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ENSURING THE INDEPENDENCE OF THE INTERNATIONAL CRIMINAL COURT

by

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Table of Contents

I. Introduction

II. History of the Debate

III. Checks and Balances

1. Independent judicial review and approval by Pre-trial Chamber

2. Complementary regime

3. Careful definition of crimes

4. Provisions on election and qualification of prosecutors and judges

5. Provisions for removal of officials for serious misconduct or breach of duty

6 Security Council's ability to defer any ICC investigation

IV. Current Situations

V. Conclusion

I. Introduction

Less than four years after the Rome Statute entered into force, the International Criminal Court has become an important international institution. It is one of the most highly visible and ambitious permanent institutions in furtherance of international justice ever created. One hundred countries have ratified the Rome Statute.¹ The Prosecutor has received over 1700 communications from individuals or groups as well as three referrals from States Parties and one referral from the United Nations Security Council.² The Prosecutor has opened three investigations, into the situations in the Democratic Republic of Congo, Uganda, and Darfur, Sudan. All three were initiated pursuant to referrals rather than on the Prosecutor's own motion.

One of the main goals of the International Criminal Court (ICC) is to uphold the interests of justice while not pursuing any political goals. However, because of the nature of the ICC's subject matter - genocide, crimes against humanity and war crimes - which are often committed with some political objective in mind, almost every decision of the ICC will have political overtones. The key question addressed in this short paper is how the ICC can ensure it will be impartial or, in other words, act in the absence of any political motivation.

Part II of this paper will review some of the concerns and debates during the negotiations of the Rome Statute and during the Preparatory Committee meetings, to illustrate that such concerns had been raised, debated and resulted in modifications to some of the provisions in the Rome Statute. Part III will examine the many safeguards contained in the Rome Statute to ensure the impartiality of the ICC. Part IV will briefly look at the efforts of the ICC Prosecutor to date as it will be the decisions of the Prosecutor that will help shape the perception of the ICC and determine its credibility.

II. History of the Debate

With more than 130 States represented during the Rome Conference in the summer of 1998, along with hundreds of non-governmental organizations and professional groups, the negotiations of the statute establishing the first permanent international criminal court was, to say the least, complicated.³ The final product, the Rome Statute of the International Criminal Court, was the result of broad consensus on a number of sensitive subjects and between diverse perspectives. As with any multilateral treaty, the balance

¹ 100 State Parties as of March 3, 2006. The 100th ratification was Mexico on 28 October 2005.

² As of February 1st, 2006, the Office of the Prosecutor has received 1732 communications from individuals or groups in at least 103 different countries. Three referrals from State Parties are Uganda, Democratic Republic of Congo and Central African Republic, each referring situations in their own territories. One referral from the UN Security Council is in regards to the situation in Darfur, Sudan. Cote d'Ivoire, which is not yet a State Party, recently accepted the Court's jurisdiction, which means that the situation in this country could also potentially be investigated by the ICC. This and other details are found in The Office of the Prosecutor "Update on Communications received by the Office of the Prosecutor of the ICC" found at www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.

³ The Rome Statute of the International Criminal Court (the Rome Statute), U.N. Doc. A/CONF.183/9th. 120 nations voted in favor of the adoption of the Rome Statute. 7 nations voted against the treaty (USA, Israel, China amongst them) and 21 abstained, see www.iccnw.org/romearchive.html.

was between ensuring strong treaty provisions while obtaining wide support from States. This meant that concerns were accommodated as much as possible, but at some point it was necessary to avoid “weakening the Statute to the point where the Court would be constantly paralyzed” and not worth having.⁴ As Judge Kirsch stated:

“Thus the balancing sought in Rome was to create a Statute strong enough to ensure the effective functioning of the Court, with sufficient safeguards to foster broad support among States”.⁵

With now 100 States Parties from all regions around the world, the ICC has garnered broad support in a relatively short period of time.

The concern of politically motivated or frivolous prosecutions was raised by a number of States. Particularly contentious during the negotiations was the proposal to provide for the Office of the Prosecutor to initiate investigations. Some States argued that this was too broad of a power for the Prosecutor and could lead to politicization of the Court.⁶ Other States argued that such power could result in an overwhelming number of petitions, which, given the limited resources, could detract from the Prosecutor’s ability to investigate serious crimes. Others were concerned that the Prosecutor could initiate politically motivated or frivolous complaints on his own motion. Some States wanted the Prosecutor to commence investigations solely upon requests of the United Nations Security Council. Others thought that only the Security Council and State Parties should be able to trigger the jurisdiction of the Court.⁷

The ability of the prosecutor to initiate proceedings *proprio motu* (on his or her own motion) was widely regarded as essential, as State Parties and the Security Council might be hesitant to refer serious situations for political reasons.⁸ Experience under certain human rights conventions shows that there is generally reluctance by States to bring complaints against another State.⁹ Experience also illustrates how the Security Council in the past has been hesitant to act, with action requiring agreement by the majority as well as no vetoes by the permanent five. By empowering the Prosecutor to initiate proceedings, it was argued that this enhanced the independence of the Prosecutor, ensuring that he act upon behalf of the international community and not just on request of a particular State or the Security Council.¹⁰

⁴ Philippe Kirsch QC and Darryl Robinson “*Reaching Agreement at the Rome Conference*” in Antonio Cassese, Paola Gaeta and John Jones, editors, The Rome Statute of the International Criminal Court: A Commentary Volume I (2002: Oxford University Press) at page 67.

⁵ *ibid.*

⁶ Philippe Kirsch QC and Darryl Robinson “*Initiation of Proceedings by the Prosecutor*” in Antonio Cassese, Paola Gaeta and John Jones, editors, The Rome Statute of the International Criminal Court: A Commentary Volume I (2002: Oxford University Press) at page 657.

⁷ *ibid.*

⁸ Kirsch and Robinson, *supra* note 4.

⁹ Under international law, the *International Covenant for Civil and Political Rights* article 41; *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* article 21; *Convention on the Elimination of All Forms of Racial Discrimination* article 11 and the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* article 76 all provide for inter-state complaints mechanisms. No state has filed an inter-state complaint with these treaty bodies. See Mark Freeman and Gibran Van Ert International Human Rights Law (2004: Irwin Law Inc) at page 397. The same holds true for the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights, however there have been a few intra-state communications under the European Convention on Human Rights, but not very many.

¹⁰ Kirsch and Robinson, *supra* note 6.

In order to address this concern as well as others, the Rome Statute contains extensive safeguards to prevent the Court from carrying out politically motivated or frivolous investigations or prosecutions. Many types of safeguards were discussed during negotiations, but one of the most important was the one requiring the Prosecutor to submit the matter to independent judicial review by a Pre-Trial Chamber. The majority of the States felt that such a provision responded to the concern of the risk of abuse while at the same time ensuring an “independent and effective alternative to relying exclusively on referrals from State Parties or the Security Council”.¹¹ Other safeguards, or checks and balances, were incorporated into the Rome Statute to alleviate States’ concerns. These include: the principle of complementarity; the careful definition of the most serious crimes; provisions on election and qualifications of prosecutors and judges; provisions for removal of officials for serious misconduct or breach of duty; and the deferral procedures by the Security Council.¹² Other checks and balances include the incorporation of the fair trial provisions, specific protection for national security information, the specific defences reflecting national practice, and the oversight by the Assembly of States Parties. Some of these safeguards will be explored in more detail in the following section.

III. Checks and Balances

1. Independent Judicial Review and Approval by Pre-Trial Chamber

Article 15

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 analyze 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. 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 supporting 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 Chambers 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 provide 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.*

According to this provision, the Prosecutor is only able to carry out a relatively limited preliminary examination of information received, whether from states, organizations,

¹¹ *ibid.*

¹² Kirsch and Robinson article, *supra* note 4.

victims or other reliable sources, to determine whether there is a reasonable basis for investigation. This allows the Prosecutor to reach an informed decision and be able to gather additional evidence without recourse to the formal investigatory powers. In this initial phase, the Prosecutor can seek written or oral testimony “at the seat of the Court”. Stoelting postulates that this seems “designed to limit the Prosecutor’s fact-finding capabilities by curtailing onsite investigatory capacity before the Pre-trial Chamber has given authorizations”.¹³

If the Prosecutor concludes that he should proceed, he would then have to bring the matter before a Pre-Trial Chamber for independent judicial approval before proceeding further. Such authorization to commence an investigation is not required when the referral comes from the Security Council or a State Party.¹⁴ These proceedings seem to be essentially *ex parte*, with no allowance made for submissions in opposition, although victims are permitted to make representations to the Pre-Trial Chamber. The Rules of Procedure and Evidence (RPE) provide additional guidance concerning the collection of evidence, the protection of confidentiality of information and the factors for the Prosecutor to consider in determining whether to proceed further.

The Pre-Trial Chamber will consider whether the request and the supporting material demonstrate a reasonable basis to proceed and whether the case appears to fall within the jurisdiction of the ICC. The Pre-Trial Chamber may do a number of things; they could authorize commencement of the investigation; or they may request additional information and may hold a hearing; or they may deny the request.

Therefore if the Prosecutor ever tried to launch a politically motivated investigation, the Pre-Trial Chamber could stop him. So, at the very early stages of the investigation, the Court has some control over the Prosecutor. Even after the investigation is authorized by the Pre-trial Chamber, there are still several critical stages where the Court provides oversight to ensure that the Prosecutor is acting independently and impartially. The Prosecutor must apply to the Pre-Trial Chamber for any arrest warrants or for a summons to appear. The Prosecutor also has to seek the Pre-Trial Chamber’s confirmation of the charges at the end of the pre-trial phase. As ICC Judge Sang-Hyun Song has written: “An accused will only have to stand trial if a strong case against him or her can be made”.¹⁵ However, as Stoelting points out, this hearing may be more mechanical than substantial since it is one-sided with no submissions from the other side.¹⁶ Nonetheless, the Court has strong reasons to make sure Article 15(4) determinations are incontrovertible.

The Statute requires that the Prosecutor consider a number of factors when analyzing the information to determine whether there is a basis to launch an investigation. These factors are set out in Article 53: reasonable basis to believe that a crime within the jurisdiction of

¹³ David Stoelting, “ICC Pre-Trial Proceedings: Avoiding Gridlock” (2003) 9 ILSA Journal of International and Comparative Law 413 at 418.

¹⁴ However the State Party and Security Council may refer a situation to the Court, not a specific case. See Stoelting, *ibid* at 417.

¹⁵ Judge Sang-Hyun Song, “The ICC: Impartial and Efficient International Criminal Justice for Asia and the World” from the ICC China book.

¹⁶ Stoelting, *supra* note 13 at 418.

the Court has been committed; gravity of the crimes; complementarity with national proceedings; and interests of justice.¹⁷

2. Complementary Regime

Article 1

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 jurisdictions. The Jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 17

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 to 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(3).*

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 exists, 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

1. When a situation has been referred to the Court pursuant to article 13(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(c) and 15, 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.

¹⁷ Article 53 of the *Rome Statute*:

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; 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. *Within one month of receipt of that notification, 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 accordance with article 82. 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 on the grounds of additional significant facts or significant changes of circumstances.*

The Rome Statute establishes a system of complementarity between the ICC and national courts. This is designed to permit national courts to take precedence; ensuring all due deference to national proceedings. The ICC is designed to be a court of last resort. It is not intended to replace national jurisdiction. Even though the Court's jurisdiction is limited to a small number of core crimes, its jurisdiction was never meant to be exclusive. This should reduce the fear of an out of control Prosecutor.

As Bos points out, "since complementarity was not an established legal principle, many delegations cautioned that it should not be abused by States to shield their nationals from the Court's jurisdiction".¹⁸ Others raised the concern that the ICC was being empowered to "judge" national judicial systems. This was an extremely sensitive issue during negotiations. The debates at the Rome Conference revolved around the issue of how to determine cases where States failed to bring alleged perpetrators to justice. This would be especially difficult in cases where the State is acting in good faith but nevertheless is ineffective. It was decided that "a very delicate and refined set of rules" were needed to ensure primacy of national proceedings but at the same time offering an alternative in case those national proceedings failed.¹⁹ Article 17 provides the delicate balance allowing the Court to assume jurisdiction where national proceedings are underway but not genuine. This provision spells out the relevant criteria for the Court to consider in making this determination. Articles 18 and 19 contain procedures to ensure that the Court accords all due deference to the legitimate proceedings of States.

¹⁸ Adriaan Bos, "From the International Law Commission to the Rome Conference (1994-1998) in Antonio Cassese, Paola Gaeta and John Jones, editors, *The Rome Statute of the International Criminal Court: A Commentary Volume I* (2002: Oxford University Press) at page 35.

¹⁹ Bos, *ibid.*

The principle of complementarity has been clearly defined in the Statute.²⁰ The ICC is only to prosecute when a national court with jurisdiction is unable or unwilling to legitimately proceed. Once the Pre-Trial Chamber authorizes the commencement of an investigation under article 15 or once a State Party makes a referral and the Prosecutor determines that there is a “reasonable basis to proceed”, the Prosecutor must issue a written notice to all States, including States not party to the Rome Statute that “would normally exercise jurisdiction over the crimes concerned”.²¹ The notice may be on a confidential basis if necessary to “protect persons, prevent destruction of evidence or prevent the absconding of persons”.²² A State receiving notice has one month from receipt to inform the Court “that it is investigating or has investigated” persons within its jurisdiction. If requested, the Prosecutor “shall defer to the State’s investigation”.²³ State deferrals have no time limit and may permanently stop an investigation. All States have to do is to make a request and the ICC must defer. That is the mandatory nature of article 18(2) deferrals.²⁴ However, such deferrals may be reviewed in six months “based on the State’s unwillingness or inability genuinely to carry out the investigation”.²⁵

Therefore the ICC’s jurisdiction is narrow; cases can only proceed in circumstances when a national court cannot do the job. Whether a national court is unable to or unwilling to legitimately proceed is not within the sole discretion of the Prosecutor. The Prosecutor must appear before the Pre-Trial Chamber and convince the judges that the State is genuinely unwilling or able to investigate. The Court has its own discretionary power to determine its jurisdiction. These proceedings are likely to involve political issues regarding the genuineness of the State’s representations.

The question of how to deal with amnesties and pardons has been so far left unresolved. The American delegation during the negotiations raised the issue of whether the Court should defer to a national reconciliation process that could include amnesties for even the worst perpetrators of the core crimes.²⁶

It will be interesting to see how the investigation in the situation of Darfur progresses. Shortly after the Security Council referral regarding the situation in Darfur and the list of 51 potential suspects were handed over to the ICC Prosecutor, the government of Sudan set up special courts in Darfur. A recent report of United Nations Special Rapporteur on the situation on human rights in Sudan, Sima Samar, claims that out of the 29 people tried by these courts, “15 army officers had been convicted of offences committed before the Darfur crisis started, while none of the other 14 held positions of responsibility” and furthermore none of those 51 suspects have been detained and many still hold ministerial positions.²⁷

²⁰ Article 1, 17 and 18 of the Rome Statute.

²¹ Article 18(1) of the Rome Statute.

²² Article 18(1) of the Rome Statute.

²³ Article 18(2) of the Rome Statute.

²⁴ Stoelting, *supra* note 13 at 419.

²⁵ Article 18(3) of the Rome Statute.

²⁶ Bos, *ibid.*

²⁷ BBC news “*Darfur war crimes court slammed*” March 6, 2006 found at <http://news.bbc.co.uk/2/hi/africa/4779828.stm>.

3. Careful definition of Crimes

The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole: genocide; crimes against humanity; war crimes; and, when defined, crime of aggression.²⁸ The definition of these crimes set out in Articles 6 to 8 are very detailed and are based on existing customary international law. It is noted that for the purpose of interpreting and applying the definition of the crimes, reference must be made to the Elements of Crimes adopted by the Assembly of States Parties in September 2002.

The crime of genocide contained in Article 6 of the Rome Statute reflects the definition contained in the 1948 Genocide Convention. Genocide is defined as the commission of five specific acts, that is, the killing of members of the group; causing serious bodily harm or mental harm to members of the group; imposing conditions on the group calculated to destroy it; preventing births from within the group; and forcibly transferring children from the group to another group. The offender must intend to destroy in whole or in part a national, ethnical, racial or religious group.²⁹ Crimes against humanity, as defined in Article 7, has its basis in international customary law, dating back to the Nuremberg trials and further defined by the ad hoc tribunal statutes. Crimes against humanity consists of certain acts, such as murder, torture or inhuman acts, which form part of a widespread or systematic attack directed against the civilian population.³⁰ Article 7(1) lists eleven acts of crimes against humanity.

War crimes are defined in Article 8 and covers those crimes committed in both intra-state and inter-state armed conflicts. They are defined as serious violations of international humanitarian law, which involves individual criminal responsibility. Article 8 consists of four categories of war crimes, two of them addressing international armed conflicts and two of them non-international armed conflicts. These include “grave breaches” of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. The other two categories apply to non-international armed conflicts as set out in Common article 3 of the Conventions and Additional Protocol II.

The most controversial issue concerning the definitions of the core crimes was whether offences committed during internal armed conflict should be included under the definition of war crimes. A majority of States during the Rome Conference negotiations felt that such offences should be included, not only as having a basis in international law, but on a more practical note, it was necessary given that the majority of armed conflicts

²⁸ Article 5 Rome Statute.

²⁹ The Elements of Crimes require that an act of genocide “took place on the context of a manifest pattern of similar conduct directed against that group or was conducted that could itself effect such destruction. See Daniel Prefontaine “*The Quest for Global Justice: An Overview of the Establishment of the Permanent International Criminal Court*” (January 2003).

³⁰ While the ICC Statute and the Elements of Crime do not define the terms “widespread or systematic”, it is recognized that the ad hoc Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) have considered and interpreted the substance of their meaning by applying them to real factual situations. In real terms the perpetrator must have knowledge of the attack. Further, the attack must be carried out “pursuant to or in furtherance of a State or organizational policy to commit such an attack”. See Prefontaine, *ibid.*

are now internal conflicts.³¹ Other States argued that such an inclusion intruded on national sovereignty.³²

One of the main concerns was how broadly “internal armed conflict” could be defined. Some suggested a restriction to the scope of the concept of “internal armed conflict” however most concluded that this did not address the minority States’ concerns and it was felt would be too restrictive. So in the end, the scope of internal armed conflict reflected the relevant jurisprudence of the ad hoc tribunals, but also ensured some clarification for concerned States. Article 8(2)(d) provides that internal armed conflicts do not include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. Article 8(2)(f) adds further clarification that armed conflicts are those that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

The provisions of Common Article 3 of the Geneva Convention of 1949 had sound basis in international law, given the Geneva Conventions and the Statute for the International Criminal Tribunal for Rwanda. There was also wide recognition of a short list of offences that were considered offences in internal armed conflicts, such as attacks on civilian populations, civilian objects and other forbidden targets, crimes of sexual violence and use of children under 15 as child soldiers. In the end, no provision was included to deal with weapons of mass destruction.³³

Another issue of debate in Rome was whether the ICC should exercise jurisdiction over isolated war crimes. It was felt that perhaps this would result in overwhelming number of petitions and paralyze the Court. Some delegates wanted the jurisdiction to be restricted to war crimes that were committed on a large scale or as a plan or policy. Others argued that this would limit the ICC to such war crimes that would meet the threshold of crimes against humanity and that even a single war crime that goes unpunished is of concern to the international community. The compromise is found in Article 8(1) which reads:

“The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.³⁴

As Kirsch and Robinson note this provision calls upon the Court to focus on the most serious cases but does not exclude the possibility of investigating isolated war crimes.³⁵

³¹ Bos, *supra* note 13 at page 55 wherein he described the New Zealand and Swiss proposal prepared by ICRC which emphasized that most conflicts today are non-international in character and thus the Court should also have jurisdiction over war crimes committed in non-international conflicts.

³² Kirsch and Robinson, *supra* note 4.

³³ As Kirsch and Robinson wrote: “Several treaty provisions prohibiting the use of certain weapons were widely regarded as reflecting customary international law and warranting recognition as war crimes. However, a major controversy was whether the use of nuclear weapons should be recognized as a war crime. For some it was unthinkable to mention lesser prohibited weapons and not to include nuclear weapons among the list. Others argued that including nuclear weapons would be creating new law, since 50 years of negotiations had produced neither a conventional nor a customary prohibition on the use of nuclear weapons. The solution was to exclude all weapons of mass destruction (both the poor mans and rich mans weapons) with the matter to be reviewed in the future by a review conference. Thus, the Statute now reflects the painful but necessary compromise on the issue.” Kirsch and Robinson, *ibid*.

³⁴ Article 8(1) of the Rome Statute.

³⁵ Kirsch and Robinson, *supra* note 4.

4. Provisions on election and qualification of prosecutors and judges

Article 42

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....

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.

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....

7. Neither the Prosecutor nor the Deputy Prosecutors shall participate in any matter in which their impartiality might reasonably be doubted on any ground. ...

8. Any question as to disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

The Rome Statute establishes more or less the same standards for judges and the prosecutors to ensure the independence of both. The judges of the ICC are elected by the Assembly of States Parties with a two thirds majority and the rules require them to be from different regions of the world and from the different legal systems.³⁶ These provisions ensure that there is independence from any particular State and that the Court is representing a true world court as opposed to being dominated by a certain group of States. The Prosecutor and the Deputy Prosecutors must be of different nationalities which also is meant to ensure independence from any particular State. All are elected by secret ballot. The Prosecutor is elected by an absolute majority of the members of the Assembly of States Parties whereas the Deputy Prosecutors are elected the same way from a list provided by the Prosecutor.

The judges, Prosecutor and Deputy Prosecutors must be persons of high moral character. Judges must also be impartial, with integrity and possess the qualifications required in their respective States for appointment to the highest judicial offices.³⁷ The Prosecutors must be competent in and with practical experience of, prosecuting criminal cases.³⁸

Other than the current Prosecutor and Deputy Prosecutor who can be re-elected for another three year term, the following prosecutors will only be eligible for a term of three or less years. This is to ensure that they remain independent and are not in the job long enough to curry favor with States. This is reinforced with the provision which does not allow them to engage in activities likely to interfere with their prosecutorial functions or independence.³⁹

³⁶ Article 36 of the Rome Statute.

³⁷ Article 36(3) of Rome Statute.

³⁸ Article 42(3) of Rome Statute.

³⁹ Article 42(5) of Rome Statute.

5. Provisions for removal of officials for serious misconduct or breach of duty

Article 46

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 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....

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 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.

The judges and Prosecutor know that if they abuse their authority, they can be removed by the Assembly of States Parties. In the case of a judge, there must be agreement for removal by two thirds of the State Parties upon a recommendation adopted by two thirds of the other judges. For the Prosecutor, he can be removed by simple majority of the States Parties.

The Rules of Procedure and Evidence set out in more details what constitutes serious misconduct, serious breach of duty and conduct of a less serious nature. It also provides for the procedure of complaints and procedures in the event of a request for removal from office or for disciplinary measures.⁴⁰

6. Security Council's ability to defer any ICC investigation

Article 16

No investigation or prosecution may be commenced or proceeded with under this 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.

Some States sought a central role for the Security Council within the Rome Statute. There was a concern that the ICC might somehow displace the Council's responsibility for maintaining international peace and security. The compromise made during the Rome Conference negotiations was that while the Security Council was allowed to prevent ICC action, it needed to take an affirmative decision under Chapter VII.

⁴⁰ Rules 23 to 32 RPE.

Article 16 clarifies the relationship between the ICC and the Security Council. The Security Council can adopt a resolution under its Chapter VII enforcement powers to stop any investigation or prosecution for a renewable 12 month period. The ICC has no authority to circumvent such a Security Council resolution. The purpose of this article is to permit the Security Council to prevent the ICC from proceeding when an ICC prosecution might interfere with ongoing diplomatic negotiations necessary to maintain international security. It is hard to imagine that a majority of its members would allow a frivolous or politically motivated case to go forward.

IV. Current situations

As of February 1st, 2006, the Prosecutor has received 1732 communications from individuals or groups in at least 103 different countries. In an effort to ensure transparency, the Office of the Prosecutor disseminates regular updates regarding communications received.⁴¹ In the latest report, it states that the communications include reports on alleged crimes in 139 countries in all regions of the world. Eighty percent of these communications were found to be manifestly outside the jurisdiction of the ICC after an initial review. The reasons for the dismissal of these communications were that they were: concerning events prior to July 1, 2002⁴²; concerning crimes that were not within the subject matter of the Court⁴³; concerning crimes committed outside the personal or territorial jurisdiction of the Court⁴⁴; and concerning manifestly ill-founded communications⁴⁵. Twenty percent of the communications were found to warrant further analyses.

The Office of the Prosecutor has adopted a policy and regulations concerning the analysis of referrals and communications.⁴⁶ There are various stages of this analysis, including basic reporting involving a simple factual and legal analysis⁴⁷; and intensive analysis which involves systematic crime analysis and examination of factors such as gravity, complementarity and the interest of justice.⁴⁸ The Prosecutor notes that the Court is faced

⁴¹ Sixty percent of the communications originated in just four countries: USA, UK, France and Germany. See The Office of the Prosecutor Report, *supra* note 2.

⁴² According to the Office of the Prosecutor's Report, 5% of communications subjected to initial review were dismissed due to temporal jurisdiction.

⁴³ According to the Office of the Prosecutor's Report, 24% of communications subjected to initial review were dismissed due to subject matter jurisdiction. This included communications on topics such as immigration issues, medical negligence, social security and pension complaints, employment law as well as a number of communications on aggression, which has not yet been defined in the Statute and will be discussed at the Review Conference in 2009.

⁴⁴ According to the Office of the Prosecutor's Report, 13% of communications subjected to initial review were dismissed due to personal/territorial jurisdiction, meaning only jurisdiction over crimes committed on the territory of, or by nationals of, States Parties, or States submitting a declaration of acceptance of jurisdiction.

⁴⁵ According to the Office of the Prosecutor's Report, 38% of communications subjected to initial review were dismissed due to manifestly ill-founded communications. Examples include general conspiracy claims without specific details, general concerns about local or national policies, or communications failing to provide facts susceptible to analysis.

⁴⁶ See www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

⁴⁷ Since the creation of the Office of the Prosecutor, 23 situations from all regions have been subject to basic reporting. Of these 10 were elevated for intensive analysis, 2 were dismissed for lack of subject matter jurisdiction and 3 were dismissed due to a combination of temporal and subject matter jurisdiction. See Office of the Prosecutor's report, *supra* note 2.

⁴⁸ The Office is typically conducting intensive analysis of 5 to 8 such situations at any given time. 10 situations have been subjected to intensive analysis; of these, 3 proceeded to investigation, 2 were dismissed and 5 analyses are ongoing. See Office of the Prosecutor's Report, *supra* note 2.

with multiple situations involving hundreds or thousands of serious crime so gravity is an important factor when deciding where to devote the limited resources.⁴⁹

The decision of the prosecutor after the analysis is usually only sent to the senders of the communication, in the interest of confidentiality. However, sometimes such a decision can be made public where the facts of the situation are in the public domain and the reasons can be provided without risk to the safety, well-being and privacy of the senders. In early February of 2006, two of the Prosecutor's decisions concluding not to initiate investigations were made public: relating to the situation in Iraq and Venezuela.⁵⁰ Regarding the alleged crimes against humanity committed on the territory of Venezuela, the Prosecutor says that for those that were committed after July 1, 2002, many appeared to fall short of the elements of crimes of persecution and that the test for widespread or systematic attack directed against any civilian population had not been satisfied. Regarding the Iraq situation, the Prosecutor concluded that the available information provided no indication of the required elements for genocide or crimes against humanity. Most allegations concerned war crimes during the military operations between March and May 2003. The prosecutor concluded that the information did not indicate intentional attacks on civilians by nationals of States Parties nor was the willful killing or inhumane treatment of the gravity required by the Statute as these crimes did not appear to be committed "as part of a plan or policy or as part of a large-scale commission of such crimes". The Prosecutor noted that since Iraq was not a State Party, he only had jurisdiction to consider alleged crimes committed by nationals of State Parties.

Among the situations currently under analysis, one is the Central African Republic, which was referred to the Prosecutor by the State Party and appears to involve high levels of sexual violence. The other situation is Cote d'Ivoire which referral was made by the State of Cote d'Ivoire which while not a State Party made a declaration of acceptance and appears to involve over one thousand potential victims of willful killing within the jurisdiction of the ICC. Three investigations have been opened, Democratic Republic of Congo, Uganda and Darfur, Sudan. All involve thousands of willful killings and large-scale sexual violence and abductions. Collectively these situations have resulted in more than five million people displaced. Small teams from the Office of the Prosecutor are investigating cases in sequence.

IV. Conclusion

The concern of politically motivated or frivolous prosecutions by the ICC was front and centre during the negotiations in Rome. This included the worry that an independent prosecutor on his or her own motion could launch such political or frivolous cases. In response to these concerns, extensive safeguards and checks and balances were incorporated into various provisions of the Rome Statute. As Judge Kirsch has written:

"Thus, although the concern was raised that this independent power could generate politically motivated or frivolous investigations, it would seem, given the

⁴⁹ Office of the Prosecutor's Report, *supra* note 2.

⁵⁰ The information regarding Venezuela and Iraq is from the February 17, 2006 [ICC] Digest Number 1387.

numerous safeguards and the requisite professionalism of the prosecutor, that this is in fact likely to be the least politicized trigger mechanism. The Prosecutor is far more likely to exercise his power to dismiss ill-conceived referrals from States Parties with a political axe to grind than to be the originator of any frivolous investigations, wasting the valuable time and resources of the ICC”.⁵¹

Only time will convince those States that remained concerned. The transparent reports by the Office of the Prosecutor setting out his method of work and policies should assist in alleviating these reservations.

⁵¹ Kirsch and Robinson, *supra* note 6.