A)

Reference to national law in the chapeau of article 90, paragraph 1;

and

Deletion of ground for refusal (b) in article 90, paragraph 2, option 2.

Option 2 (B)

No reference to national law in the chapeau article 90, paragraph 1;

and

Include ground for refusal (b) in article 90, paragraph 2, option 2.

Option 3

Include in the chapeau of article 90, paragraph 1, the words "in accordance with the procedures under their national law";

and

Insert new article 86 bis;

and

Delete ground for refusal (b) in article 90, paragraph 2, option 2.

Option 4

Insert free-standing article 86 bis.

DOCUMENT A/CONF.183/C.1/WGIC/L.19

Chairman's discussion paper regarding article ...

[Original: English]
[14 July 1998]

Conflicting obligations

In lieu of paragraph 2, option 2, subparagraph (f)

1. In the event that a State Party receives competing requests from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

2. Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State.

3. In other cases, if necessary, competing requests shall be resolved in accordance with the principles established in article 87 bis.

DOCUMENT A/CONF.183/C.1/WGIC/L.13/REV.2

Rolling text of article 91

[Original: English]
[13 July 1998]

Paragraph 4

4. When circumstances so require, in the case of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a

²⁰⁷ Subparagraph (b) may not be necessary and could be combined with paragraph 1 if the decision is taken on article 17 to allow all States to object. If this is the decision, then the remedy for the State is to object and the only instance where there would be competing requests for the same offence would be where the Court has made a finding under article 15, in which case the Court should have priority.

person on a voluntary basis, including doing so without the presence of the authorities of the requested State if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State requested is a State on the territory of which the crime which is alleged to have been committed, and there has been a determination of admissibility pursuant to articles [16 or 17], the Prosecutor may directly execute such request following such consultations with the requested State as he or she deems appropriate;

(b) In other cases, the Prosecutor may directly execute such request following consultations with the requested State and subject to any reasonable conditions or concerns raised by that State. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

(ii) Recommendations/Report

DOCUMENT /CONF.183/C.1/WGIC/L.11

[incorporating document A/CONF.183/C.1/WGIC/L.11/Corr.1 and 2 of 2 July 1998 and Add.1 of 6 July 1998 and Add.1/Corr.1 of 7 July 1998, Add.2 and Add.2/Corr.1 of 13 July 1998, Add.3 of 13 July 1998 and Add.3/Corr.1 and 2 of 14 July 1998, Add.4 of 14 July 1998 and Add.4/Corr.1 of 15 July 1998, and the rolling texts contained in L.8/Rev.1 of 30 June 1998 and Rev.1/Corr.1 and 2 of 1 and 2 July 1998, L.10 of 1 July 1998 and L.10/Corr.1 of 2 July 1998, and L.15 of 6 July 1998 and L.15/Corr.1 of 7 July 1998]

Report of the Working Group on International Cooperation and Judicial Assistance

*[Original: English]
[1 July 1998]*

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on International Cooperation and Judicial Assistance, under the chairmanship of Mr. Phakiso Mochochoko (Lesotho), the following articles of part 9:

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 85. General obligation to cooperate

Article 86. [Requests for cooperation: general provisions]

Article 87. [Surrender] [Transfer] [Extradition] of persons to the Court

Article 88. Contents of request for [surrender] [transfer] [extradition]

Article 89. Provisional arrest

Article 90. Other forms of cooperation [and judicial and legal [mutual] assistance]

Article 91. Execution of requests under article 90

[Article 92]. Rule of speciality

2. The Working Group held 5 meetings to consider these articles, from 25 June to 2 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 85, article 86 paragraphs 1 to 4, 6 and 7, article 88, article 89, article 90 bis, article 91, paragraphs 1 to 3 and 5, and article 91 bis.

3. The Working Group held an additional meeting on 7 July 1998 to consider the remaining articles. The Working Group transmits to the Committee of the Whole the following articles for its consideration: article 87, paragraphs 1 and 11; article 90, paragraphs 1, 1 bis, 1 ter, 6 and 7; article 90 ter; and article 90 quater. The following provisions have been deleted: article 87, paragraphs 2, 5, 7 and 10 and article 90, paragraph 8.

4. The Working Group held an additional meeting on 13 July 1998 to consider the remaining articles. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 86, paragraph 5, article 87 bis, article 90 (a), article 90 (b), article 90 quater, additional paragraph 2, article 92 and article X. The Working Group also notes the deletion of article 87, paragraph 6.

5. The Working Group held an additional meeting on 14 July 1998 to consider the remaining articles. The Working Group transmits to the Committee of the Whole the following articles for its consideration: article 86 bis and article 90, paragraph 2 bis.

6. The Working Group also concluded its discussion on outstanding issues with respect to certain provisions previously transmitted to the Committee of the Whole and accordingly transmits the following amendments for the consideration of the Committee of the Whole:

- In article 87, paragraph 1, the square brackets around the words “and the procedure under their national law” should be removed;
- In article 90, paragraph 1, the words “[and their national [procedural] law]” should be replaced with “and under procedures of national law”;
- In article 91, paragraph 1, the brackets around the words “the relevant procedure under” should be removed.

7. The Working Group held three additional meetings, on 14 and 15 July 1998, to consider remaining articles. The Working Group herewith transmits to the Committee of the Whole the following articles for its consideration: article 87, paragraphs 3 (a), 3 bis, 4 and 8; article 90, paragraphs 2 (a) and

(d), 3, 4 and 9; and article 91, paragraph 4. The Working Group also notes the deletion of article 87, paragraphs 3 (b), (c), (d) and (e), and 9; and article 90, paragraphs 2 (b), (c), (e) and (f), and 5.

8. The Working Group thereby has concluded its work.

II. Text of draft articles

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 85

General obligation to cooperate

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

Article 86

Requests for cooperation: general provisions

1. *Authorities competent to make and receive requests/Channels for communication of requests*

(a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, accession or approval. Subsequent changes in the designation shall be done in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of paragraph 1 (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. *Language of requests*

Requests for cooperation and supporting documents shall either be in or accompanied by a translation into an official language of the requested State or in one of the working languages reflected in article 51, in accordance with the choice made by that State upon ratification, accession or approval.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. *Confidentiality of requests from the Court*

The requested State shall keep confidential a request and any supporting documents, except to the extent that the disclosure is necessary for execution of the request.

4. *Victims and witnesses*²⁰⁸

In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. *Cooperation by non-States Parties*

The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may inform the Assembly of States Parties [or, where the Security Council referred the matter to the Court, the Security Council].²⁰⁹

6. *Cooperation of intergovernmental organizations*

The Court may ask any intergovernmental organizations to provide information or documents. The Court may also ask for other forms of cooperation and assistance as may be agreed upon with such organizations and in accordance with their respective competencies and/or mandates.

7. *States Parties' failure to cooperate*²¹⁰

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [or, where the Security Council referred the matter to the Court, to the Security Council].

Article 86 bis

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this part.

²⁰⁸ Article 88, paragraph 4, and article 90, paragraph 8 (b), could then be deleted.

²⁰⁹ The same language should be used in article 102, paragraph 2 (f), when dealing with this issue.

²¹⁰ The wording of article 102 (Assembly of States Parties), paragraph 2 (f), must be adjusted to be consistent with the new wording of this paragraph.

Article 87

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and [surrender] [transfer] [extradition] of a person, along with the supporting material outlined in article 88, to any State on the territory of which that person may be found, and shall request the cooperation of that State in the arrest and [surrender] [transfer] [extradition] of such person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and [surrender] [transfer] [extradition].

2. **(Deleted)**

3. A State Party may deny a request for surrender only if:

(a) With respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court;²¹¹

(b) **(Deleted)**²¹²

(c) **(Deleted)**

(d) **(Deleted)**

(e) **(Deleted)**

3 bis. Where the person sought for surrender brings a challenge before a national court on the basis of *ne bis in idem* as provided in article ..., the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for the surrender of the person until the Court makes a determination on admissibility.

[4. If a request for surrender is denied, the requested State Party shall promptly inform the Court of the reasons for such denial.]²¹³

5. **(Deleted)**

6. **(Pending)**

7. **(Deleted)**

8. If the person sought is being proceeded against or is serving a sentence in the requested State for an offence different from that for which surrender to the Court is sought, the

requested State, after making its decision to grant the request, shall consult with the Court.

9. **(Deleted)**

10. **(Deleted)**

11. *Transit of [surrendered] [transferred] [extradited] person*

(a) A State Party shall, except where transit through that State would impede or delay the surrender, authorize transportation under its national procedural law through its territory of a person being [surrendered] [transferred] [extradited] to the Court by another State. A request by the Court for transit shall be transmitted in accordance with article 86. The request for transit shall contain a description of the person being transported, a brief statement of the facts of the case and the legal characterization and the warrant for arrest and [transfer] [surrender] [extradition]. A person in transit shall be detained in custody during the period of transit.

(b) No authorization is required where air transportation is used and no landing is scheduled on the territory of the State of transit.

(c) If an unscheduled landing occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The State of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

Article 87 bis

Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under this article shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court:

(a) If the Court has, pursuant to articles 16 and 17,²¹⁴ determined that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

²¹¹ This provision will be reconsidered in the light of the outcome of the discussions on jurisdiction.

²¹² Some States reserved their position with respect to the deletion of this provision as this would raise problems of compatibility with constitutional provisions and domestic legislation.

²¹³ The need for this paragraph depends on the outcome of discussions on paragraph 3 of this article.

²¹⁴ The relevance of these articles will have to be reconsidered in the light of the outcome of discussions on part 2.

(b) If the Court makes such a determination pursuant to the requested State's notification under paragraph 1.²¹⁵

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.²¹⁶

4. If the requesting State is a non-State Party, the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.²¹⁵

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting non-State Party, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the offence was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall give priority to the request from the Court if it is not under an existing international obligation to extradite the person to the requested State;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the

requested State, determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.²¹⁷

Article 88

Contents of request for [surrender] [transfer] [extradition]

1. A request for arrest and [surrender; transfer; extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).²¹⁸ The request shall contain or be supported by:

(a) In the case of a request for the arrest and [surrender; transfer; extradition] of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3:

(i) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) A copy of the warrant of arrest;

(iii) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, but those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements with other States and should, if possible, be less burdensome, taking account the distinct nature of the Court;²¹⁹

(b) In the case of a request for the arrest and [surrender; transfer; extradition] of a person already convicted:

(i) A copy of any warrant of arrest for that person;

(ii) A copy of the judgement of conviction;

²¹⁵ There was general agreement that the fact that the Court has determined that the case is inadmissible does not, on its own, place the requested State under any international obligation to surrender the person to the requesting State.

²¹⁶ A view was expressed that there should be a time limit within which the Court should make a determination.

²¹⁷ Views were expressed that in those circumstances the Court should have an ability to reconsider its decision on admissibility based on the new circumstances.

²¹⁸ The confirmation is without prejudice to article 89.

²¹⁹ Some delegations have emphasized that they accepted paragraph 1 (a) (iii) with the proviso that article 87, paragraph 3, option 2 [d] will be deleted. The issue, however, is still under discussion in the Working Group.

- (iii) Information to demonstrate that the person sought is the one referred to in the judgement of conviction;
- (iv) [If the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

2. Upon the request of the Court, States Parties shall consult with the Court whether generally or with respect to a specific matter, regarding any requirements under their national law that may apply under paragraph 1 (a) (iii) of this article. In the consultations, the States Parties shall advise the Court of the specific requirements of their law.

Article 89
Provisional arrest

1. In case of urgency, the Court may request the provisional arrest of the person sought pending presentation of the request for [surrender] [transfer] [extradition] and supporting documents under article 88.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought, the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for [surrender] [transfer] [extradition] of the person sought will follow.

3. A person who is provisionally arrested may be discharged from custody²²⁰ if the requested State has not received the request for [surrender] [transfer] [extradition] and the supporting documents specified under article 88 within the time limits specified in the Rules of Procedure. However, the person may consent to [surrender] [transfer] [extradition] before the expiration of this period if the legislation of the requested State allows, in which case that State shall proceed to [surrender] [transfer] [extradite] the person to the Court as soon as possible.

4. The fact that the person sought has been discharged from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and [surrender] [transfer] [extradition] of that person if the request for [surrender] [transfer] [extradition] and supporting documents are delivered at a later date.

Article 90
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this part and under procedures of national law, comply with requests by the Court to provide assistance in relation to investigations or prosecutions as follows:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions or reports necessary to the Court;

(c) The questioning of any suspect or accused;

(d) The service of documents, including judicial documents;

(e) Facilitating the appearance of persons as witnesses or experts before the Court, which shall be voluntary;²²¹

(f) The temporary transfer of persons as provided in paragraph 1 ter of article 90;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture without prejudice to the rights of bona fide third parties;²²² and

(l) Any other types of assistance with a view to facilitating the investigation and prosecution of crimes under the Statute which are not prohibited by the law of the requested State.

1 bis. The Court shall have the authority to provide an assurance to a witness or expert appearing before the Court that

²²⁰ The question of specific time limit should be addressed in the Rules of Procedure and Evidence.

²²¹ This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.

²²² The issue of whether the Court is to be vested with such powers is linked with article 75 in part 7 on penalties.

he or she will not be prosecuted, detained or submitted to any restriction of personal freedom by the Court in respect of any acts or omissions that preceded the departure of that person from the requested State.

1 ter. (a) The Court may request the temporary transfer of a person in custody for purposes of testimony, identification or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person transferred shall remain in custody, and when the purposes of the transfer have been fulfilled the Court shall return the person without delay to the requested State.

2. A State Party may deny a request for assistance, in whole or in part, only if:

(a) With respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)]], it has not accepted the jurisdiction of the Court.²²³

(b) **(Deleted)**

(c) **(Deleted)**

(d) The request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];²²⁴

(e) **(Deleted)**

(f) **(Deleted)**

2 bis. With respect to a request presented under paragraph 1, if execution of a particular measure of assistance as detailed in the request is prohibited in the requested State on the basis of an existing fundamental legal principle²²⁵ of general application,

²²³ To be reconsidered in the light of the outcome of discussions on jurisdiction.

²²⁴ To be reconsidered in the light of the outcome of discussions on article 71. It is noted that there is another formula of this provision in document A/CONF.183/C.1/WGPM/L.39, footnote 186, which reads:

“A State Party may deny a request for assistance, in whole or in part, only if:

“...

“(c) Having complied with the provisions of article [71], it determines that there are no conditions under which it can comply with the request, including requests for information or evidence arising under article 64, without seriously prejudicing its national security interests.”

²²⁵ It is understood that this includes laws preventing the freezing or seizure of certain types of property, in which case other alternatives such as seizure of the proceeds of sale or disposal should be relied on.

the requested State shall promptly consult with the Court to try and resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the prohibition cannot be overcome, the Court shall modify the request as necessary.

3. Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.]

[4. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.]²²⁶

5. **(Deleted)**

6. *Confidentiality*²²⁷

(a) The Court shall ensure the confidentiality of documents and information except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 of the Statute and related Rules of Procedure and Evidence.

7. *Assistance by the Court*

(a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of acts which constitute a crime under this Statute or which constitute a serious crime under the national law of the requesting State.

(b) ²²⁸

(i) The assistance provided under subparagraph (a) shall include, among others:

- (1) The transmission of statements, documents or other types of evidence

²²⁶ The need for this paragraph depends on the outcome of discussions on paragraph 2 of this article.

²²⁷ Views have been expressed that subparagraphs (b) and (c) should be addressed in the Rules of Procedure and Evidence.

²²⁸ Views have been expressed that this subparagraph should be addressed in the Rules of Procedure and Evidence.

obtained in the course of an investigation or a trial conducted by the Court; and

- (2) The questioning of any person detained by the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

- (1) If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;²²⁹

- (2) If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a non-State Party.

8. **(Deleted)**

9. (a) (i) In the event that a State Party receives competing requests other than for surrender or extradition from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request;

- (ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 87 bis.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

*Article 90 (a)*²³⁰

Postponement of execution of a request in respect of ongoing investigation

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different

from that to which the request relates, the requested State may postpone the execution of a request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately granted subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 90, paragraph 1 (j).

*Article 90 (b)*²³¹

Postponement of execution of a request in respect of admissibility challenge

Without prejudice to [articles 54 quater and 54, paragraph 2], where there is an admissibility challenge under consideration by the Court pursuant to [articles 16 and 17], the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 16 or 17.²³²

Article 90 bis [90, paragraph 8]

Contents of request for other forms of assistance

1. A request for other forms of assistance referred to in article 90 shall be in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed through the channel provided for in article 86, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

²²⁹ The relationship with article 92 needs to be considered.

²³⁰ This article should be placed after article 90 (Other forms of cooperation) and before article 90 bis (Contents of request for other forms of assistance under article 90).

²³¹ The Working Group draws the attention of the Drafting Committee to the need to consider the question of the placement of this article.

²³² The wording of this article will need to be reviewed in the light of the outcome of the discussions on articles 16 and 17.

(e) Such information as may be required under the law of the requested State in order to execute the request;

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, States Parties shall consult with the Court, whether generally or with respect to a specific matter, regarding any requirements under their national law that may apply under paragraph 2 (e) of this article. In the consultations, the States Parties shall advise the Court of the specific requirements of their law.

4. The provisions of this article shall, where applicable, also apply in respect of a request made to the Court.

*Article 90 ter
Consultations*

Where a State Party receives a request under this Part and identifies problems with the request, which may impede or prevent its execution, including but not limited to:

(a) Insufficient information to execute the request;
or

(b) In the case of a request for surrender, despite best efforts, that the person sought cannot be located or that investigation conducted has determined that the person in the custodial State is clearly not the person named in the warrant; or

(c) That execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken to another State, the requested State shall, without delay, consult with the Court to resolve the matter.

*Article 90 quater
Waiver of immunity*

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

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 91

Execution of requests under articles 90 and 90 bis

1. Requests for assistance shall be executed in accordance with the relevant procedure under the laws of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime which is alleged to have been committed, and there has been a determination of admissibility pursuant to articles [16 or 17], the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.²³³

5. Provisions allowing a person heard or examined by the Court under article 71 to invoke restrictions designed to prevent disclosure of confidential information connected with national defence or security also apply to the execution of requests for assistance under this article.

²³³ A few delegations expressed strong reservations about this provision due to the view that it provided to the Prosecutor powers which could impact on their national sovereignty concerns. These delegations strongly felt that failure of consultations between the Court and the State does not warrant referral of the issue to the Assembly of States Parties or the Security Council.

Article 91 bis
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by the requested State, except for the following, which should be borne by the Court:

- (a) Costs associated with the travel and security of witnesses and experts or the transfer of persons in custody;
- (b) Costs of translation, interpretation and transcription;
- (c) The travel and subsistence costs of the Prosecutor, members of his office or any other member of the Court;
- (d) The costs of any expert opinion or report requested by the Court; and
- (e) The costs associated with the transport of a person being surrendered to the Court by a custodial States; and
- (f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. The Court shall bear the ordinary costs of execution.

Article 92
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. **(Deleted)**

3. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 88. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article X²³¹
Use of terms

For the purposes of this Statute:

(a) "Surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute;

(b) "Extradition" means the delivering up of a person by one State to another as provided by convention, treaty or national legislation.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding articles 86, 88, 89 and 91 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 2 July 1998²³⁴

Article 86

Requests for cooperation: general provisions

Article 88

Contents of request for [surrender] [transfer] [extradition]

Article 89

Provisional arrest

Article 91

Execution of requests under articles 90 and 90 bis

NOTE

The Committee of the Whole transmits the above articles on the following understanding:

The text within brackets in article 86, paragraph 7, should be reconsidered in the light of the decision on the question of the referral of a matter to the Court by the Security Council;

The terms that appear within brackets in articles 88 and 89 should be reconsidered in the light of the use of those terms in article 87;

The terms that appear within brackets in article 91, paragraph 1, should be reconsidered in the light of the decision as to the question of the application of national law in this part.

²³⁴ The transmittal letter containing the note was reproduced in document A/CONF.183/DC/R.68. In normal practice, restricted documents are not published in the official records of a conference. However, this note constitutes part of the legislative history of the Rome Statute and may provide a more complete understanding of that history. For these reasons, the relevant extracts of the restricted document are published as part of the Official Records of the Conference.

Note regarding articles 87 and 90 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

Article 87

[Surrender] [Transfer] [Extradition] of persons to the Court

Article 90

Other forms of cooperation

NOTE

Understandings of the Committee of the Whole in respect of part 9:

The terms [surrender] [transfer] [extradition] that appear within brackets should be reconsidered in the light of the decision on the use of these terms in part 9.

The reference to national law that appears within brackets in article 87, paragraph 1, and article 90, paragraph 1, should be reconsidered in the light of the decision on the question of the application of national law in part 9.

Note regarding part 9 and articles 86, 87 bis, 90, 90 (a), 90 (b), 91 and X contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

Article 86

Requests for cooperation: general provisions

Article 87 bis

Competing requests

Article 90 (a)

Postponement of execution of a request in respect of ongoing investigation

Article 90 (b)

Postponement of execution of a request in respect of admissibility challenge

Article 91

Execution of requests under articles 90 and 90 bis

Article X

Use of terms

NOTE

Understandings of the Committee of the Whole with respect to part 9:

The terms that appear within brackets in article 86, paragraph 5, should be reviewed in the light of the outcome of the discussions on part 2;

The reference to articles 16 and 17 in article 87 bis, paragraph 2 (a), and article 91, paragraph 4 (a), should be reconsidered in the light of the outcome of the discussions on part 2;

The references to various articles in article 90 (b) should be reviewed in the light of the final text of those articles;

Article 90 (a) should be placed after article 90 (Other forms of cooperation) and before article 90 bis (Contents of request for other forms of assistance under article 90);

The Drafting Committee should consider the question of the placement of article 90 (b) and of article X;

The use of the terms "surrender" and "extradition" in part 9 should be reviewed in the light of the decision on the use of these terms as reflected in article X;

The Drafting Committee should consider using the terms "requested State Party" wherever "requested State" appears in part 9.

Concerning article 87, paragraph 1, article 90, paragraph 1, and article 91, paragraph 1, previously transmitted to the Drafting Committee, the Committee of the Whole informs the Drafting Committee as follows:

In article 87, paragraph 1, the brackets around the words "and the procedure under their national law" should be removed;

In article 90, paragraph 1, the words "[and their national [procedural] law]" should be replaced with "and under procedures of national law";

In article 91, paragraph 1, the brackets around the words "the relevant procedure under" should be removed.

Note regarding articles 87, 90, and 91 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 15 July 1998³²

Article 87

Surrender of persons to the Court

Article 90

Other forms of cooperation

Article 91

Execution of requests under articles 90 and 90 bis

NOTE

Understandings of the Committee of the Whole with respect to part 9:

Article 87, paragraph 3 (a), should be reconsidered in the light of the outcome of the discussions on jurisdiction;

The need for article 87, paragraph 4, should be reconsidered in the light of the outcome of the discussions on paragraph 3 of this article;

Article 90, paragraph 2 (a), should be reconsidered in the light of the outcome of the discussions on jurisdiction;

Article 90, paragraph 2 (*d*), should be reconsidered in the light of the outcome of the discussions on article 71;

The need for article 90, paragraph 4, should be reconsidered in the light of the outcome of the discussions on paragraph 2 of this article;

The reference to articles 16 and 17 in article 91, paragraph 4 (*a*), should be reviewed in the light of the text of these articles.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.80

India: proposal regarding the compendium of draft articles referred to the Drafting Committee by the Committee of the Whole (A/CONF.183/C.1/L.58)

[Original: English]
[15 July 1998]

Article 86

Paragraph 7

Delete the phrase or, where the Security Council referred the matter to the Court, to the Security Council.

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/L.93

Poland: proposal regarding article X

[Original: English]
[17 July 1998]

Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3, or who has been convicted by the Court, by a State to the Court, pursuant to this Statute;

(b) "extradition" means the delivering up of a person for the purpose of trial or service of a sentence, by one State to another as provided by treaty, convention or national legislation.

DOCUMENT A/CONF.183/C.1/WGIC/L.1

Canada: proposal regarding an alternative text for article 88

[Original: English]
[25 June 1998]

Contents of request for [surrender] [transfer] [extradition]

1. A request for arrest and [surrender; transfer; extradition] shall be made in writing. In urgent cases a request may be made by any medium capable of delivering a written record, provided that a request shall be confirmed [if necessary] through the channel provided for in article 86. The request shall contain or be supported by:

(a) In the case of a request for the arrest and [surrender; transfer; extradition] of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, paragraph 3:

(i) Information describing the person sought, sufficient to identify the person and information as to that person's probable location;

(ii) A copy of the warrant of arrest;

(iii) Such documents, statements or other types of information regarding the commission of the offence and the accused's role therein which may be required by the laws of the requested State; [however, in no event may the requested State's requirements be more burdensome than those applicable to requests for extradition pursuant to treaties or other arrangements with other States];

(b) In the case of a request for the arrest and [surrender; transfer; extradition] of a person already convicted:

(i) A copy of any warrant of arrest for that person;

(ii) A copy of the judgement of conviction;

(iii) Information to demonstrate that the person sought is the one referred to in the judgement of conviction;

(iv) [If the person sought has been sentenced,] a copy of the sentence imposed and a statement of any time already served and that remaining.

[2. Where the State Party considers the information provided insufficient to allow it to comply with the request, it shall seek, without delay, additional information and may fix a reasonable time limit for the receipt thereof. [Any proceedings in the requested State may be continued, and the person sought may be detained, [for such period as may be necessary to enable the Court to provide the additional information requested.]] If the additional information is not provided within the reasonable

time limit fixed by the requested State, the person may be released.]

DOCUMENT A/CONF.183/C.1/WGIC/L.2

China: proposal regarding article 87

[Original: English]
[25 June 1998]

Paragraph 6

6. *Parallel requests from the Court and States*

(a) If the requested State also receives a request from a State for the extradition of the same person for the same offence for which the Court is seeking the person's [surrender] [transfer] [extradition], it shall accord priority to the request from the State over the request from the Court, unless the matter is referred by the Security Council to the Court, or the Court has determined pursuant to article 15 that the requesting State is unwilling or unable genuinely to carry out the investigation or prosecution of the case for which extradition is sought.

(b) If the requested State also receives a request from a State for the extradition of the same person for a different offence other than the offence for which the Court is seeking the person's [surrender] [transfer] [extradition], it shall accord priority to the request for the offence of a grave nature. If the offences are of the same gravity, the requested State shall make its decision on the priority of requests after considering all relevant factors.

Paragraph 7

Add a new subparagraph, as follows:

“(d) The person sought is not the person whom the proceeding is against.”

Paragraph 9

Replace the paragraph with a new paragraph, as follows:

“9. The requested State shall, in accordance with its legal procedures, take steps to arrest the accused and [surrender] [transfer] [extradite] him to the Court in accordance with the provisions of this Statute, or extradite him to another State having requested extradition, or refer the case to its competent authorities for the purpose of prosecution.”

DOCUMENT A/CONF.183/C.1/WGIC/L.3

Italy: proposal regarding article 87

[Original: French]
[25 June 1998]

Paragraph 6

6. A State Party shall, as far as possible, give priority to a request for surrender from the Court under paragraph 1 over

requests for extradition from other States, in application of all the legal instruments at its disposition.

DOCUMENT A/CONF.183/C.1/WGIC/L.4

Republic of Congo: proposal regarding article 87

[Original: French]
[25 June 1998]

The Republic of Congo favours the term “surrender” in preference to that of “extradition”. For reasons of cooperation with the Court, we are inclined towards the former.

The term “extradition” is highly problematical since extradition is a matter of relations between States.

It must be emphasized that relations between the Court and States Parties are a legitimate concern.

The Republic of Congo is in favour of the term “surrender”.

DOCUMENT A/CONF.183/C.1/WGIC/L.7

Singapore: proposal regarding article 87

[Original: English]
[26 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

Paragraph 5 bis

Where compliance with the request for surrender/cooperation would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, the Court shall, in addition, obtain under this Part the cooperation of that third State for the waiver of the immunity.

DOCUMENT A/CONF.183/C.1/WGIC/L.9

Croatia: proposal regarding article 87

[Original: English]
[29 June 1998]

[Surrender] [Transfer] [Extradition] of persons to the Court

New paragraph 3

“3. States shall not refuse a request for [surrender] [transfer] [extradition] of persons to the Court. The obligation to [surrender] [transfer] [extradite] persons to the Court under this Statute shall prevail over any legal impediment to do so which may exist under the national law or extradition treaties of the State concerned.”

The present proposal corresponds to the Statute (article 29) and the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (rule 56, rule 58) and the Statute (article 28) and Rules of Procedure and

Evidence (rule 56, rule 58) of the International Tribunal for Rwanda.

The Security Council has established this standard for the efficient functioning of the International Tribunals for the Former Yugoslavia and for Rwanda. There is no reason to apply different practices to the International Criminal Court.

DOCUMENT A/CONF.183/C.1/WGIC/L.12

Canada: proposal regarding article 91

[Original: English]
[2 July 1998]

Paragraph 4

4. In the case of a request which can be executed without any compulsory measures, such as the interview of or taking of evidence from a person on a voluntary basis or the examination of a place or site which is accessible to the public, upon his or her request, the Prosecutor and other authorities within his or her office may conduct any such examination, interview or the taking of evidence, and may do so outside the presence of national authorities if that is essential for the request to be successfully executed.

DOCUMENT A/CONF.183/C.1/WGIC/L.14

Central African Republic: proposal regarding article 86

[Original: French]
[6 July 1998]

Paragraph 4 [6]

States Parties' failure to cooperate

Where a State Party fails to comply with a request by the Court contrary to the provisions of the Statute, thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

Paragraph 6 [4]

Cooperation by non-States Parties

(a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of comity.

(b) Where a State not party to this Statute which has entered into an agreement or an ad hoc arrangement with the Court fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the United Nations General Assembly so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

(c) (new) Where a State not party to this Statute which has not entered into an agreement or an ad hoc arrangement with the Court fails to cooperate with requests under paragraph (a), thereby preventing the Court from performing its duties under this Statute, the Court may make a finding to that effect and refer the matter to the United Nations General Assembly or, where the Security Council referred the matter to the Court, to the Security Council so that necessary measures may be taken to enable the Court to exercise its jurisdiction.

NB: Paragraph 5 of the original version (Cooperation of intergovernmental organizations) now becomes paragraph 6.

DOCUMENT A/CONF.183/C.1/WGIC/L.17

[incorporating document A/CONF.183/C.1/WGIC/L.17/Corr.1 of 12 July 1998]

United States of America: proposal regarding article 87, paragraph 8 (b), relating to temporary surrender

[Original: English]
[12 July 1998]

Paragraph (b)

(b) Having fully taken into account the views of the Court, postpone the surrender of the person until such time as the proceedings against the person have been completed and any other legal impediment to his surrender or temporary surrender no longer exists.

DOCUMENT A/CONF.183/C.1/WGIC/L.18

Denmark, Norway, Sweden and Switzerland: proposal regarding article 87

[Original: English]
[13 July 1998]

Paragraph 1 bis

Where a requested State has indicated to the Court its willingness to accept sentenced persons under article 94, that State may, with the agreement of the Court, make the surrender of its own national conditional on the person being returned to the requested State for service of any sentence imposed.

DOCUMENT A/CONF.183/C.1/WGIC/L.20

Canada: proposal regarding article 87

[Original: English]
[14 July 1998]

Surrender of persons to the Court

Paragraph 8 (b)

(b) Having fully taken into account the views of the Court and the necessity for the trial to proceed, and taking into

consideration the gravity of the offence, postpone the surrender of the person until the proceedings against the person, other than the service of any sentence, have been completed. If further postponement is required for other procedures before a court where the person's presence is required, the requested State shall consult with the Court and may postpone surrender further, for a period of time agreed upon with the Court, which period should take into account any legal impediments to surrender in the requested State.

11. Part 10. Enforcement

(a) Documents of the Working Group on Enforcement

(i) Working documents

DOCUMENT A/CONF.183/C.1/WGE/L.15/REV.1

Chairman's informal draft for discussion

[Original: English]
[10 July 1998]

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before the expiry of sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence.

3. In every case, the Court shall, on its own motion or on application of the sentenced person, review whether, under the circumstances, to reduce the sentence imposed when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment. The Court shall not conduct such a review before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors is present:

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

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used to the benefit of victims; or

(c) Other factors which establish a clear and significant change of circumstances sufficient to justify the reduction in sentence, which factors shall be specified in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as shall be elaborated in the Rules of Procedure and Evidence.

DOCUMENT A/CONF.183/C.1/WGE/L.19

Chairman's proposal regarding article 101

[Original: English]
[11 July 1998]

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender in accordance with Part 9. Where the Court seeks the person's surrender, it may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.²³⁵

DOCUMENT A/CONF.183/C.1/WGE/L.4/REV.1

Working paper on articles 94 and (x)

[Original: English]
[2 July 1998]

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

Option 1 (unchanged)

Option 2

(a) (unchanged);

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the [Court] [Presidency] and in accordance with this part.

(c) The administering State of enforcement shall notify the [Court] [Presidency] of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The [Court] [Presidency] shall be given at least 45 days' notice of any such circumstances.

²³⁵ The modalities for implementation of this article would need to be established in the Rules of Procedure and Evidence.

(d) Where the [Court] [Presidency] cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article (x), subparagraph (a).

Article (x)

Role of States in enforcement [and supervision] of sentences of imprisonment

(a) In every case the [Court] [Presidency] may at any time decide to transfer the sentenced person to the prison of another State.

(b) The sentenced person may at any time apply to the [Court] [Presidency] to be transferred from the State of enforcement.

DOCUMENT A/CONF.183/C.1/WGE/L.6

[Incorporating document A/CONF.183/C.1/WGE/L.6/Corr.1 of 2 July 1998]

Working paper on article 96

*[Original: English]
[1 July 1998]*

Supervision and administration of sentence

Paragraph 1

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] and shall be reasonably consistent with widely accepted international conventional standards governing treatment of prisoners.

DOCUMENT A/CONF.183/C.1/WGE/L.7

**Working paper on proposal to merge article 96,
paragraph 2, options 1 and 2**

*[Original: English]
[2 July 1998]*

Supervision and administration of sentence

1. **(As proposed.)**

2. The conditions of detention shall be governed by the law of the State of enforcement and reasonably consistent with widely accepted international conventional standards governing treatment of prisoners, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²³⁶

3. Communications between persons sentenced and the Court shall be unimpeded and confidential, subject to [any overriding security considerations].

DOCUMENT A/CONF.183/C.1/WGE/L.8

Working paper on article 94

*[Original: English]
[2 July 1998]*

Role of States in enforcement [and supervision] of sentences of imprisonment

1. **(Pending)**

2. In exercising its discretion to make a designation under paragraph 1, the [Court] [Presidency] may take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment;

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person regarding any concerns as to personal security or rehabilitation;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or regarding a State's ability to enforce a sentence in accordance with this Part, as may be appropriate in designating the State of enforcement.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

DOCUMENT A/CONF.183/C.1/WGE/L.9

Working paper on article 96

*[Original: English]
[3 July 1998]*

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the [Court] [Presidency] and shall be consistent with widely accepted international conventional standards governing treatment of prisoners.

2. The conditions of detention shall be governed by the law of the State of enforcement and reasonably consistent with widely accepted international conventional standards governing treatment of prisoners, but in any case not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²³⁷

²³⁶ Provision on transfer to be considered under the proposal of the United Kingdom of Great Britain and Northern Ireland for article 94.

²³⁷ Paragraph 2 was accepted by some delegations only on the basis that there will be an article (x) on transfer.

3. Communications between persons sentenced and the Court shall be unimpeded and confidential, subject to any overriding security considerations.

DOCUMENT A/CONF.183/C.1/WGE/L.10

Working paper on articles 94 and (x)

[Original: English]

[3 July 1998]

Article 94

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

Option 1: (unchanged)

Option 2

(a) (unchanged)

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the [Court] [Presidency] and in accordance with this part.

(c) The administering State of enforcement shall notify the [Court] [Presidency] of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The [Court] [Presidency] shall be given at least 45 days' notice of any such circumstances.

(d) Where the [Court] [Presidency] cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article (x), subparagraph (a).

Article (x)

Role of States in enforcement [and supervision] of sentences of imprisonment

1. (a) In every case the [Court] [Presidency] may at any time decide to transfer the sentenced person to the prison of another State.

(b) The sentenced person may at any time apply to the [Court] [Presidency] to be transferred from the State of enforcement.

2. In exercising its discretion to make a designation under paragraph 1, the [Court] [Presidency] shall take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment;²³⁸

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2.

DOCUMENT A/CONF.183/C.1/WGE/L.11

Working paper on articles 97 and 98

[Original: English]

[3 July 1998]

Article 97

Transfer of the person upon completion of sentence

1. Where the State of enforcement does not authorize the person to remain in its territory following completion of sentence, the person shall be transferred to another State. The person may indicate the State to which he wishes to be transferred. However, if that State does not agree to accept the person, he or she may be transferred to the State of his or her nationality or another State that agrees to accept the person.

2. The costs involved in transferring the person to another State pursuant to paragraph 1 shall be borne by the Court, if no State bears those costs.

3. [Subject to the provisions of article 98,] The State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

[Article 98]

Limitation of prosecution or punishment for other offences

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment or to extradition to a third State for any conduct committed prior to delivery to the State of enforcement, unless

²³⁸ Some delegations expressed the view that there needs to be an additional article on this issue. Some delegations expressed the view that this should be the only reference.

such prosecution, punishment or extradition has been approved by the [Court] [Presidency] at the request of the State of enforcement.

2. The [Court] [Presidency] shall rule on the matter after having heard the person.

3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court or returns to the territory of that State after having left it.]

DOCUMENT A/CONF.183/C.1/WGE/L.12

Working paper on article 93

[Original: English]

[3 July 1998]

General obligation regarding enforcement of judgements

Formula 1

States Parties shall enforce directly on their territory the judgements of the Court.

Formula 2

States Parties shall give effect to the judgements of the Court in accordance with the provisions of this Part and their national law.

NB: The second, bracketed paragraph of article 93 is reserved, pending resolution of the issue of enforcement of orders of reparation under article 73 and article 99

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/WGE/L.14

[incorporating documents A/CONF.183/C.1/WGE/L.14/Add.1 of 11 July 1998 and Add.1/Corr.1 and Add. 2 of 14 July 1998]

Report of the Working Group on Enforcement

[Original: English]

[7 July 1998]

I. Introduction

1. At its 2nd meeting, on 16 June 1998, the Committee of the Whole decided to refer to the Working Group on Enforcement, under the chairmanship of Ms. Mary Ellen Warlow (United States of America), the following articles of part 10:

PART 10. ENFORCEMENT

Article 93. General obligations regarding recognition [and enforcement] of judgements

Article 94. Role of States in enforcement [and supervision] of sentences of imprisonment

Article 95. Enforcement of the sentence

Article 96. Supervision and administration of sentence

Article 97. Transfer of the person upon completion of sentence

[Article 98]. Limitation of prosecution/punishment for other offences

[Article 99]. Enforcement of fines and forfeiture measures

Article 100. Pardon, parole and commutation of sentences [early release]

[Article 101]. Escape

2. The Working Group held five meetings to consider the articles contained in part 10, Enforcement, from 30 June to 3 July 1998. The Working Group herewith transmits to the Committee of the Whole the following articles of part 10 for its consideration: article 94, paragraph 3; article 94 bis; article 95; article 96; article 97; article 98; article 99, paragraphs 1 and 1 bis.

3. The Working Group held four further meetings, from 9 to 11 July 1998, to consider the remaining articles of part 10. The Working Group herewith transmits to the Committee of the Whole the following articles of Part 10 for its consideration: article 94, article 99, paragraph 3, and article 100. The Working Group notes the deletion of article 93 and article 99, paragraph 2.

4. The Working Group recommends that the words "review of the judgement or sentence" in article 95, paragraph 2, which has already been referred to the Drafting Committee, be replaced by "appeal or revision of judgement or sentence". This change is necessary to make the article consistent with part 8.

5. The Working Group held two further meetings, from 11 to 13 July 1998, to consider the remaining articles of part 10. The Working Group herewith transmits to the Committee of the Whole the following text for article 101.

6. The Working Group has thereby concluded its work on part 10.

II. Text of draft articles

PART 10. ENFORCEMENT

Article 93

General obligation regarding recognition [and enforcement] of judgements

(Deleted)²³⁹

Article 94

Role of States in enforcement of sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. The State so designated shall promptly inform the Court whether it accepts the request.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) The administering State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under subparagraph (b) above, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such circumstances. During this period, the State of enforcement shall not act contrary to the provision of article 100.

(d) Where the Court cannot agree to the change of circumstances, it shall notify the State and proceed in accordance with article 94 bis, paragraph 1.

2. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account any of the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment in accordance with principles of equitable distribution to be elaborated in the Rules of Procedure and Evidence;²⁴⁰

(b) The application of widely accepted international conventional standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

3. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in conformity with and under the conditions as set out in the Host State Agreement as referred to in article 3, paragraph 2. In such a case, the costs involved in enforcement of a sentence of imprisonment shall be borne by the Court.

Article 94 bis

Change in designation of State of enforcement

1. In every case the Court may at any time decide to transfer the sentenced person to the prison of another State.

2. The sentenced person may at any time apply to the Court to be transferred from the State of enforcement.

Article 95

Enforcement of the sentence

1. Subject to conditions it may have specified in paragraph 1 (b) of article 94, the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it.

2. The Court alone shall have the right to decide any application for review of the judgement or sentence. The State of enforcement shall not impede the sentenced person from making any such application.

Article 96

Supervision and administration of sentence

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international conventional standards governing treatment of prisoners.

2. The conditions of detention shall be governed by the law of the State of enforcement and consistent with widely accepted international conventional standards governing treatment of prisoners, and shall in any case be not more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.²⁴¹

3. Communications between a person sentenced and the Court shall be unimpeded and confidential.

²³⁹ Delegations noted with respect to the deletion of article 93 their understanding that the use of the term "give effect to" in article 99 could not be interpreted as allowing States to modify amounts of fines or forfeitures ordered by the Court.

²⁴⁰ Some delegations expressed the view that there needs to be an additional article on this issue. Other delegations expressed the view that this should be the only reference

²⁴¹ Paragraph 2 was accepted by some delegations only on the basis that there will be article 94 bis.

Article 97

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement shall, in accordance with the law of the State of enforcement, be transferred to another State which agrees or is obligated to receive him or her, unless the State of enforcement authorizes the person to remain in its territory.
2. The costs involved in transferring the person to another State pursuant to paragraph 1 shall be borne by the Court, if no State bears those costs.
3. Subject to the provisions of article 98, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to the State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 98²⁴²

Limitation of prosecution or punishment for other offences

1. A sentenced person in the custody of the State of enforcement shall not be subjected to prosecution or punishment or to extradition to a third State for any conduct committed prior to delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall rule on the matter after having heard the person.
3. Paragraph 1 of this article shall cease to apply if the sentenced person remains more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court or returns to the territory of that State after having left it.

Article 99

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties in accordance with the procedure of their national law.²⁴³
- 1 bis. When the State Party is unable to give effect to the order for forfeiture, it shall take measures to recover the value of the

proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

2. **(Deleted)**

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.²⁴⁴

Article 100

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before the expiry of sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.²⁴⁵
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

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

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used to the benefit of victims; or

(c) Other factors which establish a clear and significant change of circumstances sufficient to justify the reduction in sentence, which factors shall be specified in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as shall be elaborated in the Rules of Procedure and Evidence.

²⁴² Some delegations who had wanted article 98 deleted indicated a willingness to accept article 98 if necessary to achieve consensus. However, they stressed that their position to delete article 92 (also dealing with the rule of speciality) remained unchanged. Some other delegations felt that article 98 must be included, but also felt that article 92 should be deleted.

²⁴³ Some delegations also wanted to emphasize that their willingness to accept a reference to national procedural law in this Part does not prejudice their position with respect to the inclusion of such a reference in Part 9.

²⁴⁴ The Working Group noted that there were a number of potential complex problems which may arise in the implementation of this provision, including questions about the disposition of various types of property, which should be addressed in the Rules of Procedure and Evidence.

²⁴⁵ The Rules of Procedure and Evidence should also provide for the person to be heard through his or her legal representative.

Article 101
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender in accordance with Part 9. Where the Court seeks the person's surrender, it may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.²³⁵

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/12

Declaration by the Netherlands

[Original: English]
[17 July 1998]

The delegation of the Kingdom of the Netherlands states that the principle of equitable burden sharing regarding the imprisonment of an irrevocable sentence by the International Criminal Court is an imperative duty of vital importance of all States Parties to the present Statute.

On the basis of this principle the future preparatory negotiations will elaborate this principle in further detail.

The residual duty of the host State to imprison sentenced persons if the Court has not been able to designate a State of imprisonment will only apply in an exceptional situation, which inherently does not conform to the principle of equitable burden sharing.

DOCUMENT A/CONF.183/C.1/WGE/L.1

Japan: proposal regarding articles 93 and 99

[Original: English]
[29 June 1998]

Article 93

General obligation regarding recognition and enforcement of judgements

First paragraph

Amend the paragraph to read:

“States Parties shall give effect to the judgement of the Court in accordance with the provisions of this Part and their national law.”

Article 99

Enforcement of fines and forfeiture measures

Amend the whole article to read:

“1. The Court may request States Parties to enforce its order of fines and forfeiture measures. The requested State Party shall submit to its competent authorities, with a view to giving effect to it, the order of fines and forfeiture issued by the Court.

“2. Property which is obtained by a State Party as a result of its giving effect to an order of fines and forfeiture measures issued by the Court shall be disposed of by that State Party according to its domestic law and administrative procedures.”

DOCUMENT A/CONF.183/C.1/WGE/L.2

Italy: proposal regarding article 94

[Original: French]
[30 June 1998]

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1

At the end of option 2 (a), add the following sentence:

“In every case the Court may at any time decide to transfer the sentenced person to the prison of another State.”

DOCUMENT A/CONF.183/C.1/WGE/L.3

Uruguay: proposal regarding article 94

[Original: Spanish]
[30 June 1998]

Role of States in enforcement [and supervision] of sentences of imprisonment

Paragraph 1, option 2 (b)

(b) The sentence shall be served as directed by the Court, without prejudice to the internal law of the State in whose territory the sentence is to be served.

DOCUMENT A/CONF.183/C.1/WGE/L.5

Syrian Arab Republic: proposal regarding article 97

[Original: Arabic]
[1 July 1998]

Transfer of the person upon completion of sentence

Paragraphs 1 and 2

1. The prisoner shall be released following completion of sentence and, where the State of enforcement does not authorize the person to remain in its territory (if he or she so requests), the person shall be transferred to the State of his or her choice, the State of his or her nationality or another State that agrees to accept the person.

2. The costs involved in transferring the prisoner referred to in paragraph 1 shall be borne by the Court if no State bears those costs.

DOCUMENT A/CONF.183/C.1/WGE/L.17

Canada: proposal regarding article 99

[Original: English]
[9 July 1998]

Enforcement of fines and forfeiture measures

This article applies in the case where identified assets or property against which an order for fine or forfeiture may be realized are located in the territory of the State party.

12. Part 11. Assembly of States Parties

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.41

[incorporating document A/CONF.183/C.1/L.41/Corr.1 of 3 July 1998]

Coordinator's rolling text for article 102

[Original: English]
[2 July 1998]

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;²⁴⁶

(e) Determine whether to alter, as appropriate, the number of judges;

(f) **(Pending)**

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world as far as possible.

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of the Court.

3 bis. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly of States Parties or of the Bureau.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions on matters of substance by consensus in the Assembly and in the Bureau. If consensus cannot be reached, decisions on matters of substance must be approved by a two-thirds majority of those present and voting, provided that an absolute majority of States Parties constitutes the quorum for voting, except as otherwise provided in the Statute.

6. A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

7. The Assembly shall adopt its own rules of procedure.

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

²⁴⁶ This paragraph is without prejudice to the final decision on article 104.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.47

[incorporating documents A/CONF.183/C.1/L.47/Corr.1 of 6 July 1998 and Add.1 of 8 July 1998 and Add 2 of 14 July 1998]

Recommendations of the Coordinator

[Original: English]

[3 July 1998]

1. At its 18th meeting, on 29 June 1998, the Committee of the Whole considered part 11 consisting of article 102 entitled "Assembly of States Parties". The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations on the text for article 102.
2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text of article 102, paragraph 1, paragraph 2 (a) to (e) and (g), paragraph 3, paragraph 3 bis, paragraph 4, and paragraphs 6 to 8.
3. As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text of article 102, paragraph 5.
4. As a result of still further informal consultations, the Coordinator submits to the Committee of the Whole the following text of article 102, paragraph 2 (f).

PART 11. ASSEMBLY OF STATES PARTIES

Article 102

Assembly of States Parties

1. There is hereby established an Assembly of States Parties to this Statute. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed the Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - (a) Consider and adopt recommendations of the Preparatory Commission;
 - (b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - (c) Consider the reports and activities of the Bureau and take appropriate action in regard thereto;
 - (d) Consider and decide the budget for the Court;²⁴⁶
 - (e) Determine whether to alter, as appropriate, the number of judges;

(f) Consider any question relating to non-cooperation pursuant to article 86, paragraphs 5 and 7;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and eighteen members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

The Bureau shall meet as often as necessary, but at least once a year, and shall assist the Assembly in the discharge of its responsibilities.

(c) The Assembly may also establish other subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation in order to enhance the efficiency and economy of the Court.

3 bis. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly of States Parties or of the Bureau.

4. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in the Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

5. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

6. A State Party that is in arrears in the payment of its financial contributions to the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

7. The Assembly shall adopt its own rules of procedure.

8. The official and working languages of the Assembly of States Parties shall be those of the General Assembly of the United Nations.

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]
[23 June 1998]

Proposals relating to official and working languages

NOTE

This document is reproduced under part 4.

DOCUMENT A/CONF.183/C.1/L.28

Ukraine: proposal regarding article 102

[Original: Russian]
[29 June 1998]

Assembly of States Parties

Paragraph 3 (b)

It is proposed that the text of this subparagraph should be amended to read as follows:

“(b) The Bureau shall [have a representative character] [be elected on the basis of ensuring its representative character] *from among candidates nominated from each geographical group as defined by the General Assembly of the United Nations*, taking into account, in particular, equitable geographical distribution and bearing in mind the adequate representation of the principal legal systems of the world.”²⁴⁷

DOCUMENT A/CONF.183/C.1/L.81

Mexico: amendment to the draft Statute

[Original: Spanish]
[15 July 1998]

NOTE

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13. Part 12. Financing of the Court

Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.55/REV.1

[incorporating document A/CONF.183/C.1/L.55/Rev.1/Corr.1 of 11 July 1998]

Coordinator’s rolling text for articles 103, 103 bis, 105 and 107

[Original: English]
[9 July 1998]

Article 103

Except as otherwise specifically provided, all financial matters related to the Court, and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by the Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 103 bis

Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 105

Voluntary contributions

Without prejudice to article 104, the Court may receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities, as additional funds, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 107

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.78

[incorporating document A/CONF.183/C.1/L.78/Corr.1 of 16 July 1998]

Recommendations of the Coordinator

[Original: English]
[15 July 1998]

I. Introduction

1. At its 18th meeting, on 29 June 1998, the Committee of the Whole considered Part 12 entitled “Financing of the Court”.

²⁴⁷ It is proposed that the last words [“... as far as possible”] should be deleted.

F. Documents of the Committee of the Whole

The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations for part 12.

2. As a result of the informal consultations, the Coordinator herewith submits to the Committee of the Whole the text contained in section II below.

3. The title of the part should be changed to "Financing".

II. Text recommended

PART 12. FINANCING

Article 103

Except as otherwise specifically provided, all financial matters relating to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by the Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

*Article 103 bis*²⁴⁸ *Payment of expenses*

Expenses of the Court and the Assembly of States Parties including its Bureau and subsidiary bodies shall be paid from the funds of the Court.

Article 104 *Funds of the Court*

The expenses of the Court and the Assembly of States Parties including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses²⁴⁹ incurred due to referrals by the Security Council.²⁵⁰

Article 105 *Voluntary contributions*

Without prejudice to article 104, the Court may receive and utilize voluntary contributions from Governments, international organizations, individuals, corporations and other entities,²⁵¹ as additional funds, in accordance with relevant criteria adopted by the Assembly of States Parties.

²⁴⁸ Former article 103.

²⁴⁹ This may include the possibility of start-up funding by the United Nations if so decided by the General Assembly.

²⁵⁰ The issue of referrals could be reviewed in the light of the decision taken under part 2.

²⁵¹ The view was expressed that the Court may only receive contributions in kind from individuals and corporations.

Article 106 *Assessment of contributions*

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessments, based on the scale adopted by the United Nations for its regular budget, and adjusted in accordance with the principles on which that scale is based.

Article 107 *Annual audit*

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

14. Part 13. Final clauses

(a) Documents submitted by the Coordinator

(i) Working document

DOCUMENT A/CONF.183/C.1/L.54/REV.2

Coordinator's rolling text regarding the preamble and part 13

[Original: English]
[10 July 1998]

NOTE.

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(ii) Recommendations/Report

DOCUMENT A/CONF.183/C.1/L.61

Recommendations of the Coordinator regarding the preamble and part 13

[Original: English]
[11 July 1998]

NOTE

This document is reproduced under the preamble.

(b) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.14/REV.1

Mexico: revised proposals regarding articles 12 bis, 15 and article 108

[Original: Spanish]
[24 June 1998]

NOTE

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DOCUMENT A/CONF.183/C.1/L.24

**Switzerland: proposal regarding article 37
(Qualification and election of judges), article 110
(Amendments) and article 111 (Review of the Statute)**

[Original: English]
[29 June 1998]

NOTE.

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DOCUMENT A/CONF.183/C.1/L.29

Denmark: proposal regarding article 111

[Original: English]
[29 June 1998]

Review of the Statute

Suggestion to merge option 1 and option 2

1. [...] years after the entry into force of this Statute the Depositary shall convene a meeting of the Assembly of States Parties with a view to agreeing to any adjustments in the Statute necessary in the interests of justice, fairness and efficiency. The review may include but is not limited to the catalogue of crimes contained in article 5.

2. Subsequently, at the request of a State Party, the Depositary shall, upon approval by a majority of States Parties, convene a meeting of the Assembly of States Parties for the same purpose as stated in paragraph 1.

3. The provisions of paragraphs 3 to 6 of article 110 shall apply to any amendment to the Statute resulting from such a meeting of the Assembly of States Parties.

15. Final Act

**(a) Documents submitted by the Coordinator
Recommendations/Report**

DOCUMENT A/CONF.183/C.1/L.49/REV.1

[incorporating document A/CONF.183/C.1/L.49/Rev.1/Add.1 of 11 July 1998]

Recommendations of the Coordinator

[Original: English]
[6 July 1998]

1. At its 20th meeting, on 30 June 1998, the Committee of the Whole considered the draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Committee entrusted Mr. S. Rama Rao (India) with the task of coordinating informal consultations on the text for the Final Act.

2. As a result of the informal consultations, the Coordinator submits to the Committee of the Whole the following text of the draft Final Act.

3. As a result of further informal consultations, the Coordinator herewith submits to the Committee of the Whole the following text for paragraphs 4 (a) and (f) of the annex.

4. The Working Group held further consultations with respect to the bracketed portion of paragraph 4 (a) the text of which was referred to the Drafting Committee by the Committee of the Whole. As a result, the Working Group recommends to remove the square brackets and slightly redraft the text as follows.

**DRAFT FINAL ACT OF THE UNITED NATIONS DIPLOMATIC
CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT**

1. The United Nations General Assembly, in its resolution 51/207 of 17 December 1996, decided to hold a diplomatic conference of plenipotentiaries in 1998 with a view to finalizing and adopting a convention on the establishment of an international criminal court.

2. The General Assembly, in its resolution 52/160 of 15 December 1997, accepted with deep appreciation the generous offer of the Government of Italy to act as host to the conference and decided to hold the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.

3. Previously, the General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court; in its resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, the Assembly invited the Commission to consider further and analyse the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court; and in its resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, the Assembly requested the Commission to elaborate the draft statute for such a court as a matter of priority.

4. The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At that session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

5. The General Assembly, in its resolution 49/53 of 9 December 1994, decided to establish an ad hoc committee to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider

arrangements for the convening of an international conference of plenipotentiaries.

6. The Ad Hoc Committee on the Establishment of an International Criminal Court met from 3 to 13 April and from 14 to 25 August 1995, during which time the Committee reviewed the issues arising out of the draft statute prepared by the International Law Commission and considered arrangements for the convening of an international conference.

7. The General Assembly, in its resolution 50/46 of 11 December 1995, decided to establish a preparatory committee to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries.

8. The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

9. By its resolution 51/207 of 17 December 1996, the General Assembly decided that the Preparatory Committee would meet in 1997 and 1998 in order to complete the drafting of the text for submission to the Conference.

10. The Preparatory Committee met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, during which time the Committee continued to prepare a widely acceptable consolidated text of a convention for an international criminal court.

11. In its resolution 52/160 of 15 December 1997, the General Assembly requested the Preparatory Committee to continue its work in accordance with General Assembly resolution 51/207 and, at the end of its sessions, to transmit to the Conference the text of a draft convention on the establishment of an international criminal court prepared in accordance with its mandate.

12. The Preparatory Committee met from 16 March to 3 April 1998, during which time the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

13. The Conference met at the headquarters of the Food and Agriculture Organization of the United Nations in Rome from 15 June to 17 July 1998.

14. The General Assembly, in its resolution 52/160, requested the Secretary-General to invite all States Members of the United Nations or members of specialized agencies or of the

International Atomic Energy Agency to participate in the Conference. The delegations of ... States participated in the Conference, as follows: ...

15. In the same resolution, the General Assembly requested the Secretary-General to invite representatives of organizations and other entities that had received a standing invitation from the Assembly pursuant to its relevant resolutions to participate as observers in its sessions and work on the understanding that such representatives would participate in that capacity, and to invite, as observers to the Conference, representatives of interested regional intergovernmental organizations and other interested international bodies, including the International Tribunals for the Former Yugoslavia and for Rwanda. The following organizations were represented at the Conference by an observer: ...

16. Pursuant to the same resolution, the Secretary-General invited non-governmental organizations accredited by the Preparatory Committee, with due regard to the provisions of section VII of Economic and Social Council resolution 1996/31 of 25 July 1996, and in particular to the relevance of their activities to the work of the Conference, to participate in the Conference, along the lines followed in the Preparatory Committee and in accordance with the resolution as well as the rules of procedure to be adopted by the Conference. The following non-governmental organizations were represented at the Conference by an observer: ...

17. The Conference elected Mr. Giovanni Conso (Italy) as President.

18. The Conference elected as Vice-Presidents the representatives of the following States: Algeria, Austria, Bangladesh, Burkina Faso, China, Chile, Colombia, Costa Rica, Egypt, France, Gabon, Germany, India, Iran (Islamic Republic of), Japan, Kenya, Latvia, Malawi, Nepal, Nigeria, Pakistan, Russian Federation, Samoa, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Uruguay.

19. The following committees were set up by the Conference:

General Committee:

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee

Committee of the Whole:

Chairman: Mr. Philippe Kirsch (Canada)

Vice-Chairmen: Ms. Silvia Fernández de Gurmendi (Argentina), Mr. Constantin Virgil Ivan

(Romania) and Phakiso Mochochoko (Lesotho)

Rapporteur: Mr. Yasumasa Nagamine (Japan)

Drafting Committee

Chairman: Mr. M. Cherif Bassiouni (Egypt)

Members: Cameroon, China, Dominican Republic, France, Germany, Ghana, India, Jamaica, Lebanon, Mexico, Morocco, Philippines, Poland, Republic of Korea, Russian Federation, Slovenia, South Africa, Spain, Sudan, Switzerland, Syrian Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela

The Rapporteur of the Committee of the Whole participated ex officio in the work of the Drafting Committee in accordance with rule 49 of the rules of procedure of the Conference.

Credentials Committee

Chairman: ...

Members: Argentina, China, Côte d'Ivoire, Dominica, Nepal, Norway, Russian Federation, United States of America and Zambia

20. The Secretary-General was represented by Mr. Hans Corell, Under-Secretary-General, the Legal Counsel. Mr. Roy S. Lee, Director of Codification Division of the Office of Legal Affairs, acted as Executive Secretary. The secretariat was further composed as follows: ...

21. The Conference had before it a draft Statute on the Establishment of an International Criminal Court transmitted by the Preparatory Committee in accordance with its mandate (A/CONF.183/2/Add.1 and Corr.1).

22. The Conference assigned to the Committee of the Whole the consideration of the draft Convention on the Establishment of an International Criminal Court adopted by the Preparatory Committee. The Conference entrusted the Drafting Committee, without reopening substantive discussion on any matter, with coordinating and refining the drafting of all texts referred to it without altering their substance, formulating drafts and giving advice on drafting as requested by the Conference or by the Committee of the Whole and reporting to the Conference or to the Committee of the Whole as appropriate.

23. On the basis of the deliberations recorded in the records of the Conference (A/CONF.183/SR.1 to SR. ...) and of the Committee of the Whole (A/CONF.183/C.1/SR.1 to SR. ...) and the reports of the Committee of the Whole (A/CONF.183/...) and of the Drafting Committee (A/CONF.183/...), the

Conference drew up the Rome Statute of the International Criminal Court.

24. The foregoing Statute, which is subject to ratification, acceptance or approval, was adopted by the Conference on .. July 1998 and opened for signature on .. July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

25. After 17 October 1998, the closing date for signature at the Ministry of Foreign Affairs of Italy, the Statute will be deposited with the Secretary-General of the United Nations.

26. The Conference also adopted the following resolutions, which are annexed to the present Final Act:

Tribute to the International Law Commission

Tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman

Tribute to the President of the Conference, to the Chairman of the Committee of the Whole and to the Chairman of the Drafting Committee

Tribute to the people and the Government of Italy

Resolution on the Establishment of the Preparatory Commission for the International Criminal Court

...

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Rome this .. th day of July, one thousand nine hundred and ninety-eight, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Ministry of Foreign Affairs of Italy.

Annex

Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

A

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution in the preparation of the original draft of the Statute, which constituted the basis for the work of the Preparatory Committee.

B

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Pays tribute to the participants in the Preparatory Committee on the Establishment of an International Criminal Court and its Chairman, Mr. Adrian Bos, for their outstanding and hard work, their commitment and their dedication.

C

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its deep appreciation and gratitude to the people and the Government of Italy for making the necessary arrangements for the holding of the Conference in Rome, for their generous hospitality and for their contribution to the successful completion of the work of the Conference.

D

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Expresses its appreciation and thanks to Mr. Giovanni Conso, President of the Conference, Mr. Philippe Kirsch, Chairman of the Committee of the Whole, and Mr. M. Cherif Bassiouni, Chairman of the Drafting Committee, who, through their experience, skilful efforts and wisdom in steering the work of the Conference, contributed greatly to the success of the Conference.

E

The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court,

Having decided to take all possible measures to ensure the coming into operation of the International Criminal Court without undue delay and to make the necessary arrangements for the commencement of its functions,

Having decided that a preparatory commission should be established for the fulfilment of these purposes,

Decides as follows:

1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as

possible at a date to be decided by the General Assembly of the United Nations;

2. The Commission shall consist of representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference;

3. The Commission shall elect its Chairman and other officers, adopt its rules of procedure and decide on its programme of work. These elections shall take place at the first meeting of the Commission;

3 bis. The official and working languages of the Preparatory Commission shall be those of the General Assembly of the United Nations;

4. The Commission shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court, including the draft texts of:

(a) Elements of crimes and the Rules of Procedure and Evidence on a priority basis;²⁵²

(b) A relationship agreement between the Court and the United Nations;

(c) Basic principles governing a headquarters agreement to be negotiated between the Court and the host country;

(d) **(Deleted)**

(e) Financial regulations and rules;

(f) An agreement on the privileges and immunities of the Court;

(g) A budget for the first financial year;

(h) The rules of procedure of the Assembly of States Parties.

5. The Commission shall remain in existence until the conclusion of the first meeting of the Assembly of States Parties.

6. The Commission shall prepare a report on all matters within its mandate and submit it to the first meeting of the Assembly of States Parties.

7. The Commission shall meet at the Headquarters of the United Nations. The Secretary-General of the United Nations is requested to provide to the Commission such secretariat

²⁵² The question of timing is still under discussion.

services as it may require, subject to the approval of the General Assembly of the United Nations.²⁵³

8. The Secretary-General of the United Nations shall bring the present resolution to the attention of the General Assembly for any necessary action.

(b) Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

Note regarding the Final Act contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998⁷⁶

NOTE

Understandings of the Committee of the Whole with respect to the Final Act:

The text within square brackets in paragraph 4 (a) of the annex will be reconsidered in the light of the discussions on this issue.

The wording of paragraph 7 of the annex is subject to the finalization of article 104.

Note regarding the annex to the Final Act contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 14 July 1998¹⁷²

NOTE

The Committee of the Whole further informs the Drafting Committee that it decided to remove the square brackets in paragraph 4 (a) of the annex to the Final Act previously transmitted to the Drafting Committee and to slightly redraft the text of that paragraph as follows:

"4. (a) Elements of crimes and the Rules of Procedure and Evidence on a priority basis;"

²⁵³ The wording of this paragraph is subject to the finalization of article 104.

(c) Documents submitted by delegations

DOCUMENT A/CONF.183/C.1/L.16

Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal regarding articles 51 and 102 and the resolution of the Conference relating to the establishment of a Preparatory Commission

[Original: Spanish]
[23 June 1998]

Proposals relating to official and working languages

NOTE

This document is reproduced under part 4.

DOCUMENT A/CONF.183/C.1/L.57

Belarus, Kazakhstan and Ukraine: proposal regarding a draft resolution on equitable representation in elections to the Court

[Original: Russian]
[9 July 1998]

DRAFT RESOLUTION ON EQUITABLE REPRESENTATION IN ELECTIONS TO THE COURT,²⁵⁴ SUBMITTED BY THE DELEGATIONS OF BELARUS, KAZAKHSTAN AND UKRAINE

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,

Having adopted the Statute of the International Criminal Court, which establishes a requirement of equitable geographical distribution in elections to the Court,

Inviting the maximum number of States to become Parties to the Statute so that the International Criminal Court may enjoy universal support,

Expresses the hope that, in accordance with the said requirement, States Parties will strive to elect²⁵⁵ at least [...] ²⁵⁶ judges from each geographical group as defined by the United Nations General Assembly, especially when State accession to the Statute has become widespread and the composition of each geographical group is broadly similar to the membership of that group at the United Nations.

²⁵⁴ The title of this resolution should be added to paragraph 26 of the draft Final Act.

²⁵⁵ It is important that equitable geographical distribution should be the issue at the stage of the elections proper, not at the candidate selection stage or at other stages preceding the elections.

²⁵⁶ This figure must be determined as a function of the total number of judges on the Court, as laid down in article 37 of the Statute.

DOCUMENT A/CONF.183/C.1/L.71

Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey: proposal regarding crimes of terrorism and drug crimes

[Original: English]
[14 July 1998]

NOTE

This document is reproduced under part 2.

DOCUMENT A/CONF.183/C.1/L.75

Movement of Non-Aligned Countries: proposal regarding the Bureau proposal in document A/CONF.183/C.1/L.59 and Corr.1

[Original: English]
[14 July 1998]

NOTE

This document is reproduced under part 2.

Index to the documents of the Conference

NOTE: An asterisk indicates that the document has not been included in volume III.

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
DOCUMENTS OF THE PLENARY			
A/CONF.183/1*	Provisional agenda		The agenda is reproduced in volume II.
A/CONF.183/2 and Add.1 and Add.1/Corr.1 and Add.2/Rev.1	Report of the Preparatory Committee on the Establishment of an International Criminal Court	5	
A/CONF.183/3 and Corr.1	Memorandum of the Secretary-General on the methods of work and procedures for the Conference	187	
A/CONF.183/4	Communications received regarding consultations on the draft rules of procedure for the Conference (rules 6, 11 and 49) and the candidature of the Chairman of the Committee of the Whole: note by the Secretary-General	189	
A/CONF.183/5	Communication received regarding consultations on the draft rules of procedure for the Conference (rules 19, 36 and 52): note by the Secretary-General	190	
A/CONF.183/6*	Rules of procedure for the Conference		See volume II.
A/CONF.183/7 and Corr.1 and 2	Report of the Credentials Committee	3	
A/CONF.183/8	Report of the Committee of the Whole	93	
A/CONF.183/9*	Rome Statute of the International Criminal Court		Incorporating the corrections effected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. See volume I.
A/CONF.183/10*	Final Act of the Conference		See volume I.
A/CONF.183/SR.1-9*	Summary records of the 1st to 9th plenary meetings of the Conference		See volume II.
A/CONF.183/INF/1*	Information note for participants		Not reproduced.
A/CONF.183/INF/2*	Draft programme of work		Not reproduced.
A/CONF.183/INF/3	Non-governmental organizations accredited to participate in the Conference: note by the Secretary-General	193	
A/CONF.183/INF/4	Communication from the Inter-Agency Standing Committee to the Conference : note by the Secretary-General	191	

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
A/CONF.183/INF/5 and Corr.1*	Provisional list of delegations to the Conference		The final list of delegations reproduced is in volume II.
A/CONF.183/INF/6	Letter dated 30 June 1998 from the Chairman of the Organizing Committee for the Conference to the President of the Conference	192	
A/CONF.183/INF/7	Letter from the President of the Conference to all representatives of participating States	192	
A/CONF.183/INF/8	Letter of the Secretary-General to the President of the Conference	192	

DOCUMENTS OF THE COMMITTEE OF THE WHOLE^{a,b}

A/CONF.183/C.1/L.92 and Corr.1	Draft report of the Committee of the Whole		See the report of the Committee of the Whole issued as a document of the plenary.
A/CONF.183/C.1/L.76 and Add.1, Add.2 and Add.2/Corr.1, Add.3 and 4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and 8, Add.9 and Add.9/Corr.1, and Add.10-13	Draft Statute for the International Criminal Court		Idem
A/CONF.183/C.1/L.76/Add.14	Draft Final Act of the Conference		Idem
A/CONF.183/C.1/SR.1-42*	Summary records of the 1st to 42nd meetings of the Committee of the Whole		See volume II.
A/CONF.183/C.1/L.64, L.65/Rev.1, L.66 and Add.1, L.67/Rev.1, L.68/Rev.2, L.82 and Corr.1, L.83-L.88 and L.91	Report of the Drafting Committee to the Committee of the Whole	149	
A/CONF.183/C.1/L.58*	Compendium of draft articles referred to the Drafting Committee by the Committee of the Whole		Not reproduced (draft articles contained in Coordinators' recommendations and working group reports).

PREAMBLE

Documents submitted by the Coordinator

A/CONF.183/C.1/L.54/Rev.2	Rolling text	197	
A/CONF.183/C.1/L.61 and Corr.1 and L.73.	Recommendations	199	

Documents submitted by delegations

A/CONF.183/C.1/L.22, L.32 and L.52	Proposals	202	
------------------------------------	-----------	-----	--

^a Including documents submitted by delegations to the plenary relating to the draft Statute.

^b No documents were issued under the symbols A/CONF.183/C.1/L.36 and L.63, A/CONF.183/C.1/WGPM/L.66 and A/CONF.183/C.1/WGE/L.16.

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
PART 1. ESTABLISHMENT OF THE COURT			
<i>Notes contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee</i>			
A/CONF.183/DC/R.2			Relevant extracts reproduced.
PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW			
<i>Documents submitted by the Bureau</i>			
A/CONF.183/C.1/L.53	Discussion paper	204	
A/CONF.183/C.1/L.59 and Corr.1	Proposal	212	
<i>Documents submitted by the Coordinator</i>			
A/CONF.183/C.1/L.60/Rev.1	Working paper	220	
A/CONF.183/C.1/L.44 and Corr.1	Recommendations	221	
<i>Documents of the Working Group on Applicable Law</i>			
A/CONF.183/C.1/WGAL/L.1 and L.3	Working papers	222	Replaced document A/CONF.183/C.1/WGGP/L.11.
A/CONF.183/C.1/WGAL/L.2 and Add.1 and Add.1/Corr.1	Report	223	
<i>Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee</i>			
A/CONF.183/DC/R.8, R.182 and letter dated 15 July 1998 (not issued owing to time constraints)			Relevant extracts reproduced.
<i>Documents submitted by delegations</i>			
A/CONF.183/INF/9-11	Information conveyed by New Zealand on behalf of the International Committee of the Red Cross	224	
A/CONF.183/C.1/L.1 and Corr.1, L.4-L.13, L.14/Rev.1, L.15, L.17, L.18, L.20, L.23, L.25, L.26, L.27/Rev.1, L.30, L.33-L.35, L.37 and Corr.1, L.38-L.40, L.46 and Corr.1, L.48, L.50, L.51, L.56 and Corr.1, L.62, L.69-L.72, L.74, L.75, L.77, L.79, L.81, L.89, L.90, L.94, and L.95	Proposals	226	
A/CONF.183/C.1/WGAL/L.4	Proposal	250	
PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW			
<i>Documents of the Working Group on General Principles of Criminal Law</i>			
A/CONF.183/C.1/WGGP/L.1 and L.8/Rev.1	Chairman's suggestions	250	

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
A/CONF.183/C.1/WGGP/L.3 and Corr.1, L.5/Rev.2, L.6, L.7/Rev.1 and Corr.1 and L.9/Rev.1 and Corr.1	Working papers	251	
A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	Report	253	

Documents of the Working Group on Penalties

A/CONF.183/C.1/WGP/L.8/Rev.1	Chairman's working paper	257	
A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2, Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	Report	257	

Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

A/CONF.183/DC/R.8, R.76 and R.119			Relevant extracts reproduced.
-----------------------------------	--	--	-------------------------------

Documents submitted by delegations

A/CONF.183/C.1/L.2 and L.3	Proposals	258	
A/CONF.183/C.1/WGGP/L.2 and L.10	Proposals	259	
A/CONF.183/C.1/WGP/L.4	Proposal	260	

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Documents submitted by the Coordinator

A/CONF.183/C.1/L.31/Rev.1 and Rev.1/Add.1 and Rev.1/Add.1/Corr.1	Rolling text	260	
A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	Recommendations	263	

Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee

A/CONF.183/DC/R.87, R.119 and R.145 and Corr.1			Relevant extracts reproduced.
---	--	--	-------------------------------

Documents submitted by delegations

A/CONF.183/C.1/L.16, L.19, L.21, L.24, L.42, L.43 and L.81	Proposals	269	
---	-----------	-----	--

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
---------------	--------------	-------------	---------------------

PART 5. INVESTIGATION AND PROSECUTION

Documents of the Working Group on Procedural Matters

A/CONF.183/C.1/WGPM/L.1, L.5 and Corr.1, L.6, L.7 and Corr.1, L.9 and Corr.1, L.10 and Corr.1, L.38/Rev.1 and Corr.1 and 2, L.40, L.43 and Corr.1, L.64 and L.75	Discussion paper and working papers	271	
--	-------------------------------------	-----	--

A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	Report	277	
--	--------	-----	--

***Notes contained in the transmittal letters from the Chairman of the Committee of the Whole
to the Chairman of the Drafting Committee***

A/CONF.183/DC/R.29 and Corr.1, R.87, R.182 and R.188	Relevant extracts reproduced.
---	-------------------------------

Documents submitted by delegations

A/CONF.183/C.1/L.81	Amendment	293	
---------------------	-----------	-----	--

A/CONF.183/C.1/WGPM/L.3, L.4, L.8, L.11, L.18 and Corr.1, L.19, L.20, L.31, L.61 and L.77	Proposals and working papers	293	
---	------------------------------	-----	--

PART 6. THE TRIAL

Documents of the Working Group on Procedural Matters

A/CONF.183/C.1/WGPM/L.42	Chairman's proposal	295	
--------------------------	---------------------	-----	--

A/CONF.183/C.1/WGPM/L.37 and Corr.1, L.41 and Corr.1, L.51 and Corr.1, L.63/Rev.1, L.67, L.68/Rev.2, L.71 and L.76/Rev.1	Working papers	296	
---	----------------	-----	--

A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	Report	301	
--	--------	-----	--

***Notes contained in the transmittal letters from the Chairman of the Committee of the Whole
to the Chairman of the Drafting Committee***

A/CONF.183/DC/R.87, R.145 and Corr.1, and R.188	Relevant extracts reproduced.
--	-------------------------------

Documents submitted by delegations

A/CONF.183/11	Proposal	302	
---------------	----------	-----	--

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
A/CONF.183/C.1/L.81	Amendment	302	
A/CONF.183/C.1/WGPM/L.12–L.17, L.21–L.36, L.39, L.48/Rev.1, L.49, L.52, L.58/Rev.1, L.65, L.69 and L.70/Rev.1	Proposals	302	
A/CONF.183/C.1/WGP/L.4	Proposal	260	

PART 7. PENALTIES

Documents of the Working Group on Penalties

A/CONF.183/C.1/WGP/L.2, L.3/Rev.1, L.7, L.9/Rev.1 and L.10	Chairman's working papers	314	
A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2, and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	Report	315	

*Notes contained in the transmittal letters from the Chairman of the Committee of the Whole
to the Chairman of the Drafting Committee*

A/CONF.183/DC/R.87 and R.145 and Corr.1			Relevant extracts reproduced.
--	--	--	-------------------------------

Documents submitted by delegations

A/CONF.183/C.1/WGP/L.1, L.5, L.6, L.11 and Corr.1 and 2, L.12, L.13 and L.15	Proposals	318	
--	-----------	-----	--

PART 8. APPEAL AND REVIEW

Documents of the Working Group on Procedural Matters

A/CONF.183/C.1/WGPM/L.72 and L.74	Working papers	319	
A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	Report	320	

*Notes contained in the transmittal letters from the Chairman of the Committee of the Whole
to the Chairman of the Drafting Committee*

A/CONF.183/DC/R.87, R.119 and R.188			Relevant extracts reproduced.
--	--	--	-------------------------------

Documents submitted by delegations

A/CONF.183/C.1/WGPM/L.44–L.47, L.50, L.53–L.57, L.59, L.60, L.62 and L.73	Proposals	321	
---	-----------	-----	--

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE			
<i>Documents of the Working Group on International Cooperation and Judicial Assistance</i>			
A/CONF.183/C.1/WGIC/L.5, L.6, L.16 and L.19	Chairman's discussion papers	323	
A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1, L.13/Rev.2 and L.15 and L.15/Corr.1	Rolling texts		Documents A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1 are incorporated in the report of the Working Group.
A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1 and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	Report	325	
<i>Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee</i>			
A/CONF.183/DC/R.68, R.119, R.188 and letter dated 15 July 1998 (not issued owing to time constraints)			Relevant extracts reproduced.
<i>Documents submitted by delegations</i>			
A/CONF.183/C.1/L.80, L.81 and L.93	Proposals	335	
A/CONF.183/C.1/WGIC/L.1-L.4, L.7, L.9, L.12, L.14, L.17 and Corr.1, L.18 and L.20	Proposals	335	
PART 10. ENFORCEMENT			
<i>Documents of the Working Group on Enforcement</i>			
A/CONF.183/C.1/WGE/L.15/Rev.1 and L.19	Chairman's texts	338	
A/CONF.183/C.1/WGE/L.4/Rev.1, L.6 and Corr.1, and L.7-L.12	Working papers	338	
A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1, and Add.2	Report	341	Replaced the draft report contained in document A/CONF.183/C.1/WGE/L.13 and Corr.1.
<i>Documents submitted by delegations</i>			
A/CONF.183/12	Declaration	344	
A/CONF.183/C.1/WGE/L.1-L.3, L.5 and L.17	Proposals	344	

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
PART 11. ASSEMBLY OF STATES PARTIES			
<i>Documents submitted by the Coordinator</i>			
A/CONF.183/C.1/L.41 and Corr.1	Rolling text	345	
A/CONF.183/C.1/L.47 and Corr.1 and Add.1 and 2	Recommendations	346	
<i>Documents submitted by delegations</i>			
A/CONF.183/C.1/L.16, L.28 and L.81	Proposals	347	
PART 12. FINANCING OF THE COURT			
<i>Documents submitted by the Coordinator</i>			
A/CONF.183/C.1/L.55/Rev.1 and Corr.1	Rolling text	347	
A/CONF.183/C.1/L.78 and Corr.1	Recommendations	347	
PART 13. FINAL CLAUSES			
<i>Documents submitted by the Coordinator</i>			
A/CONF.183/C.1/L. 54/Rev.2	Rolling text	348	
A/CONF.183/C.1/L.61 and Corr.1	Recommendations	348	
<i>Documents submitted by delegations</i>			
A/CONF.183/C.1/L.14/Rev.1, L.24 and L.29	Proposals	348	
FINAL ACT			
<i>Documents submitted by the Coordinator</i>			
A/CONF.183/C.1/L.49/Rev.1 and Add.1	Recommendations	349	
<i>Notes contained in the transmittal letters from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee</i>			
A/CONF.183/DC/R.119 and R.188			Relevant extracts reproduced.
<i>Documents submitted by delegations</i>			
A/CONF.183/C.1/L.16, L.57, L.71 and L.75	Proposals	353	
DOCUMENTS OF THE DRAFTING COMMITTEE			
A/CONF.183/DC/R.1, R.2, R.8, R.19, R.29 and Corr.1, R.52, R.68, R.76, R.87, R.119, R.142, R.145 and Corr.1, R.182, R.188*	Texts referred by the Committee of the Whole to the Drafting Committee		Extracts reproduced under relevant parts of the draft Statute and the draft Final Act.

Index to the documents of the Conference

<i>Symbol</i>	<i>Title</i>	<i>Page</i>	<i>Observations</i>
A/CONF.183/DC/R.6, R.10, R.12, R.13, R.16, R.17, R.46, R.47, R.50, R.58, R.61, R.88/Rev.1, R.99–R.101, R.114/Rev.1, R.115–R.118, R.149, R.150, R.152, R.154, R.164/Rev.1 and R.165*	Rolling texts		Not reproduced.
A/CONF.183/DC/R.3, R.4/Rev.1, R.5/Rev.1, R.7/Rev.1, R.9, R.11, R.14, R.15, R.18, R.20–R.28, R.30/Rev.1, R.31, R.32/Rev.1, R.33, R.34/Rev.1, R.35–R.38, R.39/Rev.1, R.40–R.41, R.42/Rev.1, R.43–R.45, R.48, R.49, R.51, R.53–R.57, R.59, R.60, R.62/Rev.1, R.63–R.64, R.65/Rev.1, R.66/Rev.1, R.67, R.69–R.75, R.77–R.80, R.81/Rev.1, R.82, R.83/Rev.1, R.84–R.86, R.89, R.90/Rev.1, R.91/Rev.1, R.92–R.98, R.102–R.113, R.120–R.139, R.140/Rev.1, R.141, R.143/Rev.1, R.144, R.146–R.148, R.151, R.153, R.155–R.157, R.158/Rev.1, R.159–R.163, R.166–R.169, R.170/Rev.1, R.171–R.172, R.173/Rev.1, R.174–R.180, R.183–R.185, R.186/Rev.1, R.187 and R.189–R.197*	Texts adopted on first or second reading by the Drafting Committee		Not reproduced.
A/CONF.183/DC/R.181 and Add.1 and 2*	Draft report of the Drafting Committee to the Committee of the Whole		See the report of the Drafting Committee to the Committee of the Whole issued as a document of the Committee of the Whole.

List of documents arranged by article

NOTE: The list of documents includes the proposals, working papers, recommendations, reports and other documents relating to the draft Statute for the International Criminal Court and the draft Final Act submitted to the Rome Conference by the Preparatory Committee on the Establishment of an International Criminal Court (document A/CONF.183/2 reproduced in the present volume at p. 5). The list is arranged in relation to the relevant part and article of the draft Statute and the draft Final Act. The documents listed are organized according to the body to which they were submitted (Plenary, Committee of the Whole or Working Group), the type of document (for example, rolling texts, recommendations, working papers, reports and proposals) and the numerical order of the document symbols. The numbers of the articles contained in these documents correspond to those of the draft Statute submitted by the Preparatory Committee and not those of the Rome Statute adopted by the Conference. All documents on the list are reproduced in the present volume at the page indicated.

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
PREAMBLE				
	<i>Committee of the Whole</i>	Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	197
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1 and L.73	199
		Spain: proposal	A/CONF.183/C.1/L.22	202
		Andorra: proposal	A/CONF.183/C.1/L.32	203
		Dominican Republic: proposal	A/CONF.183/C.1/L.52	203
PART 1. ESTABLISHMENT OF THE COURT				
<i>Article 1</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.2	
<i>Article 3</i>		Idem	Ibid.	
PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW				
<i>Article 5</i>	<i>Committee of the Whole</i>	Bureau discussion paper	A/CONF.183/C.1/L.53	204
<i>Crimes within the jurisdiction of the Court</i>		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Spain: proposal	A/CONF.183/C.1/L.1 and Corr.1	226
<i>Crime of genocide</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.8	
	<i>Committee of the Whole</i>	United States of America: proposal	A/CONF.183/C.1/L.10	229
<i>Crimes against humanity</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Note in transmittal letter, ^a dated 15 July 1998 ^b		
		Coordinator's recommendations	A/CONF.183/C.1/L.44 and Corr.1	221

^a Explanatory note contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee.

^b Not issued owing to time constraints.

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		United States of America: proposal	A/CONF.183/C.1/L.10	229
		Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago, and United Republic of Tanzania: proposal	A/CONF.183/C.1/L.12	239
		Cuba: proposal	A/CONF.183/C.1/L.17	240
		India, Sri Lanka and Turkey: proposal	A/CONF.183/C.1/L.27/Rev.1	242
		Cuba: proposal	A/CONF.183/C.1/L.30	242
		Nepal: proposal	A/CONF.183/C.1/L.35	243
	<i>Working Group on Applicable Law</i>	Working Group report	A/CONF.183/C.1/WGAL/L.2 and Add.1 and Add.1/Corr.1	223
<i>War crimes</i>	<i>Plenary</i>	New Zealand: information conveyed on behalf of the International Committee of the Red Cross	A/CONF.183/INF/10	225
		Idem	A/CONF.183/INF/11	226
	<i>Committee of the Whole</i>	Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Spain: proposal	A/CONF.183/C.1/L.1 and Corr.1	226
		Idem	A/CONF.183/C.1/L.4	227
		China: proposal	A/CONF.183/C.1/L.5	227
		United States of America: proposal	A/CONF.183/C.1/L.10	229
		Slovenia: proposal	A/CONF.183/C.1/L.11	239
		Lesotho, Malawi, Namibia, South Africa, Swaziland and United Republic of Tanzania: proposal	A/CONF.183/C.1/L.13	239
		Iraq: proposal	A/CONF.183/C.1/L.26	242
		Ukraine: proposal	A/CONF.183/C.1/L.33	242
		New Zealand: proposal	A/CONF.183/C.1/L.40	245
		Sierra Leone: proposal	A/CONF.183/C.1/L.62	247
		India: proposal	A/CONF.183/C.1/L.72	248
		Indonesia, Philippines, Thailand and Viet Nam: proposal	A/CONF.183/C.1/L.74	248
		Group of African States: proposal	A/CONF.183/C.1/L.89	249
		India: proposed amendments	A/CONF.183/C.1/L.94	250
<i>Crime of aggression</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal	A/CONF.183/C.1/L.37 and Corr.1	243
		Armenia: proposal	A/CONF.183/C.1/L.38	244

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Cameroon: proposal	A/CONF.183/C.1/L.39	244
		Algeria, Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Lebanon, Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal	A/CONF.183/C.1/L.56 and Corr.1	246
		Movement of Non-Aligned Countries: proposal	A/CONF.183/C.1/L.75	248
		Mexico: amendment	A/CONF.183/C.1/L.81	249
<i>Other crimes</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Spain: proposal	A/CONF.183/C.1/L.1 and Corr.1	226
		Comoros and Madagascar: proposal	A/CONF.183/C.1/L.46 and Corr.1	245
		Barbados, Dominica, Jamaica and Trinidad and Tobago: proposal	A/CONF.183/C.1/L.48	246
		Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago, and Turkey: proposal	A/CONF.183/C.1/L.71	248
		Mexico: amendment	A/CONF.183/C.1/L.81	249
<i>Elements of crimes</i>	<i>Plenary</i>	New Zealand: information conveyed on behalf of the International Committee of the Red Cross	A/CONF.183/INF/10	225
	<i>Committee of the Whole</i>	Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		United States of America: proposal	A/CONF.183/C.1/L.8	229
		Idem	A/CONF.183/C.1/L.10	229
		Idem	A/CONF.183/C.1/L.69	247
<i>Article Y</i>		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
<i>Article 6</i>	<i>Plenary</i>	New Zealand: information conveyed on behalf of the International Committee of the Red Cross	A/CONF.183/INF/9	224
	<i>Committee of the Whole</i>	Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Republic of Korea: proposal	A/CONF.183/C.1/L.6	227
		India: proposal	A/CONF.183/C.1/L.79	248
		Mexico: amendment	A/CONF.183/C.1/L.81	249
		India: proposed amendments	A/CONF.183/C.1/L.95	250
<i>Article 7</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Republic of Korea: proposal	A/CONF.183/C.1/L.6	227
		United States of America: proposal	A/CONF.183/C.1/L.70	247
		India: proposal	A/CONF.183/C.1/L.79	248
		India: proposed amendments	A/CONF.183/C.1/L.95	250

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
<i>Article 7 bis</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		United States of America: proposal	A/CONF.183/C.1/L.90	249
		India: proposed amendments	A/CONF.183/C.1/L.95	250
<i>Article 7 ter</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Republic of Korea: proposal	A/CONF.183/C.1/L.77	248
		United States of America: proposal	A/CONF.183/C.1/L.90	249
		India: proposed amendments	A/CONF.183/C.1/L.95	250
<i>Article 8</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Mexico: amendment	A/CONF.183/C.1/L.81	249
<i>Article 9*</i>	<i>Plenary</i>	New Zealand: information conveyed on behalf of the International Committee of the Red Cross	A/CONF.183/INF/9	224
	<i>Committee of the Whole</i>	Bureau discussion paper	A/CONF.183/C.1/L.53	204
<i>Article 10</i>		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Republic of Korea: proposal	A/CONF.183/C.1/L.6	227
		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Belgium: proposal	A/CONF.183/C.1/L.7	229
		Spain: proposal	A/CONF.183/C.1/L.20	241
		Cameroon: proposal	A/CONF.183/C.1/L.39	244
		India: proposal	A/CONF.183/C.1/L.79	248
<i>Article 11</i>		Mexico: amendment	A/CONF.183/C.1/L.81	249
		India: proposed amendments	A/CONF.183/C.1/L.95	250
		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Mexico: amendment	A/CONF.183/C.1/L.81	249
<i>Article 12</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
<i>Article 12 bis</i>		Mexico: revised proposals	A/CONF.183/C.1/L.14/Rev.1	240
<i>Article 13</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Republic of Korea: proposal	A/CONF.183/C.1/L.34	243
		Uruguay: proposal	A/CONF.183/C.1/L.51	246
<i>Article 13 bis</i>		Republic of Korea: proposal	A/CONF.183/C.1/L.34	243
<i>Article 14</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
<i>Article 15</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Mexico: revised proposal	A/CONF.183/C.1/L.14/Rev.1	240
		China: proposal	A/CONF.183/C.1/L.15	240
		Uruguay: proposal	A/CONF.183/C.1/L.23	241
<i>Article 16</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		United States of America: proposal	A/CONF.183/C.1/L.25	241
<i>Article 17</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Coordinator's working paper	A/CONF.183/C.1/L.60/Rev.1	220
<i>Article 18</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Japan: proposal	A/CONF.183/C.1/L.18	240
<i>Article 19</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		Turkey: proposal	A/CONF.183/C.1/L.50	246
<i>Article 20</i>		Bureau discussion paper	A/CONF.183/C.1/L.53	204
		Bureau proposal	A/CONF.183/C.1/L.59 and Corr.1	212
		United States of America: proposal	A/CONF.183/C.1/L.9	229
		Note in transmittal letter ^a	A/CONF.183/DC/R.182	
	<i>Working Group on Applicable Law</i>	Working paper	A/CONF.183/C.1/WGAL/L.1 ^c	222
		Idem	A/CONF.183/C.1/WGAL/L.3	223
		Working Group report	A/CONF.183/C.1/WGAL/L.2 and Add.1 and Add.1/Corr.1	223
		Guatemala: proposal	A/CONF.183/C.1/WGAL/L.4	250
PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW				
<i>Article 21</i>	<i>Working Group on General Principles of Criminal Law</i>	Chairman's suggestions	A/CONF.183/C.1/WGGP/L.1	250
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253

^c This document was originally issued as a document of the Working Group on General Principles of Criminal Law, under the symbol A/CONF.183/C.1/WGGP/L.11, before the establishment of the Working Group on Applicable Law.

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
<i>Article 21 bis</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
		Chairman's working paper	A/CONF.183/C.1/WGP/L.8/Rev.1	257
	<i>Working Group on Penalties</i>	Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	257
		Mexico: proposal	A/CONF.183/C.1/WGP/L.4	260
<i>Article 22</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.8	
	<i>Working Group on General Principles of Criminal Law</i>	Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 23</i>	<i>Committee of the Whole</i>	France: proposal	A/CONF.183/C.1/L.3	258
		Working paper	A/CONF.183/C.1/WGGP/L.3 and Corr.1	251
	<i>Working Group on General Principles of Criminal Law</i>	Idem	A/CONF.183/C.1/WGGP/L.5/Rev.2	251
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 24</i>		Idem	Ibid.	
<i>Article 25</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.76	
	<i>Committee of the Whole</i>	United States of America: proposal	A/CONF.183/C.1/L.2	258
		Working paper	A/CONF.183/C.1/WGGP/L.7/Rev.1	252
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 26</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.8	
	<i>Working Group on General Principles of Criminal Law</i>	Chairman's suggestions	A/CONF.183/C.1/WGGP/L.1	250
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 27</i>		Idem	Ibid.	
<i>Article 28</i>		Chairman's suggestions	A/CONF.183/C.1/WGGP/L.1	250
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 29</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.8	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on General Principles of Criminal Law</i>	Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
<i>Article 30</i>		Idem	Ibid.	
<i>Article 31</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
	<i>Working Group on General Principles of Criminal Law</i>	Chairman's suggestions	A/CONF.183/C.1/WGGP/L.8/Rev.1	251
		Working paper	A/CONF.183/C.1/WGGP/L.6	252
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
		United States of America: proposal	A/CONF.183/C.1/WGGP/L.2	259
		Syrian Arab Republic, Yemen, Iraq, Oman, Libyan Arab Jamahiriya, Qatar, Saudi Arabia, Morocco, Algeria, United Arab Emirates, Sudan, Kuwait, Egypt: letter	A/CONF.183/C.1/WGGP/L.10	259
<i>Article 32</i>		Working paper	A/CONF.183/C.1/WGGP/L.9/Rev.1 and Corr.1	253
		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
		United States of America: proposal	A/CONF.183/C.1/WGGP/L.2	259
<i>Article 33</i>		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
		United States of America: proposal	A/CONF.183/C.1/WGGP/L.2	259
<i>Article 34</i>		Working Group report	A/CONF.183/C.1/WGGP/L.4 and Corr.1 and Add.1/Rev.1 and Add.1/Rev.1/Corr.1, Add.2 and Add.2/Corr.1 and Add.3	253
		United States of America: proposal	A/CONF.183/C.1/WGGP/L.2	259
PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT				
<i>Article 35</i>	<i>Committee of the Whole</i>	Coordinator's rolling text	A/CONF.183/C.1/L.31/Rev.1 and Add.1 and Add.1/Corr.1	260
		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 36</i>		Coordinator's rolling text	A/CONF.183/C.1/L.31/Rev.1 and Add.1 and Add.1/Corr.1	260

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 37</i>		Coordinator's rolling text	A/CONF.183/C.1/L.31/Rev.1 and Add.1 and Add.1/Corr.1	260
		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
		Idem	A/CONF.183/DC/R.145 and Corr.1	
	<i>Committee of the Whole</i>	Switzerland: proposal	A/CONF.183/C.1/L.24	270
		Ukraine: proposed amendment	A/CONF.183/C.1/L.42	271
		Mexico: amendment	A/CONF.183/C.1/L.81	271
<i>Article 38</i>		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 39</i>		Idem	Ibid.	
<i>Article 40</i>		Coordinator's rolling text	A/CONF.183/C.1/L.31/Rev.1 and Add.1 and Add.1/Corr.1	260
		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 42</i>		Idem	Ibid.	
<i>Article 43</i>		Idem	Ibid.	
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
<i>Article 44</i>	<i>Committee of the Whole</i>	Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
		Niger and Republic of Congo: proposal	A/CONF.183/C.1/L.43	271
<i>Article 45</i>	<i>Committee of the Whole</i>	Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 47</i>		Idem	Ibid.	
		United Arab Emirates: proposal	A/CONF.183/C.1/L.21	270
<i>Article 48</i>		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
<i>Article 49</i>		Idem	Ibid.	
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Committee of the Whole</i>	Japan: proposal	A/CONF.183/C.1/L.19	270
<i>Article 51</i>		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal	A/CONF.183/C.1/L.16	269
<i>Article 52</i>		Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
<i>Article 53</i>	<i>Committee of the Whole</i>	Coordinator's recommendations	A/CONF.183/C.1/L.45 and Corr.1-3 and Add.1, Add.2 and Add.2/Corr.1 and Add.3	263
PART 5. INVESTIGATION AND PROSECUTION				
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.29 and Corr.1	
<i>Article 54</i>	<i>Committee of the Whole</i>	Mexico: amendment	A/CONF.183/C.1/L.81	249
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.29 and Corr.1	
		Idem	A/CONF.183/DC/R.188	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.1	271
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		France: working paper	A/CONF.183/C.1/WGPM/L.4	293
		Argentina, Belgium, Canada, Finland, France, Germany, Israel, Italy, Japan, Malawi, New Zealand, Poland, Portugal, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America: working paper	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
		France: proposal	A/CONF.183/C.1/WGPM/L.77	295
<i>Article 54 bis</i>		Working paper	A/CONF.183/C.1/WGPM/L.1	271
		Idem	A/CONF.183/C.1/WGPM/L.10 and Corr.1	274
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 54 ter</i>		Working paper	A/CONF.183/C.1/WGPM/L.1	271

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Idem	A/CONF.183/C.1/WGPM/L.6	274
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		France: proposal	A/CONF.183/C.1/WGPM/L.11	293
<i>Article 54 quater</i>		United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.3	293
<i>Article 55</i>		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 56</i>		Idem	Ibid.	
<i>Article 57</i>		Working paper	A/CONF.183/C.1/WGPM/L.1	271
		Idem	A/CONF.183/C.1/WGPM/L.38/Rev.1 and Corr.1 and 2	274
		Discussion paper	A/CONF.183/C.1/WGPM/L.40	276
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		France: proposal	A/CONF.183/C.1/WGPM/L.8	293
		Poland: proposal	A/CONF.183/C.1/WGPM/L.31	294
		Philippines: proposal	A/CONF.183/C.1/WGPM/L.61	295
<i>Article 57 bis</i>		Working paper	A/CONF.183/C.1/WGPM/L.38/Rev.1 and Corr.1 and 2	274
		Idem	A/CONF.183/C.1/WGPM/L.64	277
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8	277
<i>Article 58</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.182	
	<i>Committee of the Whole</i>	Mexico: amendment	A/CONF.183/C.1/L.81	293

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.7 and Corr.1	274
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 59</i>		Working paper	A/CONF.183/C.1/WGPM/L.5 and Corr.1	273
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 60</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.29 and Corr.1	
	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 61</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.9 and Corr.1	274
		Idem	A/CONF.183/C.1/WGPM/L.43 and Corr.1	276
		Idem	A/CONF.183/C.1/WGPM/L.75	277
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Austria: proposal	A/CONF.183/C.1/WGPM/L.19	294
		United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.20	294
	PART 6. THE TRIAL			
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
		Idem	A/CONF.183/DC/R.145 and Corr.1	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
<i>Article 62</i>	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 63</i>		Working paper	A/CONF.183/C.1/WGPM/L.51 and Corr.1	297
		Idem	A/CONF.183/C.1/WGPM/L.67	298
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Egypt, Iraq, Libyan Arab Jamahiriya, Oman, Qatar, Sudan and Syrian Arab Republic: proposal	A/CONF.183/C.1/WGPM/L.15	303
		Malawi: proposal	A/CONF.183/C.1/WGPM/L.16	304
		Colombia: proposal	A/CONF.183/C.1/WGPM/L.17	304
<i>Article 64</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.41 and Corr.1	296
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Israel: proposal	A/CONF.183/C.1/WGPM/L.52	312
<i>Article 65</i>		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Switzerland: proposal	A/CONF.183/C.1/WGPM/L.29	308
<i>Article 66</i>		Working paper	A/CONF.183/C.1/WGPM/L.37 and Corr.1	296

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 67</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Working Group on Procedural Matters</i>	Chairman's proposal	A/CONF.183/C.1/WGPM/L.42	295
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.33	309
		Australia: proposal	A/CONF.183/C.1/WGPM/L.35	309
		Egypt, Oman and Syrian Arab Republic: proposal	A/CONF.183/C.1/WGPM/L.36	309
<i>Article 68</i>		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Canada: proposal	A/CONF.183/C.1/WGPM/L.58/Rev.1	312
<i>Article 69</i>	<i>Plenary</i>	Holy See: proposal	A/CONF.183/11	302
	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Holy See: proposal	A/CONF.183/C.1/WGPM/L.14	303
		United States of America: reference paper	A/CONF.183/C.1/WGPM/L.21	304
		Syrian Arab Republic: proposal	A/CONF.183/C.1/WGPM/L.22	306
		Canada: proposal	A/CONF.183/C.1/WGPM/L.23	306
		Iraq: proposal	A/CONF.183/C.1/WGPM/L.24	307
		Colombia: proposal	A/CONF.183/C.1/WGPM/L.25	307

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Canada: proposal	A/CONF.183/C.1/WGPM/L.26	307
		Philippines: proposal	A/CONF.183/C.1/WGPM/L.27	307
		Poland: proposal	A/CONF.183/C.1/WGPM/L.31	294
		Israel: proposal	A/CONF.183/C.1/WGPM/L.34	309
		Canada: proposal	A/CONF.183/C.1/WGPM/L.48/Rev.1	311
<i>Article 70</i>		Working paper	A/CONF.183/C.1/WGPM/L.68/Rev.2	299
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Japan: proposal	A/CONF.183/C.1/WGPM/L.13	303
		Netherlands: proposal	A/CONF.183/C.1/WGPM/L.65	313
<i>Article 70 bis</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.68/Rev.2	299
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 71</i>	<i>Committee of the Whole</i>	Mexico: amendment	A/CONF.183/C.1/L.81	302
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.76/Rev.1	300
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.12	302
		Croatia: proposal	A/CONF.183/C.1/WGPM/L.32	308
		France and United States of America: proposal	A/CONF.183/C.1/WGPM/L.39	310
		Singapore: proposal	A/CONF.183/C.1/WGPM/L.49	311

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
<i>Article 71 bis</i>		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		Belgium, Italy, United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.70/Rev.1	313
<i>Article 72</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.145 and Corr.1	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.71	300
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 73</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.63/Rev.1	298
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
		France and United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.28	307
		Japan: proposal	A/CONF.183/C.1/WGPM/L.30	308
		United States of America: proposal	A/CONF.183/C.1/WGPM/L.69	313
<i>Article 74</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 74 bis</i>	<i>Working Group on Penalties</i>	Mexico: proposal	A/CONF.183/C.1/WGP/L.4	260

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
PART 7. PENALTIES				
<i>Article 75</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
		Idem	Ibid.	
		Idem	A/CONF.183/DC/R.145 and Corr.1	
	<i>Working Group on Penalties</i>	Chairman's working paper	A/CONF.183/C.1/WGP/L.3/Rev.1	314
		Idem	A/CONF.183/C.1/WGP/L.10	315
		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
		Italy: proposed amendments	A/CONF.183/C.1/WGP/L.1	318
		Algeria, Bahrain, Comoros, Egypt, Iran, (Islamic Republic of), Iraq, Kuwait, Libyan Arab Jamahiriya, Nigeria, Oman, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, United Arab Emirates and Yemen: proposal	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
		Barbados, Dominica, Jamaica, Singapore and Trinidad and Tobago: proposal	A/CONF.183/C.1/WGP/L.13	319
		Mexico: proposal	A/CONF.183/C.1/WGP/L.15	319
<i>Article 76</i>	<i>Committee of the Whole</i>	France: proposal	A/CONF.183/C.1/L.3	258
		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
	<i>Working Group on Penalties</i>	Italy: proposed amendments	A/CONF.183/C.1/WGP/L.1	318
		Belgium, Benin, Brazil, Burundi, Dominican Republic, Egypt, France, Oman, Portugal, Republic of Korea, Romania, Samoa, Slovenia, South Africa, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United Republic of Tanzania: proposal	A/CONF.183/C.1/WGP/L.12	319
		Chairman's working paper	A/CONF.183/C.1/WGP/L.9/Rev.1	315
		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
<i>Article 77</i>	<i>Working Group on Penalties</i>	Italy: proposal	A/CONF.183/C.1/WGP/L.1	318
		Austria: proposal	A/CONF.183/C.1/WGP/L.5	318
		Ukraine: proposal	A/CONF.183/C.1/WGP/L.6	318
		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
		Chairman's working paper	A/CONF.183/C.1/WGP/L.9/Rev.1	315
<i>Article 78</i>		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
<i>Article 79</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on Penalties</i>	Chairman's working paper	A/CONF.183/C.1/WGP/L.2	314
		Idem	A/CONF.183/C.1/WGP/L.7	315
		Working Group report	A/CONF.183/C.1/WGP/L.14 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.3/Rev.1	315
<i>Article 79 bis</i>		Idem	Ibid.	
PART 8. APPEAL AND REVIEW				
<i>Article 80</i>	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	277
<i>Article 81</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.87	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.72	319
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	320
		Netherlands: proposal	A/CONF.183/C.1/WGPM/L.44	321
		Kenya: proposal	A/CONF.183/C.1/WGPM/L.46	321
		Canada: proposal	A/CONF.183/C.1/WGPM/L.47	321
		United States of America: proposal	A/CONF.183/C.1/WGPM/L.50	321
<i>Article 82</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	320
		Syrian Arab Republic: proposal	A/CONF.183/C.1/WGPM/L.53	322
		Israel: proposal	A/CONF.183/C.1/WGPM/L.54	322
		Philippines: proposal	A/CONF.183/C.1/WGPM/L.60	323
		Canada: proposal	A/CONF.183/C.1/WGPM/L.73	323
<i>Article 83</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on Procedural Matters</i>	Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	320
		Japan: proposal	A/CONF.183/C.1/WGPM/L.45	321
		United Kingdom of Great Britain and Northern Ireland: proposal	A/CONF.183/C.1/WGPM/L.57	322
		Argentina: proposal	A/CONF.183/C.1/WGPM/L.59	322
		Syrian Arab Republic: proposal	A/CONF.183/C.1/WGPM/L.62	323
<i>Article 84</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
	<i>Working Group on Procedural Matters</i>	Working paper	A/CONF.183/C.1/WGPM/L.74	320
		Working Group report	A/CONF.183/C.1/WGPM/L.2 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1 and 2, Add.3, Add.4, Add.5 and Add.5/Corr.1, Add.6 and Add.6/Corr.1, Add.7 and Add.7/Corr.1 and Add.8 and Add.8/Corr.1	320
		Kenya: proposal	A/CONF.183/C.1/WGPM/L.55	322
		Canada: proposal	A/CONF.183/C.1/WGPM/L.56	322
PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE				
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
<i>Article 85</i>	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 86</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.68	
		Idem	A/CONF.183/DC/R.188	
	<i>Committee of the Whole</i>	India: proposal	A/CONF.183/C.1/L.80	335
		Mexico: amendment	A/CONF.183/C.1/L.81	335

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 86 bis</i>		Central African Republic: proposal	A/CONF.183/C.1/WGIC/L.14	337
		Chairman's discussion paper	A/CONF.183/C.1/WGIC/L.16	324
		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 87</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
		Note in transmittal letter, ^a dated 15 July 1998 ^b		
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Chairman's discussion paper	A/CONF.183/C.1/WGIC/L.5	323
		Idem	A/CONF.183/C.1/WGIC/L.6	323
		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
		China: proposal	A/CONF.183/C.1/WGIC/L.2	336
		Italy: proposal	A/CONF.183/C.1/WGIC/L.3	336
		Republic of Congo: proposal	A/CONF.183/C.1/WGIC/L.4	336
		Singapore: proposal	A/CONF.183/C.1/WGIC/L.7	336
		Croatia: proposal	A/CONF.183/C.1/WGIC/L.9	336
		United States of America: proposal	A/CONF.183/C.1/WGIC/L.17 and Corr.1	337
		Denmark, Norway, Sweden and Switzerland: proposal	A/CONF.183/C.1/WGIC/L.18	337
		Canada: proposal	A/CONF.183/C.1/WGIC/L.20	337
<i>Article 87 bis</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 88</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.68	
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Chairman's discussion paper	A/CONF.183/C.1/WGIC/L.5	323
		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
		Canada: proposal	A/CONF.183/C.1/WGIC/L.1	335
<i>Article 89</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.68	
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 90</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
		Note in transmittal letter, ^a dated 15 July 1998 ^b		
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Chairman's discussion paper	A/CONF.183/C.1/WGIC/L.16	324
		Idem	A/CONF.183/C.1/WGIC/L.19	324
		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 90 (a)</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 90 (b)</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 90 bis</i>		Idem	Ibid.	
<i>Article 90 ter</i>		Idem	Ibid.	
<i>Article 90 quater</i>		Idem	Ibid.	
<i>Article 91</i>	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.68	
		Idem	A/CONF.183/DC/R.188	
		Note in transmittal letter, ^a dated 15 July 1998 ^b		
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Rolling text	A/CONF.183/C.1/WGIC/L.13/Rev.2	324
		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
		Canada: proposal	A/CONF.183/C.1/WGIC/L.12	337
<i>Article 91 bis</i>		Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
<i>Article 92</i>		Idem	Ibid.	
<i>Article X</i>	<i>Committee of the Whole</i>	Poland: proposal	A/CONF.183/C.1/L.93	335

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.188	
	<i>Working Group on International Cooperation and Judicial Assistance</i>	Working Group report	A/CONF.183/C.1/WGIC/L.11 and Corr.1 and 2 and Add.1 and Add.1/Corr.1, Add.2 and Add.2/Corr.1, Add.3 and Add.3/Corr.1 and 2, Add.4 and Add.4/Corr.1, and A/CONF.183/C.1/WGIC/L.8/Rev.1 and Rev.1/Corr.1 and 2, L.10 and L.10/Corr.1 and L.15 and L.15/Corr.1	335
PART 10. ENFORCEMENT				
<i>Article 93</i>	<i>Working Group on Enforcement</i>	Working paper	A/CONF.183/C.1/WGE/L.12	341
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
		Japan: proposal	A/CONF.183/C.1/WGE/L.1	344
<i>Article 94</i>	<i>Plenary</i>	Netherlands: declaration	A/CONF.183/12	344
	<i>Working Group on Enforcement</i>	Working paper	A/CONF.183/C.1/WGE/L.8	339
		Idem	A/CONF.183/C.1/WGE/L.10	340
		Idem	A/CONF.183/C.1/WGE/L.4/Rev.1	338
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
		Italy: proposal	A/CONF.183/C.1/WGE/L.2	344
		Uruguay: proposal	A/CONF.183/C.1/WGE/L.3	344
<i>Article 94 bis</i>		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
<i>Article 95</i>		Idem	Ibid.	
<i>Article 96</i>		Working paper	A/CONF.183/C.1/WGE/L.6 and Corr.1	339
		Idem	A/CONF.183/C.1/WGE/L.7	339
		Idem	A/CONF.183/C.1/WGE/L.9	339
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
<i>Article 97</i>		Working paper	A/CONF.183/C.1/WGE/L.11	340
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
		Syrian Arab Republic: proposal	A/CONF.183/C.1/WGE/L.5	344
<i>Article 98</i>		Working paper	A/CONF.183/C.1/WGE/L.11	340
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
<i>Article 99</i>		Idem	Ibid.	
		Japan: proposal	A/CONF.183/C.1/WGE/L.1	344

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Canada: proposal	A/CONF.183/C.1/WGE/L.17	345
<i>Article 100</i>		Chairman's text	A/CONF.183/C.1/WGE/L.15/Rev.1	338
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
<i>Article 101</i>		Chairman's text	A/CONF.183/C.1/WGE/L.19	338
		Working Group report	A/CONF.183/C.1/WGE/L.14 and Add.1 and Add.1/Corr.1 and Add.2	341
<i>Article X</i>		Working paper	A/CONF.183/C.1/WGE/L.10	340
		Idem	A/CONF.183/C.1/WGE/L.4/Rev.1	338
PART 11. ASSEMBLY OF STATES PARTIES				
<i>Article 102</i>	<i>Committee of the Whole</i>	Coordinator's rolling text	A/CONF.183/C.1/L.41 and Corr.1	345
		Coordinator's recommendations	A/CONF.183/C.1/L.47 and Corr.1 and Add.1 and 2	346
		Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal	A/CONF.183/C.1/L.16	347
		Ukraine: proposal	A/CONF.183/C.1/L.28	347
		Mexico: amendment	A/CONF.183/C.1/L.81	347
PART 12. FINANCING OF THE COURT				
<i>Article 103</i>		Coordinator's rolling text	A/CONF.183/C.1/L.55/Rev.1 and Corr.1	347
		Coordinator's recommendations	A/CONF.183/C.1/L.78 and Corr.1	347
<i>Article 103 bis</i>		Coordinator's rolling text	A/CONF.183/C.1/L.55/Rev.1 and Corr.1	347
		Coordinator's recommendations	A/CONF.183/C.1/L.78 and Corr.1	347
<i>Article 104</i>		Idem	Ibid.	
<i>Article 105</i>		Coordinator's rolling text	A/CONF.183/C.1/L.55/Rev.1 and Corr.1	347
		Coordinator's recommendations	A/CONF.183/C.1/L.78 and Corr.1	347
<i>Article 106</i>		Idem	Ibid.	
<i>Article 107</i>		Coordinator's rolling text	A/CONF.183/C.1/L.55/Rev.1 and Corr.1	347
		Coordinator's recommendations	A/CONF.183/C.1/L.78 and Corr.1	347
PART 13. FINAL CLAUSES				
<i>Article 108</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
		Mexico: revised proposals	A/CONF.183/C.1/L.14/Rev.1	348
<i>Article 109</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348

List of documents arranged by article

<i>Article</i>	<i>Body</i>	<i>Document</i>	<i>Symbol</i>	<i>Page</i>
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 110</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
		Switzerland: proposal	A/CONF.183/C.1/L.24	349
<i>Article 110 bis</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 111</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
		Switzerland: proposal	A/CONF.183/C.1/L.24	349
		Denmark: proposal	A/CONF.183/C.1/L.29	349
<i>Article 112</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 113</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 114</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 115</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
<i>Article 116</i>		Coordinator's rolling text	A/CONF.183/C.1/L.54/Rev.2	348
		Coordinator's recommendations	A/CONF.183/C.1/L.61 and Corr.1	348
FINAL ACT				
		Coordinator's recommendations	A/CONF.183/C.1/L.49/Rev.1 and Add.1	349
	<i>Drafting Committee</i>	Note in transmittal letter ^a	A/CONF.183/DC/R.119	
		Idem	A/CONF.183/DC/R.188	
	<i>Committee of the Whole</i>	Andorra, Argentina, Bolivia, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela: proposal	A/CONF.183/C.1/L.16	353
		Belarus, Kazakhstan and Ukraine: proposal	A/CONF.183/C.1/L.57	353
		Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey: proposal	A/CONF.183/C.1/L.71	354
		Movement of Non-Aligned Countries: proposal	A/CONF.183/C.1/L.75	354

List of documents submitted by delegations

NOTE: The list includes the documents submitted by delegations relating to the draft Statute for the International Criminal Court and the draft Final Act submitted to the Rome Conference by the Preparatory Committee on the Establishment of an International Criminal Court (document A/CONF.183/2 reproduced in this volume at p. 5). The list is arranged by delegation in alphabetical order. The documents listed are organized according to the relevant article of the draft Statute and the draft Final Act, the body to which the documents were submitted and the numerical order of the document symbols. The numbers of the articles contained in these documents correspond to those of the draft Statute submitted by the Preparatory Committee and not those of the Rome Statute adopted by the Conference. All documents on the list are reproduced in the present volume at the page indicated.

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
Algeria	Article 5 <i>(Crime of aggression)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		<i>Idem</i>	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Andorra	Preamble	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.32	203
	Article 51	<i>Idem</i>	A/CONF.183/C.1/L.16	269
	Article 102	<i>Idem</i>	<i>Ibid.</i>	
	Final Act	<i>Idem</i>	<i>Ibid.</i>	
Argentina	Article 51	<i>Idem</i>	<i>Ibid.</i>	
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 83	<i>Idem</i>	A/CONF.183/C.1/WGPM/L.59	322
	Article 102	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Final Act	<i>Idem</i>	<i>Ibid.</i>	
Armenia	Article 5 <i>(Crime of aggression)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.38	244
Australia	Article 67	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.35	309
Austria	Article 61	<i>Idem</i>	A/CONF.183/C.1/WGPM/L.19	294
	Article 77	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.5	318
Bahrain	Article 5 <i>(Crime of aggression)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		<i>Idem</i>	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Bangladesh	Article 5 <i>(Crimes against humanity)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239
Barbados	Article 5 <i>(Other crimes)</i>	<i>Idem</i>	A/CONF.183/C.1/L.48	246
		<i>Idem</i>	A/CONF.183/C.1/L.71	248

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.13	319
	Final Act	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.71	248
Belarus	Final Act	Idem	A/CONF.183/C.1/L.57	353
Belgium	Article 10	Idem	A/CONF.183/C.1/L.7	229
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 71 bis	Idem	A/CONF.183/C.1/WGPM/L.70/Rev.1	313
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
Benin	Article 76	Idem	Ibid.	
Bolivia	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 102	Idem	Ibid.	
	Final Act	Idem	Ibid.	
Brazil	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
Burundi	Article 76	Idem	Ibid.	
Cameroon	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.39	244
	Article 10	Idem	Ibid.	
Canada	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 68	Idem	A/CONF.183/C.1/WGPM/L.58/Rev.1	312
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.23	306
		Idem	A/CONF.183/C.1/WGPM/L.26	307
		Idem	A/CONF.183/C.1/WGPM/L.48/Rev.1	311
	Article 81	Idem	A/CONF.183/C.1/WGPM/L.47	321
	Article 82	Idem	A/CONF.183/C.1/WGPM/L.73	323
	Article 84	Idem	A/CONF.183/C.1/WGPM/L.56	322
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.20	337
	Article 88	Idem	A/CONF.183/C.1/WGIC/L.1	335
	Article 91	Idem	A/CONF.183/C.1/WGIC/L.12	337
	Article 99	<i>Working Group on Enforcement</i>	A/CONF.183/C.1/WGE/L.17	345
Central African Republic	Article 86	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.14	337
Chile	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 102	Idem	Ibid.	
	Final Act	Idem	Ibid.	
China	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.5	227

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 15	Idem	A/CONF.183/C.1/L.15	240
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.2	336
Colombia	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.17	304
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.25	307
	Article 102	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Final Act	Idem	Ibid.	
Comoros	Article 5 (<i>Other crimes</i>)	Idem	A/CONF.183/C.1/L.46 and Corr.1	245
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Croatia	Article 71	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.32	308
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.9	336
Cuba	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.17	240
		Idem	A/CONF.183/C.1/L.30	242
Denmark	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.18	337
	Article 111	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.29	349
Dominica	Article 5 (<i>Other crimes</i>)	Idem	A/CONF.183/C.1/L.48	246
		Idem	A/CONF.183/C.1/L.71	248
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.13	319
	Final Act	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.71	248
Dominican Republic	Preamble	Idem	A/CONF.183/C.1/L.52	203
	Article 51	Idem	A/CONF.183/C.1/L.16	269
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
	Article 102	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Final Act	Idem	Ibid.	
Egypt	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303
	Article 67	Idem	A/CONF.183/C.1/WGPM/L.36	309
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
	Article 76	Idem	A/CONF.183/C.1/WGP/L.12	319

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
El Salvador	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 102	Idem	Ibid.	
	Final Act	Idem	Ibid.	
Finland	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
France	Article 23	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.3	258
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.4	293
		Idem	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
		Idem	A/CONF.183/C.1/WGPM/L.77	295
	Article 54 ter	Idem	A/CONF.183/C.1/WGPM/L.11	293
	Article 57	Idem	A/CONF.183/C.1/WGPM/L.8	293
	Article 71	Idem	A/CONF.183/C.1/WGPM/L.39	310
	Article 73	Idem	A/CONF.183/C.1/WGPM/L.28	307
	Article 76	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.3	258
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
Germany	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
Guatemala	Article 20	<i>Working Group on Applicable Law</i>	A/CONF.183/C.1/WGAL/L.4	250
	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 102	Idem	Ibid.	
	Final Act	Idem	Ibid.	
Holy See	Article 69	<i>Plenary</i>	A/CONF.183/11	302
	Article 69	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.14	303
India	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239
		Idem	A/CONF.183/C.1/L.27/Rev.1	242
	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.72	248
		Idem	A/CONF.183/C.1/L.94	250
	Article 5 (<i>Other crimes</i>)	Idem	A/CONF.183/C.1/L.71	248
	Article 6	Idem	A/CONF.183/C.1/L.79	248
		Idem	A/CONF.183/C.1/L.95	250
	Article 7	Idem	A/CONF.183/C.1/L.79	248
		Idem	A/CONF.183/C.1/L.95	250
	Article 7 bis	Idem	Ibid.	
Article 7 ter	Idem	Ibid.		
Article 10	Idem	A/CONF.183/C.1/L.79	248	

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
		Idem	A/CONF.183/C.1/L.95	250
	Article 86	Idem	A/CONF.183/C.1/L.80	335
	Final Act	Idem	A/CONF.183/C.1/L.71	248
Indonesia	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.74	248
Iran (Islamic Republic of)	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Iraq	Article 5 (<i>War crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.26	242
	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	Idem	A/CONF.183/C.1/WGPM/L.15	303
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.24	307
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Israel	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 64	Idem	A/CONF.183/C.1/WGPM/L.52	312
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.34	309
	Article 82	Idem	A/CONF.183/C.1/WGPM/L.54	322
Italy	Article 54	Idem	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 71 bis	Idem	A/CONF.183/C.1/WGPM/L.70/Rev.1	313
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.1	318
	Article 76	Idem	Ibid.	
	Article 77	Idem	Ibid.	
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.3	336
	Article 94	<i>Working Group on Enforcement</i>	A/CONF.183/C.1/WGE/L.2	344
Jamaica	Article 5 (<i>Other crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.48	246
		Idem	A/CONF.183/C.1/L.71	248
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.13	319
	Final Act	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.71	248
Japan	Article 18	Idem	A/CONF.183/C.1/L.18	240
	Article 49	Idem	A/CONF.183/C.1/L.19	270

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 70	Idem	A/CONF.183/C.1/WGPM/L.13	303
	Article 73	Idem	A/CONF.183/C.1/WGPM/L.30	308
	Article 83	Idem	A/CONF.183/C.1/WGPM/L.45	321
	Article 93	<i>Working Group on Enforcement</i>	A/CONF.183/C.1/WGE/L.1	344
	Article 99	Idem	Ibid.	
Kazakhstan	Final Act	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.57	353
Kenya	Article 81	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.46	321
	Article 84	Idem	A/CONF.183/C.1/WGPM/L.55	322
Kuwait	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Lebanon	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
Lesotho	Article 5 (<i>Crimes against humanity</i>)	Idem	A/CONF.183/C.1/L.12	239
	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.13	239
Libyan Arab Jamahiriya	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Madagascar	Article 5 (<i>Other crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.46 and Corr.1	245
Malawi	Article 5 (<i>Crimes against humanity</i>)	Idem	A/CONF.183/C.1/L.12	239
	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.13	239
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 63	Idem	A/CONF.183/C.1/WGPM/L.16	304
Mexico	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.81	249
	Article 5 (<i>Other crimes</i>)	Idem	Ibid.	
	Article 6	Idem	Ibid.	
	Article 8	Idem	Ibid.	
	Article 10	Idem	Ibid.	
	Article 11	Idem	Ibid.	
	Article 12 bis	Idem	A/CONF.183/C.1/L.14/Rev.1	240
	Article 15	Idem	Ibid.	
	Article 21 bis	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.4	260
	Article 37	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.81	249
	Article 54	Idem	Ibid.	
	Article 58	Idem	Ibid.	
	Article 71	Idem	Ibid.	
	Article 74 bis	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.4	260
	Article 75	Idem	A/CONF.183/C.1/WGP/L.15	319
	Article 86	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.81	249
	Article 102	Idem	Ibid.	
	Article 108	Idem	A/CONF.183/C.1/L.14/Rev.1	240
Morocco	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
Namibia	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239
	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.13	239
Nepal	Article 5 (<i>Crimes against humanity</i>)	Idem	A/CONF.183/C.1/L.35	243
Netherlands	Article 70	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.65	313
	Article 81	Idem	A/CONF.183/C.1/WGPM/L.44	321
	Article 94	<i>Plenary</i>	A/CONF.183/12	344
New Zealand	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/INF/10 ^a	225
		Idem	A/CONF.183/INF/11 ^a	226
		<i>Committee of the Whole</i>	A/CONF.183/C.1/L.40	245
	Article 5 (<i>Elements of crimes</i>)	<i>Plenary</i>	A/CONF.183/INF/10 ^a	225

^a New Zealand conveyed information on behalf of the International Committee of the Red Cross.

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 6	Idem	A/CONF.183/INF/9 ^a	224
	Article 9	Idem	Ibid.	
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
Niger	Article 44	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.43	271
Nigeria	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Norway	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.18	337
Oman	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303
	Article 67	Idem	A/CONF.183/C.1/WGPM/L.36	309
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Panama	Article 76	Idem	A/CONF.183/C.1/WGP/L.12	319
	Article 51	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Article 102	Idem	Ibid.	
Paraguay	Final Act	Idem	Ibid.	
	Article 51	Idem	Ibid.	
	Article 102	Idem	Ibid.	
Peru	Final Act	Idem	Ibid.	
	Article 51	Idem	Ibid.	
	Article 102	Idem	Ibid.	
Philippines	Final Act	Idem	Ibid.	
	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.74	248
	Article 57	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.61	295
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.27	307
	Article 82	Idem	A/CONF.183/C.1/WGPM/L.60	323
Poland	Article 54	Idem	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 57	Idem	A/CONF.183/C.1/WGPM/L.31	294
	Article 69	Idem	Ibid.	
	Article X	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.93	335

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
Portugal	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
Qatar	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Republic of Congo	Article 44	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.43	271
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.4	336
Republic of Korea	Article 6	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.6	227
	Article 7	Idem	Ibid.	
	Article 7 ter	Idem	A/CONF.183/C.1/L.77	248
	Article 9	Idem	A/CONF.183/C.1/L.6	227
	Article 13	Idem	A/CONF.183/C.1/L.34	243
	Article 13 bis	Idem	Ibid.	
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
Romania	Article 76	Idem	Ibid.	
Samoa	Article 76	Idem	Ibid.	
Saudi Arabia	Article 5 (<i>Crime of aggression</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Sierra Leone	Article 5 (<i>War crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.62	247
Singapore	Article 71	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.49	311
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.13	319
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.7	336
Slovenia	Article 5 (<i>War crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.11	239
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>	
South Africa	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239	
	Article 5 (<i>War crimes</i>)	<i>Idem</i>	A/CONF.183/C.1/L.13	239	
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319	
Spain	Preamble	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.22	202	
	Article 5 (<i>Crimes within the jurisdiction of the Court</i>)	<i>Idem</i>	A/CONF.183/C.1/L.1 and Corr.1	226	
	Article 5 (<i>War crimes</i>)	<i>Idem</i>	<i>Ibid.</i>		
		<i>Idem</i>	A/CONF.183/C.1/L.4	227	
	Article 5 (<i>Other crimes</i>)	<i>Idem</i>	A/CONF.183/C.1/L.1 and Corr.1	226	
	Article 10	<i>Idem</i>	A/CONF.183/C.1/L.20	241	
	Article 51	<i>Idem</i>	A/CONF.183/C.1/L.16	269	
	Article 102	<i>Idem</i>	<i>Ibid.</i>		
Sri Lanka	Final Act	<i>Idem</i>	<i>Ibid.</i>		
	Article 5 (<i>Crimes against humanity</i>)	<i>Idem</i>	A/CONF.183/C.1/L.27/Rev.1	242	
	Article 5 (<i>Other crimes</i>)	<i>Idem</i>	A/CONF.183/C.1/L.71	248	
Sudan	Final Act	<i>Idem</i>	<i>Ibid.</i>		
	Article 5 (<i>Crime of aggression</i>)	<i>Idem</i>	A/CONF.183/C.1/L.37 and Corr.1	243	
		<i>Idem</i>	A/CONF.183/C.1/L.56 and Corr.1	246	
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259	
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303	
Swaziland	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319	
	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239	
	Article 5 (<i>War crimes</i>)	<i>Idem</i>	A/CONF.183/C.1/L.13	239	
	Sweden	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
		Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.18	337
Switzerland	Article 37	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.24	270	
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294	
	Article 65	<i>Idem</i>	A/CONF.183/C.1/WGPM/L.29	308	

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
Syrian Arab Republic	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.18	337
	Article 110	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.24	270
	Article 111	Idem	Ibid.	
	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 63	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.15	303
	Article 67	Idem	A/CONF.183/C.1/WGPM/L.36	309
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.22	306
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
	Article 82	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.53	322
	Article 83	Idem	A/CONF.183/C.1/WGPM/L.62	323
	Article 97	<i>Working Group on Enforcement</i>	A/CONF.183/C.1/WGE/L.5	344
Thailand	Article 5 (<i>War crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.74	248
Togo	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
	Article 76	Idem	Ibid.	
Trinidad and Tobago	Article 5 (<i>Crimes against humanity</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239
	Article 5 (<i>Other crimes</i>)	Idem	A/CONF.183/C.1/L.48	246
		Idem	A/CONF.183/C.1/L.71	248
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.13	319
	Final Act	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.71	248
Turkey	Article 5 (<i>Crimes against humanity</i>)	Idem	A/CONF.183/C.1/L.27/Rev.1	242
	Article 5 (<i>Other crimes</i>)	Idem	A/CONF.183/C.1/L.71	248
	Article 19	Idem	A/CONF.183/C.1/L.50	246
	Final Act	Idem	A/CONF.183/C.1/L.71	248
Ukraine	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.33	242
	Article 37	Idem	A/CONF.183/C.1/L.42	271
	Article 77	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.6	318
	Article 102	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.28	347
	Final Act	Idem	A/CONF.183/C.1/L.57	353

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
United Arab Emirates	Article 5 <i>(Crime of aggression)</i>	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 47	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.21	270
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
United Kingdom of Great Britain and Northern Ireland	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 54 quater	Idem	A/CONF.183/C.1/WGPM/L.3	293
	Article 61	Idem	A/CONF.183/C.1/WGPM/L.20	294
	Article 67	Idem	A/CONF.183/C.1/WGPM/L.33	309
	Article 71	Idem	A/CONF.183/C.1/WGPM/L.12	302
	Article 71 bis	Idem	A/CONF.183/C.1/WGPM/L.70/Rev.1	313
	Article 73	Idem	A/CONF.183/C.1/WGPM/L.28	307
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
	Article 83	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.57	322
United Republic of Tanzania	Article 5 <i>(Crimes against humanity)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.12	239
	Article 5 <i>(War crimes)</i>	Idem	A/CONF.183/C.1/L.13	239
	Article 76	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.12	319
United States of America	Article 5 <i>(Genocide)</i>	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.10	229
	Article 5 <i>(Crimes against humanity)</i>	Idem	Ibid.	
	Article 5 <i>(War crimes)</i>	Idem	Ibid.	
	Article 5 <i>(Elements of crimes)</i>	Idem	A/CONF.183/C.1/L.8	229
		Idem	A/CONF.183/C.1/L.10	229
		Idem	A/CONF.183/C.1/L.69	247
	Article 7	Idem	A/CONF.183/C.1/L.70	247
	Article 7 bis	Idem	A/CONF.183/C.1/L.90	249
	Article 7 ter	Idem	Ibid.	
	Article 16	Idem	A/CONF.183/C.1/L.25	241
	Article 20	Idem	A/CONF.183/C.1/L.9	229
	Article 25	Idem	A/CONF.183/C.1/L.2	258

List of documents submitted by delegations

<i>Delegation</i>	<i>Article</i>	<i>Body</i>	<i>Symbol</i>	<i>Page</i>
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.2	259
	Article 32	Idem	Ibid.	
	Article 33	Idem	Ibid.	
	Article 34	Idem	Ibid.	
	Article 54	<i>Working Group on Procedural Matters</i>	A/CONF.183/C.1/WGPM/L.18 and Corr.1	294
	Article 69	Idem	A/CONF.183/C.1/WGPM/L.21	304
	Article 71	Idem	A/CONF.183/C.1/WGPM/L.39	310
	Article 73	Idem	A/CONF.183/C.1/WGPM/L.69	313
	Article 81	Idem	A/CONF.183/C.1/WGPM/L.50	321
	Article 87	<i>Working Group on International Cooperation and Judicial Assistance</i>	A/CONF.183/C.1/WGIC/L.17 and Corr.1	337
Uruguay	Article 13	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.51	246
	Article 15	Idem	A/CONF.183/C.1/L.23	241
	Article 51	Idem	A/CONF.183/C.1/L.16	269
	Article 94	<i>Working Group on Enforcement</i>	A/CONF.183/C.1/WGE/L.3	344
	Article 102	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.16	269
	Final Act	Idem	Ibid.	
Venezuela	Article 51	Idem	Ibid.	
	Article 102	Idem	Ibid.	
	Final Act	Idem	Ibid.	
Viet Nam	Article 5 (<i>War crimes</i>)	Idem	A/CONF.183/C.1/L.74	248
Yemen	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.37 and Corr.1	243
		Idem	A/CONF.183/C.1/L.56 and Corr.1	246
	Article 31	<i>Working Group on General Principles of Criminal Law</i>	A/CONF.183/C.1/WGGP/L.10	259
	Article 75	<i>Working Group on Penalties</i>	A/CONF.183/C.1/WGP/L.11 and Corr.1 and 2	319
Group of African States	Article 5 (<i>War crimes</i>)	<i>Committee of the Whole</i>	A/CONF.183/C.1/L.89	249
Movement of Non-Aligned Countries	Article 5 (<i>Crime of aggression</i>)	Idem	A/CONF.183/C.1/L.75	248
	Final Act	Idem	Ibid.	

Litho in United Nations, New York
01-67671-August 2002-65

United Nations publication
Sales No.C.02.L5
A/CONF.183/13 (Vol. III)