INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
INSTITUT INTERNATIONAL DE DROIT HUMANITAIRE
ISTITUTO INTERNAZIONALE DI DIRITTO UMANITARIO

Siamo molto lieti di poter finalmente pubblicare gli atti della 23a e della 24a Tavola Rotonda sui problemi attuali del diritto internazionale umanitario, svoltesi rispettivamente dal 2 al 4 settembre 1998 e 1999.

Cogliamo questa occasione per rivolgere il nostro più sincero apprezzamento a tutti i relatori, ai presidenti di sessione ed a coloro che hanno contribuito con i loro interventi, ma soprattutto ai partecipanti per il loro prezioso apporto ai risultati ed al successo delle Tavole Rotonde.

Ci auguriamo che questa pubblicazione costituisca un utile documento per tutte le istituzioni e le persone coinvolte ed interessate dai temi del rispetto e dell'attuazione del diritto internazionale umanitario, dei diritti della persona umana e del diritto dei rifugiati.

We have great pleasure in presenting the long-awaited publication of the proceedings of the 23rd and 24th Round Tables on Current Problems of International Humanitarian Law held from 2 to 4 September 1998 and 1999 respectively.

We would like to take this opportunity to extend our sincerest appreciation to all the rapporteurs, chairmen and those who contributed with papers, and most importantly, to all the participants, for their valuable contribution to the successful outcome of these Round Tables.

We do hope that this publication will prove to be a useful document for all institutions and individuals involved in and concerned for the respect and implementation of international humanitarian law, human rights and refugee law.

C'est avec notre grand plaisir que nous vous présentons finalement la publication des travaux des 23ème et 24ème Tables Rondes relatives aux Problèmes Actuels du Droit Humanitaire qui se sont tenus respectivement les 2-4 Septembre 1998 et 1999.

Nous voudrions à cette occasion saisir l'opportunité d'exprimer notre profonde gratitude à tous les rapporteurs, chairmen et particulièrement à tous les participants qui, par leur précieuses contributions écrite ou orale, nous ont conduit à un résultat très positif.

Nous espérons que cette publication constitutera un document utile pour toutes les institutions et les personnes impliquées dans le respect et l'application du Droit Internationale Humanitaire, les Droits de l'Homme et le Droit des Réfugiés.

Sanremo, 22/11/2000

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INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW
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(Rome, 15 juin-17 juillet 1998)

Sotto gli auspici di / Under the auspices of / Sous les auspices des

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United Nations High Commissioner for Refugees
United Nations High Commissioner for Human Rights
International Organization for Migration
Fédération Internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge

SEDUTA DI APERTURA

OPENING SESSION

SEANCE D'OUVERTURE

ADRESSE DE BIENVENUE

Prof. Jovan PATRNOGIC
Président, Institut International de Droit Humanitaire

Dans le travail à l'Institut, nous avons toujours insisté, tout d'abord, sur la mobilisation des personnes de bonne volonté et, ensuite, sur celle des personnes qualifiées et compétentes en vue d'établir un dialogue qui puisse tenir compte des différences, des spécificités et des tendances propres aux intérêts et aux courants de pensée des diverses régions et groupes de pays. Les contacts directs établis sur un plan informel, et à l'extérieur des cercles gouvernementaux, offrent une large possibilité aux intéressés de s'exprimer librement et de faire part d'opinions vraiment personnelles sans se sentir liés aux pays ou aux gouvernements auxquels ils appartiennent. A cet égard, je voudrais rappeler le rôle de l'Institut pendant la Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés, qui a adopté en 1977 les Protocoles Additionnels aux Conventions de Genève. Dans l'intervalle des sessions, l'Institut a organisé plusieurs réunions informelles destinées aux représentants des gouvernements participant à la Conférence et aux autres experts internationaux. Un dialogue ouvert et sincère a été établi à cette occasion entre les participants qui ont alors pu se pencher sur les questions les plus difficiles à l'ordre du jour de la Conférence. Les gouvernements représentés ainsi que la Conférence ont beaucoup apprécié les efforts et la contribution de l'Institut au succès des travaux.

Encouragé par cette expérience, l'Institut a continué d'organiser chaque année une Table Ronde, dialogue humanitaire sur les problèmes actuels du droit humanitaire. La liste serait trop longue si l'on devait citer tous les sujets qui ont été abordés dans ce cadre. J'aimerais néanmoins rappeler quelques uns des sujets les plus délicats et les plus complexes comme, par exemple, la solidarité internationale et l'action humanitaire, le droit à l'assistance humanitaire (problème de l'intervention humanitaire), les règles fondamentales du droit humanitaire concernant les conflits internes, la guerre de guérillas, le terrorisme et le droit international humanitaire, la prévention des conflits, les conflits armés et la déstructuration des Etats, ou encore l'influence de l'assistance humanitaire et des médias sur l'évolution des situations conflictuelles.

Nous avons toujours considéré que les grands jugements des criminels de guerre à Nuremberg et à Tokyo ont ouvert la voie à la création d'une vraie juridiction internationale, à savoir la création d'un Tribunal permanent pénal. La Commission des Nations Unies pour le droit international a bien commencé ce travail en introduisant à l'ordre du jour l'élaboration d'un Code des crimes de guerre et contre l'humanité. L'importante codification du droit international humanitaire qui trouve son couronnement dans l'adoption en 1949 des quatre Conventions de Genève sur la protection des victimes de guerre, l'adoption le 10 décembre 1948 de la Déclaration universelle des droits de l'homme, et la Convention sur la prévention et la répression du crime de génocide adoptée le 9 décembre 1948, ont abondamment confirmé la volonté de la communauté internationale d'établir une juridiction internationale ayant deux buts fondamentaux, à savoir : prévenir les graves violations des droits de l'homme et du droit humanitaire, et punir les responsables ayant commis ces violations. Malheureusement, ce sont justement les Etats membres des Nations Unies qui ont pensé autrement. Il n'était plus question de parler de la guerre ou des conflits armés puisque la guerre était interdite aux termes de la Charte des Nations Unies. Il fallait se concentrer sur la création des conditions nécessaires à une paix durable. Des efforts ont été entrepris en vue de créer les structures nécessaires dans le domaine de la paix. On se rappellera même une brève période pendant laquelle il a été abondamment débattu de coexistence pacifique entre les deux blocs, en y réservant même un rôle aux pays du tiers-monde.

Nous avons bien conscience que nous avons eu tort d'interrompre les efforts et les premières initiatives dans le domaine de la création d'un Tribunal permanent. Les grandes tragédies dans presque toutes les régions du monde, notamment en Afrique et en Europe, ont confirmé cette grande erreur historique. Ce que nous avons essayé de faire, avec des résultats encourageants pour le moment, à travers la création de deux Tribunaux, l'un pour l'ex-Yougoslavie, l'autre pour le Rwanda, est très positif, mais cela montre bien qu'il est impératif d'aller plus loin. Ce que nous avons obtenu à la Conférence de Rome peut-il être considéré comme un grand succès? Aurons-nous vraiment demain une Cour internationale pénale qui surveillera le respect et l'application des règles fondamentales inscrites dans les Pactes

internationaux des droits de l'homme et dans les Conventions de Genève? Voilà un grand défi pour toutes la communauté internationale et une raison aussi pour l'Institut de penser qu'il faut agir vite et réfléchir d'urgence sur l'avancement des travaux de la Conférence de Rome.

Quelles sont les avantages d'une justice internationale? Je voudrais mentionner en premier lieu le caractère international de la Cour qui lui accorde une légitimité politico-juridique accrue. La solennité et la gravité de ses jugements, l'autorité que lui confère son Statut de plus haute instance compétente du fait qu'elle a pour auteur la Conférence diplomatique des Nations Unies, permettent de donner à ses décisions tout le poids d'une dénonciation à caractère internationale.

Une justice internationale se distingue aussi par son caractère d'impartialité. Cette qualité, qui est l'apanage normal de tout appareil judiciaire, peut quelques fois être mise à mal par les situations conflictuelles qui déchirent un pays. Aussi, la garantie d'impartialité offerte par une justice pénale internationale peut se révéler particulièrement nécessaire dans le cas de jugements relatifs aux violations commises dans le cadre d'un conflit interne.

Une justice internationale est par ailleurs dotée de moyens qui lui permettent, en principe, un accès privilégié aux informations et, même, aux suspects.

Cependant la justice internationale ne doit pas se présenter comme un substitut aux tribunaux nationaux: ces deux instances doivent autant que possible collaborer et se compléter.

Certainement la Cour va contribuer au respect et l'application du droit humanitaire dans toutes les situations des conflits armés et va stimuler le travail de recherche dans le domaine des droits de l'homme et du droit humanitaire.

Raison et passion, sont deux moteurs de l'action de notre Institut. La raison pourrait être définie comme cette studieuse concentration sur l'ordre des choses, dont nous voulons affiner le décryptage et dont nous voulons trouver la logique de l'aboutissement. Il y a aussi bien sûr toute la volonté d'inscrire, de formuler le projet de la politique humanitaire dans les normes du droit international humanitaire. La passion, quant à elle, a souvent, hélas, été perçue comme indigne, comme trop humaine, comme trop sentimentale, trop individuelle, pour être clairement revendiquée. Et pourtant! Que serait notre petite histoire, l'histoire de notre Institut sans la révolte? Les vingt-deux Tables Rondes sur les problèmes actuels du droit humanitaire, organisées par notre Institut depuis 1970, représentent en vérité notre révolte contre les violations graves des droits de l'homme et du droit humanitaire, le non respect de la dignité humaine, le non respect des souffrances des victimes, etc. Que serait la révolte sans la passion? Comment développer les moyens nécessaires pour que cette révolte, notre passion, soit inscrite dans l'ordre des choses, pour qu'elle trouve la logique, qu'elle aboutisse à la formulation d'une politique humanitaire, à la fois réaliste et efficace?

MESSAGE

Mr. Kofi ANNAN
United Nations Secretary-General
(Delivered by Mr. Vladimir PETROVSKY, General Director of the UN Office in Geneva)

«I wish to congratulate the International Institute of Humanitarian Law for selecting "The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" as the topic of the Round Table. This initiative is most timely. I believe that scholars and practitioners have a crucial role to play in reviewing and disseminating the results of the Diplomatic Conference in Rome.

As you are aware, important work remains to be done in the elaboration of the rules of procedure of the Court, as well as in the development of a framework for co-operation between the Court and other organisations. Your deliberations can provide useful guidance in this respect.

I wish you a very productive meeting.»

ALLOCUZIONE

Prof. Giovanni CONSO
Presidente della Conferenza Diplomatica delle Nazioni Unite
per l'Istituzione della Corte Penale Internazionale

Sono appena passati quarantacinque giorni dal momento in cui la Conferenza di Roma ha approvato, a larghissima maggioranza, lo Statuto istitutivo della Corte Criminale Internazionale permanente, quarantacinque giorni per di più coincidenti in gran parte con il periodo delle ferie d'agosto, e già il benemerito Istituto Internazionale di Diritto Umanitario chiama a raccolta per puntualizzare al meglio i termini dell'evento. Una scelta che merita di essere definita sacrosanta, non solo per quanto attiene all'oggetto, ma anche e soprattutto per quanto attiene al momento: infatti, non c'è assolutamente tempo da perdere!

Anche se sento ancora risuonare negli orecchi il fragore festoso degli applausi che il 17 luglio hanno accolto la proclamazione dei risultati delle votazioni decisive, così come continuo a percepire negli occhi il luccichio frutto della commozione gioiosa che accompagnava tutti quegli applausi, il rischio che tanto entusiasmo si smorzi prematuramente è grande: e ciò sia per il naturale, inevitabile, senso di liberatorio appagamento che permea di sé ogni successo ottenuto *in extremis,* sia per la pericolosa impressione, favorita come in questo caso proprio dall'entità del successo, che il più sia stato realizzato. Invece, molto, moltissimo resta a fare, il che si traduce, per un verso, nella necessità di un intenso, costante attivarsi da parte di quanti hanno a cuore che la Corte entri in funzione il più presto possibile e, all'inverso, nella disponibilità di larghi spazi per le manovre ostili, o comunque ostruzionistiche, dei pochi, però fortissimi, avversari.

Ma la mia presenza qui non vuole essere soltanto segnalazione di un allarme, bensì anche testimonianza di positività, nell'ottica appunto di un'imprescindibile continuità d'impegno, che, appunto per avere profonde e lontane radici, deve far sì che nulla vada perduto di quanto faticosamente conquistato passo dopo passo, con incalcolabile dispendio di energie materiali e non. Ecco perché è importante attestare ancora una volta, anche se in modo pur sempre insufficiente, l'apprezzamento caloroso e riconoscente per il ruolo determinante svolto dall'ambasciatore Adriaan Bos alla guida del Comitato preparatorio in oltre tre anni d'incessante lavoro, dalla fine del 1994 sino alla vigilia della Conferenza di Roma, raggiungendo il suo culmine dal 19 al 30 gennaio a Zutphen nella sua Olanda e dal 6 all'8 maggio nella nostra Courmayeur. Grazie a così lungo ed appassionato lavoro è stato possibile far pervenire alla Conferenza di Roma un progetto finale talmente ben delineato da consentirle di approvare, nell'arco di poco più di un mese, uno Statuto ricco di centotrenta articoli, dai contenuti estremamente delicati. Certo, la sapiente regia di Philippe Kirsch, subentrato *in extremis* a Adriaan Bos per un'inopinata, improvvisa indisposizione (il 18 luglio, però, in Campidoglio a Roma ci sarebbe stato felicemente anche lui) e la lucida prontezza di Cherif Bassiouni ci hanno messo, e non poco, di proprio, ma una cosa è fuori discussione: senza l'affiatamento che Adriaan Bos aveva creato all'interno della sua Commissione, poi pressoché interamente trasfusa nel "Committee of the Whole", ivi compresa la particolarmente fruttuosa articolazione in gruppi di lavoro, assai felicemente congegnati nelle rispettive strutturazioni, l'impresa sarebbe rimasta irrealizzabile.

Nell'attesa di ascoltare, fra qualche minuto e con tutta l'attenzione che merita, la relazione di Adriaan Bos, base autentica del presente Convegno, vorrei aggiungere solamente un paio d'osservazioni che, tra le tante possibili, al momento più mi premono.

La prima ha per oggetto le critiche, quasi sempre velate di malizia, secondo cui lo Statuto sarebbe nato all'insegna di arrendevoli compromessi, anche a costo di sacrificare i principi alla smania di un risultato purchessia. Quali sarebbero i compromessi quasi mai viene precisato e, comunque, allorché la precisazione viene data, diventa facile smentire l'assunto. A tacitare la malevolenza basterebbe, tuttavia, una constatazione che parla da sola: a parte le ventuno astensioni, lo Statuto è andato incontro a sette no, e di peso. Se di compromesso si fosse trattato, come si giustificherebbero quei no?

La seconda osservazione riguarda l'aver considerato l'art. 124 dello Statuto alla stregua di una disposizione a regime, cioè destinata a perpetuarsi, così dando tendenziosamente ad intendere che la dichiarazione proveniente da uno Stato parte di non accettare la competenza della Corte, per quanto

riguarda i crimini di guerra commessi sul proprio territorio o da propri cittadini, consentirebbe a quello Stato di sottrarre *sine die* alla giurisdizione della Corte tali gravissimi reati. Le cose stanno ben diversamente: la dichiarazione di non accettazione può essere effettuata soltanto per i sette anni successivi all'entrata in vigore dello Statuto, senza poter superare quel limite, che è, quindi, da intendere come massimo.

Questo termine di sette anni dall'entrata in vigore dello Statuto molto significativamente ricorre altre volte nel capitolo delle "Clausole finali" dello Statuto: in particolare, l'art.121 par.1 e l'art.123 par.1, con l'attribuire, nel momento dello scadere di tale periodo, l'uno ad ogni Stato parte la possibilità di proporre all'Assemblea degli Stati parti emendamenti allo Statuto e l'altro al Segretario generale dell'ONU il potere di convocare *ex officio* una conferenza di revisione aperta a quanti comporranno tale Assemblea, forniscono una chiara dimostrazione delle potenzialità di sviluppo insite nello Statuto appena approvato, a cominciare dall'ampliamento della lista dei crimini di competenza della Corte. Naturalmente, tra i ripensamenti ipotizzabili, il più auspicabile non può essere che quello grazie al quale i no di oggi diventino, in un più o meno vicino domani, altrettanti sì, e ciò senza che neppure occorrano emendamenti o revisioni. Dovrebbe bastare la forza attrattiva che un'operazione di tanto respiro, portata avanti con coerenza, senza sbavature e titubanze, dai tantissimi Stati favorevoli non mancherebbe di esercitare. Anche per il senso di disagio, che il restare fuori da un così sacrosanto impegno contro la criminalità più aberrante inevitabilmente, provocherebbe in chi volesse perpetuare l'atteggiamento ostile all'istituzione.

PRESENTAZIONE DELLA TAVOLA ROTONDA

Dr. Ugo GENESIO
Segretario Generale, Istituto Internazionale di Diritto Umanitario

La decisione di mettere il tema della Corte Penale Internazionale all'ordine del giorno di questa Tavola Rotonda è stata presa nello scorso gennaio. A quell'epoca nessuno era in grado di fare previsioni sugli sviluppi della Conferenza Diplomatica delle Nazioni Unite a Roma: le divergenze in seno al Comitato preparatorio erano tali per cui lo svolgimento stesso della Conferenza nelle date fissate era da taluno messo in forse. Con la sua decisione, in quel momento, l'Istituto volle compiere un atto di fiducia: fiducia nella determinazione degli enti internazionali, in particolare delle Nazioni Unite; nel coraggio dei governi; nell'impegno e nella capacità di mobilitazione delle organizzazioni umanitarie; nella forte spinta dell'opinione pubblica mondiale. Un atto di fiducia come contributo modesto ma non insignificante al delicato e complesso lavoro che avrebbe dovuto portare alla creazione di quella nuova giurisdizione internazionale che in più occasioni, nel corso degli anni, era stata evocata nelle nostre tavole rotonde come strumento indispensabile per assicurare efficacia e credibilità all'intero sistema del diritto internazionale umanitario.

Già in passato, vorrei ricordarlo senza presunzione, il nostro Istituto aveva saputo inserirsi nel processo evolutivo del diritto internazionale umanitario. Ciò era avvenuto, su sollecitazione del Comitato Internazionale della Croce Rossa, nelle varie fasi della Conferenza Diplomatica di Ginevra, svoltasi fra il 1974 e il 1977, che portò all'adozione dei due Protocolli aggiuntivi alle Convenzioni di Ginevra del 1949 per la promozione delle vittime della guerra. Le annuali tavole rotonde dell'Istituto furono inizialmente concepite proprio come strumento di approfondimento informale ai lavori di quella Conferenza Diplomatica, e poi proseguirono come momento di valutazione e di riesame della normativa alla luce dei successivi sviluppi attraverso gli anni. Ebbene, altrettanto ci accingiamo a fare oggi, domani e dopodomani riguardo al nuovo strumento che, in esito alla Conferenza di Roma, ha dato vita alla Corte Penale Internazionale. Non mi risulta che tale strumento abbia ancora formato oggetto di discussione e di valutazione a livello di esperti in un contesto internazionale. All'Istituto si offre quindi l'occasione di aprire la strada in una problematica che, almeno "de iure condito", si presenta completamente nuova e a prima vista molto difficile. Se vi è un dato certo, infatti, questo è che l'istituzione della Corte Penale Internazionale, non solo ha incontrato e continuerà ad incontrare rilevanti ostacoli sul piano politico, ma altresì è stata accolta da contrastanti giudizi degli esperti e degli internazionalisti.

Sarebbe molto positivo che questa Tavola Rotonda potesse giovare, attraverso il confronto, a un chiarimento delle diverse posizioni; all'individuazione dei punti critici della nuova normativa; alla ricerca di possibili linee direttrici e convergenze operative. Senza dimenticare che le procedure per l'effettiva entrata in funzione della Corte Penale Internazionale avranno inizio non prima di due mesi dalla data del deposito della sessantesima ratifica o adesione allo strumento istitutivo.

La scelta dei vari sottotemi su cui si articoleranno i dibattiti è stata necessariamente limitativa. Si può fondatamente ritenere che altre questioni avrebbero meritato di essere incluse nell'ordine del giorno: di fatto si è cercato, per quanto possibile, di dare preferenza agli aspetti di più specifico rilievo dal punto di vista del diritto umanitario. Naturalmente i vari contributi in programma, e ancor più gli interventi non programmati nella discussione, consentiranno di aprire, ove del caso delle finestre su aspetti importanti non esplicitati nell'ordine del giorno.

I lavori riprenderanno fra poco con la relazione introduttiva del Dr. Adriaan Bos che, come presidente del Comitato preparatorio della Conferenza Diplomatica, ha svolto un ruolo importantissimo nell'elaborazione del progetto di Statuto della Corte. Nel pomeriggio di oggi, nella giornata di domani e nella mattina di venerdì seguiranno quattro sedute dedicate ad aspetti specifici della normativa, nelle quali eminenti personalità del mondo accademico saranno chiamate a svolgere il compito di moderatori.

Oggi pomeriggio sarà affrontato il fondamentale problema della relazione dell'attività della Corte con il sistema delle Nazioni Unite, in particolare con il Consiglio di Sicurezza: agiranno da moderatori il Professor Ungari, presidente della Commissione Diritti Umani del governo italiano, e il Dr. Zimmermann, membro del Servizio Giuridico del Ministero Affari Esteri della Repubblica Federale di Germania.

Domattina si discuterà della posizione degli stati che non aderiranno almeno inizialmente alla giurisdizione della Corte, in base all'affermato principio di universalità nel diritto internazionale: la discussione sarà diretta dal Professor Pocar, membro del Comitato Diritti Umani delle Nazioni Unite. La seduta pomeridiana di domani, dedicata alla competenza per materia riconosciuta alla Corte, si svolgerà sotto la guida del Professor Meron, esperto autorevole della delegazione americana alla Conferenza di Roma. Venerdì mattina, infine, saranno esaminate le prospettive di promozione della futura attività della Corte, certo dipendenti anche da un'adeguata sensibilizzazione dell'opinione pubblica attraverso i "mass media": moderatore sarà il Professor Bothe, dell'Università di Francoforte.

Il programma prevede una serie di contributi di qualificati esperti, fra cui: Mr. Claude Bruderlein, consigliere giuridico dell'Ufficio di Coordinamento per le Questioni Umanitarie delle Nazioni Unite a New York; il Dr. Bosko Jakovljevic, apprezzato esperto e coraggioso combattente per la causa dei diritti umani; Ms. Debbie Elizondo, rappresentante dell'Alto Commissariato Rifugiati delle Nazioni Unite; Ms. Marie-Claude Roberge, membro della Divisione giuridica del Comitato Internazionale della Croce Rossa; il Prof. Eric David, dell'Università di Bruxelles; il Prof. Stelios Perrakis, del Ministero Affari Esteri di Grecia; Mr. Edward Girardet, giornalista, presidente del Centro "Humanitarian Reporting" di Ginevra; il Dr. Giorgio Filibeck del Pontificio Consiglio "Giustizia e Pace", osservatore per la Santa Sede.

Interventi preannunziati sono, fra gli altri, quelli del Prof. Mario Bettati dell'Università Paris II, dell'On.le Mariapia Garavaglia, presidente della Croce Rossa Italiana e vicepresidente della Federazione delle Società di Croce Rossa e Mezza Luna Rossa, del Prof. Natalino Ronzitti, dell'Università LUISS di Roma, e del Dr. Marco De Ponte, di Amnesty International: interventi questi che certamente daranno ampio respiro ai dibattiti, allargandone la prospettiva a questioni che non emergono dal programma ufficiale dei lavori pur non rivestendo una grande importanza, come quella riguardante il concorso delle giurisdizioni nazionali e il cosiddetto principio di complementarità.

Il compito delicato e gravoso di raccogliere le indicazioni espresse dai dibattiti e di tradurli in un documento conclusivo contenente, ove possibile, una serie di specifiche raccomandazioni è stato affidato all'Amb. Kussbach, membro della Commissione umanitaria internazionale di accertamento dei fatti, che sarà coadiuvato dalla Prof.ssa Flavia Lattanzi. Va chiarito, al fine di evitare possibili equivoci, che le dichiarazioni rese e le posizioni assunte nel corso dei lavori dai Partecipanti manterranno un carattere strettamente personale e privato e non investiranno in alcun modo il ruolo ufficiale che essi ricoprono presso governi o istituzioni.

Vorrei concludere con un ringraziamento a quelle istituzioni e a quei governi, in numero invero assai limitato, che accogliendo l'appello dell'Istituto anche con versamenti di modesto importo hanno reso possibile l'organizzazione di questa Tavola Rotonda. Un elenco dei donatori si trova incluso nella cartellina congressuale: il nostro auspicio è che si tratti di un elenco ancora provvisorio.

MESSAGE

Duke Guido Orazio BOREA D'OLMO-
Representative of the Sovereign Military Order of Malta
to the International Institute of Humanitarian Law

Mr. Chairman and distinguished participants to this Round Table, as representative of the Sovereign Order of Malta, I wish a true success to our meeting here in San Remo, to discuss upon the results of the Diplomatic Conference in Rome and its future perspectives. The Order of Malta is by far the most senior institution engaged in humanitarian assistance. In fact, since its foundation nine centuries ago, it has been busy throughout the world caring for people in need as a result of illness, war, forced expatriation and other disasters of all sorts, without discrimination on grounds of nationality or religion, with the help of its approximately 11,000 members, 70,000 full-time volunteers and more than 1,000,000 collaborators.

Therefore we, as all devoted to the benefit of mankind, cannot remain indifferent to the establishment of an International Criminal Court.

As it is true that a court first needs laws, in order to apply sanctions to the violators of the same , it is equally true that crimes against mankind will be prevented successfully only when there are concrete examples of severe judgement passed by a court, applying the laws established by the international community.

Undoubtedly, the competence of the Court, embracing genocide, war crimes, protection of human life and liberties, its composition and financing, the connection between its own competence and national sovereignty as well as many other items, must be the object of very careful consideration, in order to obtain an independent, functional, effective and credible Permanent International Criminal Court.

I feel confident that this Round Table will be able to propose interesting solutions to such difficult subjects.

MESSAGE

M. James PURCELL
Directeur Général de l'Organisation Internationale pour les Migrations

Monsieur le Président, Mesdames et Messieurs,

Le Directeur Général de l'Organisation International pour les Migrations vous prie d'excuser son absence, des engagements préalables l'empêchant de participer à cette Table Ronde. Il regrette d'autant plus de ne pouvoir être parmi nous qu'il s'agit de la dernière Table Ronde à laquelle il aurait pu participer dans le cadre de son second et dernier mandat en tant que Directeur Général de l'OIM. Il formule ses vœux pour des délibérations fructueuses et constructives, dans la tradition de l'Institut.

Au cours de ce dernier quart de siècle, la communauté internationale a subi des mutations profondes, parfois violentes, dont la portée et les retombées ne sont pas encore pleinement assimilées. En examinant ces mutations et le hiatus existant parfois entre le droit et la réalité sociale, on ne peut manquer de relever avec inquiétude le retard accusé par le développement de la fonction juridictionnelle, et surtout l'absence de progrès dans le domaine de la juridiction pénale internationale.

L'établissement d'une Cour pénale internationale devrait donc être salué comme une avancée décisive dans l'ancrage d'exigence de justice et d'équité dans les relations internationales.

Les propositions de création d'une Cour pénale internationale sont vieilles de plus d'un siècle. De Gustave Moyniet à l'Institut de Droit International, en passant par Henri Donnedieu de Vabres et la Commission du Droit International, les projets se sont succédés sans jamais aboutir. Il a fallu des circonstances particulières pour que, enfin, le XX^{e} siècle fasse au XXI^{e} siècle le don d'un instrument juridique qui trouve son origine dans le besoin ressenti par l'homme de mettre un frein à sa propre cruauté et à sa propre barbarie.

La Cour pénale internationale, dont le projet a été approuvé le 18 juillet dernier à Rome, a suscité des espérances inachevées et des craintes inavouées, espérances illusoires d'une justice absolue, craintes spécieuses d'une érosion du pouvoir des Etats. Quelle que soit l'opinion initiale, le résultat est là et il constitue un premier pas important pour la prévention et la répression universelle de comportements juridiquement et moralement inacceptables; il faudra du temps pour que les ratifications nécessaires soient réunies, il faudra de la patience pour amener les Etats à ratifier cet instrument, il faudra de l'abnégation pour accepter les imperfections de ce traité sans chercher à les améliorer avant de lui avoir donné une chance de faire ses preuves.

L'ordre du jour de cette Table Ronde nous invite à examiner des problèmes spécifiques liés à cette Cour pénale internationale et je ne doute pas que les experts présents dans cette salle sauront faire avancer la compréhension de cet instrument. Cette démarche est utile à plus d'un titre et nous sera bénéfique. Nos débats doivent cependant franchir une étape supplémentaire: le souhait que je formule, en guise de conclusion, et que nous puissions dépasser le stade de cette analyse et réfléchir aussi aux mesures pratiques que nous pourrions mettre en œuvre pour accélérer l'entrée du Statut de la Cour dans le champ du droit positif.

INTRODUCTORY REPORT

Mr. Adriaan BOS
Legal Adviser
Ministry of Foreign Affairs, The Netherlands

In this introduction I would like first of all to express my gratitude to our host, the International Institute of Humanitarian Law and its President, Professor Jovan Patrnogic for having organised this Round Table. It is indeed one of the first occasions to exchange views on the results of the Rome Conference. I am also very honoured to be asked to introduce the subject. My introduction will be global and covering only a few aspects. Let me start by making some general remarks with regard to the adoption of the Rome Statute.

First of all I want to emphasise the importance of the adoption of the Rome Statute. It completes a period of discussions, which goes as far back as the end of the First World War. The Treaty of Versailles, concluded at the end of that war, contained a number of provisions on the establishment of an international criminal jurisdiction to prosecute the German emperor and others who had committed serious war crimes. It is not my intention to mention here and now all important milestones on the way to Rome. The most important milestones have been the establishment of the Nuremberg and Tokyo tribunals. This meant for the first time the establishment of international tribunals and the prosecution of individuals, irrespective of their rank or position for crimes against humanity, war crimes and crimes against the peace. In total more than 15,000 persons were prosecuted in Nuremberg and in the respective zones of occupation.

The efforts after the Second World War in the framework of the United Nations to establish an International Criminal Court (ICC) were for a long time paralysed by the Cold War. The work of the International Law Commission (ILC) on a Code of Crimes against the Peace and Security of Mankind and on a Statute of international criminal jurisdiction was without success. It stranded in the mud of the Cold War.

The change in the United Nations came in 1989 when the delegation of Trinidad and Tobago proposed the possibility of establishing an ICC to prosecute major drug traffickers. This initiative reopened the discussion in the United Nations on the establishment of an ICC. Between 1990 and 1992 the ILC submitted reports to the General Assembly concerning the establishment of an international criminal jurisdiction. Another very important event has been the establishment in 1993 of the International Criminal Tribunal for the Former Yugoslavia (ICTY). In a relative short period of time this Tribunal was established and became operational. This has served as an eye-opener. It became clear that an international criminal court was no longer a vision only, but could be put into operation as well. Moreover, the establishment of ad hoc tribunals - the ICTY was followed by the establishment of the International Tribunal for Rwanda (ICTR) - stimulated the request for a permanent court. It is clear that the establishment of ad hoc tribunals remains somewhat arbitrary. The Security Council will not always be in agreement to take such decisions. The competence of the Security Council to establish such tribunals is also not generally recognised. Each situation is different and this may mean that their Statutes are adjusted to those ad hoc cases with the risk of inconsistency between the various Statutes. The establishment of a permanent court would meet those concerns.

More generally, I think that the international community was ripe for the establishment of a permanent court. It became clear that the international instruments adopted after the Second World War - in particular the Geneva Conventions of 1949, but also international criminal law in general - were lacking an effective enforcement mechanism.

Moreover, a major contemporary development is the need to ensure human dignity, freedom and welfare. All matters which by their very nature highlight the role of the individuals. The accountability under international law of the individual for his acts is developing.

The establishment of the Court is therefore a logical outcome of the development of the international legal order and at the same time an important contribution to it. The individual becomes a bearer of rights and obligations in the framework of a developing international public order. Consequentially no longer the sovereign states exclusively but also new international institutions

determine the existence of breaches of obligations by individuals that are of concern for the international community as a whole.

Those developments can also explain why, first in the period of the negotiations in the Ad Hoc Committee and subsequently in the Preparatory Committee, the discussion progressively centred no longer on the question whether to establish a court, but on how to establish it. The establishment was no longer questioned. This was an important change. It may also explain the very constructive and positive attitude of all participants throughout the preparatory phase and also during the conference in Rome. There was clearly a commitment to complete the work in Rome.

A very fundamental aspect of the Statute is the principle of complementarity. Pursuant to the preambular para. 10 and Article 1, the principle of complementarity is elaborated in Article 17 dealing with the issues of admissibility and Article 18 dealing with the procedural aspects in case admissibility is invoked.

I am convinced that the insertion in the Statute of the principle of complementarity has been very instrumental in getting the permanent Court accepted. The ICC is established to supplement national judiciary systems in cases in which they are either unavailable or ineffective. This means that whenever a state properly carries out its obligation to investigate and prosecute, and even if it decides on solid grounds not to prosecute, the case would be inadmissible before the ICC. The Court would be able to intervene only when it determines that a national judicial system is unable or unwilling to prosecute or has collapsed. The assessment, when that is the case, is for the Court to make. For the effectiveness of the Court, it is very important that this assessment lie in the hands of the Court itself and not with the states.

In order to determine unwillingness, the Court shall pay due regard to the principles of due process recognised by international law. 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.

An important addition in the final version of the Statute is that in the Article on the preliminary rulings regarding admissibility the Prosecutor shall not only notify states parties of his determination to initiate an investigation but also states non-parties which, taken into account the information available, would normally exercise jurisdiction over the crimes concerned. Challenges to the jurisdiction of the Court may be made by an accused or a person for whom a warrant of arrest or a summons to appear has been issued; a state which has jurisdiction over a case on the grounds that it is investigating or prosecuting the case or has investigated or prosecuted; or a state from which acceptance of jurisdiction is required. This can also be a non-party.

In view of the importance of this principle of complementarity it is remarkable that its formulation in the Statute has been realised without many problems. In fact the text worked out in the preliminary stage has not been changed substantially in Rome. Apart from the psychological effect of the principle - it leaves the initiative with the state - it may also serve as an encouragement for states to become active in the enforcement of the law.

The idea of establishing a court has been inspired by the desire to prevent serious crimes from going unpunished, be it by a court or by a national judiciary. According to the principle of complementarity the use of the Court for preventing serious crimes from going unpunished lies in the hands of the state.

Another major problem in the negotiations has been the question of how to reflect in the Statute the present state of international law. In the original draft of the ILC the content of the substantive rules was not elaborated in detail. For two reasons. Firstly the ILC itself was still considering the Code of Crimes against the Peace and Security. The core crimes mentioned in the negotiations were also included in the Draft Code. The other reason was the question whether it was necessary at all to define into details the crimes in the Statute. Another possibility would have been either to suffice to mention the crimes or to refer to them in a short and simple manner leaving their application and interpretation to the Court, like in the Statute of the ICTY or of the ICTR. This approach was however clearly rejected in the negotiations. It was felt necessary to have an elaborated and detailed definition of the crimes. The argument most often used was the principle of *nullum crimen sine lege*. But suspicion against the Court was also an important factor. Many delegations were not prepared to leave much discretion to the Court. Another reason for the request to define the crimes was the divergence of views about the present state of international law in

general and with respect to internal conflicts in particular. In the conference a minority spoke against the inclusion of internal conflicts (Arab states, China, India, Iran and Egypt). Others were against taking over certain parts of Additional Protocol 2 dealing with internal conflicts (such as starvation as method of warfare, attacks against nuclear plants, plants and dikes).

Definitions

In Part 2 of the Statute dealing with the definitions, Article 10 says that "nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". By codifying you run the risk of freezing the existing law and hampering its development.

The purpose of the Statute is to put an end to impunity for the perpetrators of the most serious crimes that are of concern to the international community. The perpetrators must not go unpunished and effective prosecution must be ensured. For the rest, according to this Article, there will not be any limit or prejudice to existing or developing rules of international law.

This Article should be interpreted and applied in connection with Article 21 of the Statute dealing with the applicable law. Para. 1 under b) says that the Court shall apply, where appropriate, applicable treaties and principles and rules of international law, including the established principles of international law of armed conflict. Those rules are developing continuously.

According to para. 3 of this Article the definition of crimes may not be applied and interpreted by the Court in a manner that they violate international human rights. This is another important safeguard, which permits the Court to take account of the developments of the law.

The Court shall exercise jurisdiction only over the most serious crimes of concern to the international community as a whole. It has jurisdiction in accordance with the Statute with respect to: genocide; crimes against humanity; war crimes; and the crime of aggression.

Aggression

The difficulty to include the crime of aggression in the Statute has been twofold. First it has appeared extremely difficult to reach agreement on a definition for aggression. The General Assembly Res. 3314 (XXIX) of December 1974 contains a definition, but that definition deals with aggression by states and it is not written to define a criminal act of an individual. By its nature aggression is an act in which governments and political leaders are involved and the determination whether aggression has taken place is highly political. Moreover, such determination also touches upon the competence of the Security Council who is competent according to the Charter to determine threats to the peace and security. The ILC-draft provided a prior determination by the Security Council under Article 39 of the Charter of an act of aggression by a state, as a prerequisite for a complaint to be brought before the Court by a state regarding individual acts of aggression.

This political function of the Security Council and the competence of the ICC and its independence may easily be at daggers drawn with each other.

In the discussions it became clear that a majority was in favour of the inclusion of this crime. The Chairman of the Committee of the Whole has asked the delegations in favour of inclusion to provide him with a satisfactory definition. This apparently has failed due to lack of time. The solution is to include aggression among the core crimes in the Statute. The ICC may however not try violations before the crime of aggression is defined in accordance with the Articles 110 and 111 of the Statute.

Personally, I regret that it was not possible to agree on a definition of a crime, which was already included in the Charter and judgement of Nuremberg.

Crimes against humanity

The definition of this crime has raised a few problems. The text is more elaborated and more refined in comparison with the definitions in the Statute for the ICTY or for the ICTR. One may notice that the linkage of this crime with an international armed conflict, as provided for in the Charter of the Nuremberg tribunal, no longer exists[1]. Instead of that linkage there is a double threshold. The acts,

[1] This was already considered as part of customary law by the ICTY in the *Tadic* case: "It is by now a settled rule of customary law that crimes against humanity do not require a connection to international armed conflicts".

mentioned in Article 7, must be committed as "part of a widespread or systematic attack against any civilian population". The suggestion to make those two conditions cumulative has been rejected. In addition to this "widespread" or "systematic" attack, the attack must also be in a course of conduct involving the multiple commission of the acts, pursuant to or in furtherance of a state or organisational policy. In a slightly different manner, this introduces the meaning of "and" between widespread and systematic.

It is important that the definition contains an open-ended character by referring to similar "other inhuman acts". This is very important since one never knows what kind of atrocious acts may be committed in the future.

War Crimes

The Statute refers to war crimes in Article 8. The negotiations centred on a few highly sensitive issues. There was no problem with the inclusion of the violations of rules applicable in armed conflict as provided for in the 1899 and 1907 Hague Conventions. Neither was there a problem with the acts listed as grave breaches in the Geneva Conventions of 1949.

The main problems in relation to this part of the definition were the parts dealing with the transfer or deportation of the population of an occupied territory, the list of prohibited weapons (nuclear weapons, landmines and blinding laser weapons), the conscription or enlisting of children into the national armed forces or using them actively in hostilities, rape and forced pregnancy.

The problems in relation to the internal conflicts were more difficult to resolve. The first question was whether to include, and if so, what to include from Article 3 of the Geneva Conventions and from Additional Protocol 2.

A majority was in favour of including the violations of Article 3 and of Protocol 2 totally. The results of this discussion can be found in para.s c and e of Article 8. Not all provisions of Protocol 2 have been reflected. The threshold mentioned in Article 8 para 1: "in particular when committed as part of a plan or policy or as part of a large-scale commission" was necessary to prevent isolated and incidental violations coming under the jurisdiction of the Court as well. An additional threshold with regard to internal armed conflicts is the requirement that they take place in a "protracted armed conflict between governmental authorities and organised armed groups or between such groups". Attempts to have additional thresholds with regard to internal conflicts were not successful.

Another illustration of the pressure to codify the crimes in the Statute in details is Article 9. This Article says that elements of crimes shall assist the Court in the interpretation and application of the crimes. They shall be adopted by a two-thirds majority of the members of the Assembly of states.

A transnational Article provides for a state, on becoming a party to the Statute, for a period of seven years after the treaty's entry into force at that state, to declare that it does not accept the jurisdiction of the Court over war crimes, when a crime is alleged to have been committed by its nationals or in its territory.

Another crucial and fundamental question has been the exercise of jurisdiction by the Court and the role of the Security Council. The status of the Court, its independence and its proper functioning depends largely by the way this aspect is resolved in the Statute. It is therefore understandable that the draft text provided a great number of options and the discussion before Rome never endeavoured to reach solutions. This was clearly left for Rome itself.

In this respect, I would like to make one exception. The proposal of the United Kingdom submitted in the very last phase of the preparatory discussions has been very helpful in two respects. Firstly, it has contributed to a simplification of the text dealing with jurisdiction. Secondly, it made clear that the United Kingdom was prepared to consider an independent role for the Prosecutor.

Article 12 of the Statute provides that states becoming parties to the Statute thereby accept the jurisdiction of the Court with respect to the crimes. The jurisdiction of the Court can only be exercised when situations in which one or more of such crimes appear to have been committed are referred to the Court by 1) a State Party, 2) the Security Council, or 3) the Prosecutor. The jurisdiction may be exercised by the Court if its jurisdiction is accepted by 1) the territorial state in which the conduct in question occurred, or 2) the state of which the person accused of the crime is a national. At least the acceptance of either of those states is required. This solution is a compromise between the extreme demand of consent of states for the exercise of jurisdiction in each individual case on the one hand and the universal jurisdiction

on the other. The text takes also into account that states non-parties may be involved. The acceptance of only one of the two mentioned states as a requirement to exercise jurisdiction, as proposed by Korea, has been furthered by a German proposal according to which the ICC should have universal jurisdiction regardless of any state's consent. This was presented as a reflection of customary international law.

The question of the co-operation of a state non-party remains doubtful. The obligations to co-operate are not binding for those states. Under the provisions of the Statute you need first an acceptance from such state. Once having accepted the jurisdiction the state is obliged to co-operate with the Court.

Prosecutor

The discretion of the Prosecutor in the conduct of investigation and prosecution has been very controversial. A number of states would have liked more control over the activities of the prosecutor and were opposed to his power to initiate investigations ex officio.

This power may become very effective in particular in cases where situations of violations occur within a single state. Other states may be reluctant to take action. The Prosecutor is better placed to be mindful of the interests of the international community.

Important is the safeguard against irresponsible behaviour of the Prosecutor. It requires the approval of a three-judge pre-trial chamber before the Prosecutor can launch an investigation. This decision of the Chamber is also subject to interlocutory appeal to the Appeals Chamber.

Role of the Security Council

In the preparatory phase it has been argued that situations in which core crimes have been committed are such that they can always be considered as a threat to the peace and security. Consequentially they belong to the exclusive domain of the Security Council. Only after referral by the Security Council could the Court exercise jurisdiction.

This extreme view has been rejected on grounds that it would create arbitrariness. The Security Council could act according to its own discretion and the Court would be completely dependent on the Security Council. The solution in Article 16 of the Statute is that no investigation or prosecution may be commenced or proceeded with for a period of 12 months after the Security Council in a resolution adopted under Chapter VII has requested the Court to that effect. The adoption of a resolution is a substitute for an earlier version "being dealt with". Under this formula it would have been enough for the Security Council to take up a matter for consideration and thus the Security Council could effectively preclude proceedings before the Court. The requirement of a resolution to stop any action of the Court needs a concrete decision adopted with unanimity by the Permanent Members in the Security Council. One may not expect that this will easily be the case. I consider this solution very balanced. It respects as well the importance of the political role of the Security Council. It would be unwise to deny the Security Council any role and to do so would even weaken the authority of the Court. It is on the other hand of equal importance to respect the independence of the Court.

The discussion on Part 4 dealing with the composition and administration of the Court was focussed upon a few points.

Item 1:

RELATIONS BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL COURT

THE RELATIONSHIP BETWEEN THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL COURT
- A FIRST APPRAISAL -

Dr. Andreas ZIMMERMANN
(Research Fellow, Max Planck Institute for Comparative Law and International Law)

I. Introduction

The question as to how the relationship between the United Nations and the International Criminal Court (ICC) should be regulated is not addressed in detail in the Statute of the ICC. Besides, it has not yet been elaborated in other legal instruments, such as an agreement on the co-operation and relationship between the ICC and the organisation. Therefore, the following remarks have to remain necessarily tentative and explorative, rather than providing ready answers.

When considering the relationship between the organisation and the ICC, one has to distinguish four main issues:

First, what should be the general relationship with the United Nations, a question that is addressed in Art. 2 of the ICC Statute.

Second, the relationship between the Security Council as one of the main organs of the United Nations and the ICC.

Third, the relationship between existing or still-to-be-created ad hoc tribunals such as the ICTY or the ICTR on the one side and the ICC on the other side.

Fourth, the financing of the Court and the relationship between the budget of the ICC and that of the United Nations.

II. General issues concerning the relationship between the ICC and the United Nations

During the drafting of the Statute of the ICC, several options as to the legal status of the ICC were considered[2]. One option was to create the ICC as one of the principal organs of the United Nations, following the example of the International Court of Justice[3]. However, since this would have necessitated a Charter amendment, it was considered to be not feasible within the foreseeable future for several reasons:

First, any such process would have opened the Pandora's box of further Charter amendments[4] and would have thus created unnecessary complications. Besides, under Art. 108 of the Charter, the entry into force of any such Statute forming an integral part of the Charter would have necessitated the approval by all five permanent members of the Security Council and would have thus been rather unlikely in the near future[5].

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[2] For a more detailed discussion of the issues involved see inter alia R. Clark, The Proposed International Criminal Court : Its Establishment and its Relationship with the United Nations, Criminal Law Forum (1997), p. 411 et seq.; see also G. Nesi, The International Criminal Court: Its Establishment and its Relationship with the United Nations System; its Composition, Administration and Financing, in: F. Lattanzi (ed.) The International Criminal Court – Comments on the Draft Statute (1998), p. 171 et seq.

[3] Ibid, p. 415 – 416.

[4] For the current discussion on amending Art. 23 of the Charter, regulating the composition of the Security Council see the excellent survey by I. Winkelmann, Bringing the Security Council into a new era: recent developments in the discussion on the reform of the Security Council, Max Planck Yearbook of United Nations Law 1997, p. 35 et seq.

[5] Art. 108 of the Charter reads: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and

Besides, creating a *permanent* International Criminal Tribunal on the basis of a Chapter VII resolution to be adopted by the Security Council following the models of the two existing ad hoc tribunals might have raised serious issues of both a legal and a political nature. On the one hand, such an approach would have most probably not been politically acceptable for the majority of the member states of the United Nations since it would have granted the permanent members of the Security Council a specific role in the creation of such a permanent judicial institution. Even if one acknowledges that the Security Council possesses the ability to create ad hoc criminal tribunals under its Chapter VII powers[6], creating a *permanent* judicial institution without the existence of a current threat to international peace and security might be considered to extend beyond the competence of the Security Council[7].

Given the dilemmas involved in these two above-mentioned alternatives, a general agreement was reached during the negotiation process that the ICC should be established by way of a multilateral treaty as a separate entity possessing its own international legal personality, as is now provided in Art. 4 para. 1 of the ICC Statute. Thus, with respect to its creation, the ICC closely follows the model of the International Tribunal for the Law of the Sea located in Hamburg created under Annex VI to the 1982 Law of the Sea Convention. This approach then necessitated a special provision in the Statute regulating the relationship between the United Nations on the one side and the ICC on the other side. Art. 2 of the ICC Statute which does so provide, however, only that the relationship shall be regulated by an agreement to be concluded by the Court, acting through its president on the one side and the United Nations on the other side. It is striking, however, that, unlike in the case of the International Tribunal for the Law of the Sea, the Statute of the ICC expressly provides that any such agreement needs the prior approval by the Assembly of states parties of the ICC Statute[8].

One might wonder what are the essential questions to be regulated in such a co-operation and relationship agreement. Following the model of similar agreements and in particular the Agreement on Co-operation and Relationship between the United Nations and the International Tribunal for the Law of the Sea signed on 18 December 1997, the future agreement between the ICC on the one side and the United Nations on the other will most probably provide first for a general co-ordination to take place between the ICC and the UN. Besides, it might be envisaged that the ICC shall be granted observer status both within the United Nations itself as well as within its specialised agencies. On the other hand, there is the question as to whether, and if so to what extent, the United Nations can participate in proceedings before the ICC should be addressed. This concerns in particular those cases where the organization itself is most concerned, such as when United Nations personnel had been made the object of a military attack in violation of Art. 8 para. 2 (b) (iii) of the Statute[9].

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ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council."

[6] See in particular the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of The Prosecutor v. Tadic, IT-94-1-Art.72 of 2 October 1995, in particular para.s 32–40 as well as decision of 18 June 1997 of the International Criminal Tribunal for Rwanda in the case of the Prosecutor v. J. Kanyabashi, ICTR-96-15-T, 5 et seq. (see as to this decision also the note by V. Morris, *AJIL* 92 (1998), 67 et seq.)

[7] As to the possibility for the Council to create a 'dormant' judicial structure which could have been activated on an ad hoc basis see Clark, supra note 3, p. 416.

See also the (unpublished) draft resolution submitted by the United States as of 28 April 1998 for the "Establishment of an international tribunal for the prosecution of certain persons responsible for serious violations of international humanitarian law in the territory of Cambodia during the period 15 April 1975 – 7 January 1979."

[8] See Art. 2 ICC Statute.

[9] The relevant provision reads:

> "For the purpose of this Statute, 'war crimes' means: (...)
>
> (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: (...)
>
> (iii) 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

A rather difficult issue is the question as to whether, and if so to what extent, an exchange of information or documents shall take place between the United Nations on the one side and the ICC on the other. While the exchange of public information and documents should be uncontroversial, the question whether the UN should be obliged, when requested by the Court, to deliver certain information is far more problematic. Given the fact that the United Nations cannot become a party to the Statute, it will accordingly be under no obligation to co-operate with the ICC under Part 9 of the Statute. Instead, the Court can only make non-binding demands to the United Nations to provide information under Art. 87 para. 6 of the Statute[10]. Given the fact, however, that in certain, if not most, situations involving the commission of crimes which come within the jurisdiction of the Court, United Nations personnel will be on the ground, it might be appropriate[11] to regulate in a relationship and co-operation agreement the question under which conditions the United Nations might eventually be under a legal obligation to provide information it has at its disposal or to grant permission to its personnel to give testimony before the Court.[12]

A further issue of co-operation between the Court and the United Nations concerns personnel and might involve the exchange of personnel between the two institutions, the participation of the ICC in the common pension fund of the UN and the access of ICC personnel to the United Nations Administrative Tribunal.

III. Relationship between the International Criminal Court and the Security Council[13]

One of the politically most sensitive issues addressed during the elaboration of the Statute of the ICC was and indeed still remains the relationship between the Security Council on the one side and the ICC on the other side. In that regard one has to distinguish between the possibility of the Security Council to refer situations to the Court and on the other side the possibility of the Security Council to defer ongoing investigations or prosecutions.

1. Deferrals of ongoing investigations or prosecutions by the Security Council

The original draft Statute submitted by the International Law Commission had provided that, whenever a situation has actively been dealt with by the Security Council under Chapter VII of the Charter of the United Nations, that fact alone should exclude the exercise of jurisdiction by the ICC unless the

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United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict."

For the parallel provision as far as non-international armed conflicts are concerned see Art. 8 para. 2 (e) (iii) of the Statute.

[10] Art. 87 para. 6 of the Statute provides that "[t]he Court may ask any intergovernmental organization to provide information or documents." It further stipulates that "[t]he Court may also ask for other forms of co-operation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate."

[11] For a more detailed discussion of the political and humanitarian issues involved in such an approach see C. Bruderlein, Co-operation between Humanitarian Organisations and the International Criminal Court: a Proposal for Guidelines (in this volume).

[12] It should be noted however, that this situation does not apply to that military personnel involved in peace-keeping or peace-enforcement activities, the action of which is rather attributable to the sending state than to the United Nations.

[13] For a more elaborated discussion of this question see A. Zimmermann, The Creation of a Permanent International Criminal Court, Max Planck Yearbook of United Nations Law ; 1998 p. 169 seq. (215 et seq.) with further references as well as P. Gargiulo, The Relationship between the ICC and the Security Council, in: F. Lattanzi (ed.) The International Criminal Court – Comments on the Draft Statute (1998), p. 95 et seq.

Security Council itself decides otherwise[14]. In contrast thereto, the by now famous so-called Singapore proposal[15], which is contained in Art. 16 of the ICC Statute, provides that the Security Council may defer an investigation or prosecution for twelve months only. The Security Council, however, might renew such request for a deferral if it deems such a prolongation necessary in order to fulfil its obligations for the maintenance of international peace and security. This provision *de facto* circumvents the veto-power of individual permanent members in that any such permanent member - and even all five permanent members taken together - may not alone or together block the exercise of jurisdiction by the Court. Instead, in order to hinder the exercise of jurisdiction by the Court, a regular majority in the Security Council, as provided for in Art. 27 para. 3 of the UN Charter is required; i.e. nine members of the Security Council must vote in favour of any such deferral. Besides, no permanent member must have vetoed such a deferral.

Given these requirements, it seems rather unlikely that the Security Council, whose powers and competence to stop ongoing investigations have not as such been put into question, will in the future order such a deferral. Legally speaking, however, it is interesting to note that the ICC Statute purports to limit the Security Council to only request a deferral for a period of twelve months, given that under Art. 103 of the UN Charter, obligations of member states arising under the Charter - including obligations to carry out decisions of the Security Council under Art. 25 of the Charter of the United Nations[16] - shall prevail over other obligations arising under any other international agreement.

It seems important to note, however, that any such deferral by the Security Council could not only entail the deferral of individual investigations or prosecutions but could also refer to complete situations; i.e. prosecutions relating to a given conflict as a whole. Besides, it is also important to note that, given the wording of Art. 16 of the ICC Statute, any such deferral can only take place by way of a formal resolution to be adopted under Chapter VII and not by a simple statement issued by the acting President of the Security Council.

2. Referrals of situations by the Security Council[17]

The power of the Security Council to refer a situation to the Court provided for in Art. 13 (b) of the ICC Statute, serves as the functional alternative to the creation of new *ad hoc* tribunals. Since any such referral has to be positively decided by the Security Council, it requires the political approval of all five permanent members, i.e. the absence of the casting of a negative vote by all of these States. Given the fact that certain of them have, at least up to this point in time, remained critical towards the Statute[18], one might wonder to what extent the Security Council will be in a position to use this power to refer situations to the Court in the foreseeable future.

In case such a referral takes place, it will, given the fact that it will be done by way of a resolution adopted under Chapter VII of the Charter of the United Nations within the terms and limits of the respective resolution of the Security Council, also be binding upon States which are not parties to the Statute of the ICC. Thus, the exercise of jurisdiction by the International Criminal Court under such a referral will no longer depend on the existence of the otherwise necessary preconditions for the exercise of jurisdiction under Art. 12 of the Statute, i.e. it will not be required that either the State on the territory of which the offence occurred or the State of which the accused is a national are parties to the Statute.

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[14] As to a discussion of that suggestion see *inter alia*, S. Yee, A Proposal to Reformulate Art. 23 of the ILC Draft Statute for an International Criminal Court, Hastings Int. Comp. L. Rev. 1996, 529 et seq

[15] See A. Zimmermann, Die Schaffung eines ständigen Internationalen Strafgerichtshofes - Perspektiven und Probleme vor der Staatenkonferenz in Rom, ZaöRV 1998, p. 47 et seq. (95-96).

[16] For details concerning the impact of Art. 103 see R. Bernhardt, Art. 103, in: B. Simma et al. (eds.), The Charter of the United Nations – A Commentary.

[17] For a more elaborated discussion of this question see Zimmermann, supra note 16, 94.

[18] The United States and China were among the seven States voting against the approval of the final text of the Statute of the ICC, for details see H.-P. Kaul, Durchbruch in Rom – Der Vertrag über den Internationalen Strafgerichtshof, Vereinte Nationen 1998, p. 125 et seq. (125).

Besides, not only parties to the Statute but also non-States parties will then be under an obligation to co-operate with the Court in accordance with Part 9 of the Statute.

When considering the possibility of referrals by the Security Council several further procedural differences have to be highlighted. First, preliminary challenges as to the admissibility of cases arising in a given situation under Art. 18 of the Statute are not allowed when the jurisdiction of the Court is based on a referral by the Security Council.

The Security Council could also, acting under Chapter VII in connection with Art. 103 of the UN Charter, provide for further changes as to the jurisdiction or procedure of the ICC, e.g. grant the ICC primacy over domestic courts as it has done in the case of the two ad hoc tribunals[19]. Thus, it is submitted that the Security Council could, if it so wished, circumvent the applicability of the principle of complementarity as provided in Art. 70 of the Statute, which would then no longer apply.

A last issue related to Art. 13 (b) deals with the question, whether and if so to what extent, the Security Council could limit its referral. Notwithstanding the fact that Art. 13 (b) of the ICC Statute generally addresses referrals of a complete 'situation', it seems that the Security Council could, similar to recent proposals submitted by the United States to the Security Council to create an ad hoc tribunal for Cambodia, the jurisdiction of which was supposed to be limited to certain high-ranking members of the Khmer Rouge[20], in the future, similarly limit its referral in one way or another; e.g. to a certain period of time or eventually even to a certain group of individuals.

IV. Relationship with existing or still-to-be-created ad hoc tribunals pending the entry into force of the ICC Statute

The possibility might not be excluded that the two already existing ad hoc tribunals or new ad hoc tribunals to be created by the Security Council pending the entry into force of the Statute of the ICC will have ongoing cases pending when the Statute of the ICC enters into force. Thus an eventual overlap might arise which could create certain difficulties. Besides, the question might come up, whether decisions on pardon, commutation of sentences, or release of prisoners for health reasons as far as individuals are concerned who have been tried by the two ad hoc tribunals, should not eventually be rendered by the ICC after these ad hoc tribunals have been dissolved.

The only foreseeable way to transfer the jurisdiction of such ad hoc tribunals to the ICC, however, would consist in a resolution to be adopted by the Security Council acting under Chapter VII since the jurisdiction of the ad hoc tribunals is in itself based on these powers. Any such decision by the Security Council, which would transfer certain competencies and prerogatives of the two ad hoc tribunals to the ICC, would thus effectively replace either the ICTY or the ICTR or both by the ICC. One has to note in that regard, however, that depending on the specific terms of such a transfer of jurisdiction, both the substantive and procedural norms to be applied by the ICC would in such situations be those of the ICTY or those of the ICTR and not those contained in the Statute of the ICC itself.

Finally, it could be also envisaged, once the two ad hoc tribunals have terminated their work, that their archives and other items relevant for the work of the future ICC be transferred from the two ad hoc tribunals to the ICC.

V. Financing of the Court[21]

During the elaboration of the Statute, two main alternatives for the financing of the International Criminal Court were under consideration:

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[19] See respectively Art. 9 para. 2 Statute of the ICTY and Art. 8 para. 2 of the Statute of the ICTR.

[20] See above note 8.

[21] For a more elaborate discussion of that problem from an ex ante perspective see T. Warrick, Organization of the International Criminal Court: Administrative and Financial Issues, in: M. Cherif Bassiouni (ed.), The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee and Administrative and Financial implications 1997, p. 37 et seq.

The Court could have been financed through the regular UN budget, based on the example of existing treaty bodies, created, for example, by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights or the UN Convention for the Elimination of All Forms of Racial Discrimination. Alternatively, a proposal was put forward that the budget, largely following the example of the International Tribunal for the Law of the Sea, should be exclusively funded by states parties to the ICC Statute.

The text of Art. 115 of the Statute of the ICC, as finally adopted, now provides for a compromise. As a matter of principle, it stipulates that only states parties shall fund the Court by their contributions. Where, however, a situation has been referred to the Court by the Security Council, funding shall then be provided by the United Nations, subject to a resolution of the UN General Assembly[22]. If one analyses Art. 115 of the ICC Statute, however, in more detail and more carefully, it should be noted that it explicitly states that the funding to be provided by the United Nations should only *in particular* cover referrals by the Security Council. This formula, which was carefully negotiated and can be considered a compromise between the different approaches outlined above, implicitly provides for the possibility of a phasing-in of the financing of the Court through the regular United Nations budget[23].

Conclusion

Given the fact that the Statute of the ICC has been only very recently adopted and that some years will pass before it enters into force[24], one can only speculate how, over time, the relationship between the International Criminal Court on the one side and the United Nations on the other side will develop in practice. In particular, one might wonder to what extent the Security Council will in the future refer cases to the ICC. In that regard it is particularly problematic that one permanent member of the Security Council, i.e. the United States, has officially stated that it will "actively oppose the ICC" unless the current wording of the Statute is amended. One might in that respect only hope that the approach of that and other permanent members of the Security Council, which is critical for the Statute of the ICC, will change over time to the extent that the ICC becomes a credible, neutral and effective mechanism for the punishment of the most heinous crimes of concern for mankind.

[22] See in that regard Art. 115 (b) of the Statute.

[23] See in particular A/CONF.183/C.1/L.78, p. 2, note 2 which confirms that interpretation of Art. 115 of the ICC-Statute.

[24] It has to be noted, however, that already by now almost 60 States have signed the Statute.

PRELIMINARY OBSERVATIONS ON THE POWERS AND ROLE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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Even a preliminary assessment of the efficacy of the jurisdictional regime of the International Criminal Court must consider the powers and role of the Prosecutor under the Statute of the Court. Not only does the Office of the Prosecutor, the engine, have the task of generating work for the Court through investigations and case preparation, but the longer-term legitimacy of the International Criminal Court (hereinafter ICC) will largely depend on its ability to uncover and firmly base its decisions on all facts relevant to the adjudication of the question of guilt. Unless the Prosecutor's power to investigate and prosecute cases is sufficiently efficacious, the Court is likely to be confronted with numerous review proceedings, which could undermine basic confidence in the ICC criminal process.

It is only when the ICC has been duly established and the degree of State support for the Court's work is properly tested through the first few situations it considers that we may begin to see the real strengths and weaknesses of the jurisdictional system of the ICC Statute in general and more specifically the position of the Prosecutor. However, at this stage and for our present purposes it may have some value to consider in a tentative and largely descriptive manner the main provisions in the ICC Statute relevant to the powers and role of the Prosecutor.

Appointment and removal

Article 34(c) of the ICC Statute provides that the "Office of the Prosecutor" is one of the organs of the ICC. Article 42(2) on the Office of the Prosecutor reads:

> 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.

According to Article 42(4) of the Statute, the Prosecutor "shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties" to the ICC Statute.[25] 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." In other words, also the Deputy Prosecutors will be political appointees, which is not the case in the *ad hoc* Tribunals for the former Yugoslavia and Rwanda (hereinafter ICTR). Moreover, Article 42(4) states that unless otherwise determined at the time of appointment, the Prosecutor and Deputy Prosecutors "shall hold office for a term of nine years and shall not be eligible for re-election." This may ameliorate some of the problems which the fact that also Deputy Prosecutors are political appointees might cause. Article 42(3) establishes qualifications for appointment, including high moral character, extensive practical experience in criminal cases, and excellent knowledge of at least one of the working languages of the Court.

The salaries, allowances, and expenses of the Prosecutor and Deputy Prosecutors are determined by the Assembly of States Parties, but may not be decreased during their terms of office (Article 49).

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* The views expressed are those of the author and do not necessarily reflect the views of the United Nations. The author thanks Jonas Nilsson for remarks.

[25] Article 112 provides for an "Assembly of States Parties" which will be the governing Assembly of States Parties to the Statute. Each State Party will have one representative and one vote in the Assembly (signatories which have not yet ratified may be observers in the Assembly).

Under Article 46(1), the Prosecutor or a Deputy Prosecutor may be removed from office in situations where he or she 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 ... [i]s unable to exercise the functions required by this Statute." Decisions on removal from office are taken by the Assembly of States Parties by secret ballot (Article 46(2)). Removal from office of the Prosecutor requires an absolute majority of the States Parties (Article 46(2)(b)). The requirement is the same for Deputy Prosecutors, but only "upon the recommendation of the Prosecutor" (Article 46(2)(c)). A Prosecutor or Deputy Prosecutor so challenged is entitled to have "full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence" (Article 46(4)). But the person in question shall not otherwise participate in the consideration of the matter.

Article 47 provides for the Prosecutor or a Deputy Prosecutor to be subject to disciplinary measures in cases of misconduct of a less serious nature. These disciplinary measures are to be prescribed in the Rules of Procedure and Evidence, which will be adopted by a two-thirds majority of the members of the Assembly of States Parties (Article 51(1)), based on draft Rules prepared and recommended by the Preparatory Commission.[26]

Beyond the power of States Parties to remove the Prosecutor from office, Article 48(5)(a) provides that the privileges and immunities of the Prosecutor may be waived by "an absolute majority of the judges." The privileges and immunities of the Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor (Article 48(5)(c)).

Independence and accountability

Article 42(1) contains the fundamental independence provisions that the "Office of the Prosecutor shall act independently as a separate organ of the Court" and that "[a] member of the Office shall not seek or act on instructions from any external source." Article 42 includes a number of other provisions intended to ensure that this independence is maintained. The Prosecutor and Deputy Prosecutors are prohibited from engaging in activities likely to affect confidence in their independence (Article 42(5)),[27] and may be excused at their request by the Presidency[28] from acting in a particular case (Article 42(6)). Article 42(7) envisages the exclusion of the Prosecutor or a Deputy Prosecutor in matters in which their impartiality "might reasonably be doubted on any ground," for instance where 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." Article 42(8) provides that the Appeals Chamber shall decide on such questions of disqualification. A suspect may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor under that provision.

Article 43(2) of the Statute provides for a Registrar, who is designated the "principal administrative officer of the Court." The Registrar heads the Registry, which under Article 43(1) is made "responsible for the non-judicial aspects of the administration and servicing of the Court." However, this is expressed to be "without prejudice to the functions and powers of the Prosecutor in accordance with Article 42." Article 42(2) states that the Prosecutor "shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof."

Additionally, under Article 44(1) and (2) the Prosecutor is empowered to appoint the staff of the Office of the Prosecutor, subject to the general requirement of ensuring "the highest standards of efficiency, competency, and integrity," and the requirement that the Prosecutor have regard to the criteria

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[26] See Article 112(2)(a) and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN document A/CONF.183/C.1/L.76/Add.14, 16 July 1998, Annex I, F, 5(a). Subparagraph 6 of the latter states that the draft Rules shall be finalized before 30 June 2000. Once adopted, the Rules can be amended by a two-thirds majority of the members of the Assembly of States Parties (Article 51(2)), but such amendments shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted (Article 51(4)).

[27] Article 42(5) further provides that the Prosecutor and Deputy Prosecutors "shall not engage in any other occupation of a professional nature."

[28] According to Article 38, the Presidency consists of three Judges, namely the President, and the First and Second Vice-Presidents.

contained in Article 36(8).[29] Staff regulations, which are applicable to all of the Tribunal's staff, are to be proposed by the Registrar "with the agreement of the Presidency and the Prosecutor" and approved by the Assembly of States Parties (Article 44(3)).

Similarly, Article 38(3)(a) provides that the Presidency is responsible for the proper administration of the Court, but expressly adds that this is "with the exception of the Office of the Prosecutor." Article 38(4) states:

> In discharging its responsibility under paragraph 3(a), the Presidency shall co-ordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Certain controls are provided for in Part 11 of the ICC Statute, dealing with the Assembly of States Parties. Under Article 112(2), the Assembly of States Parties shall, *inter alia*:

> (b) [p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court; ...
>
> (d) [c]onsider and decide the budget for the Court.

Article 112(4) adds that:

> 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.

It remains to be seen to what extent the work of the Office of the Prosecutor might be influenced by the Assembly through the use of its budgetary powers or oversight mechanisms. If, for example, the Court's jurisdiction has been separately triggered with respect to more than one situation, it may be technically possible for the Assembly to indirectly determine through the adoption of a budget how resources will be allocated to the investigation of those situations, although that would probably violate Article 42(2). Article 112(5) may prove to have practical importance in this regard, insofar as it provides that the Prosecutor or his or her representatives "may participate, as appropriate, in the meetings of the Assembly and of the Bureau."

As regards the accountability of the ICC Prosecutor in broader terms, the Statute does not provide for any general control or scrutiny by other bodies of the work of the Prosecutor. There are no professional organs with formal competence to control or officially review the Prosecutor's decisions or performance in general.

Investigations: initiation and control

The question of which role the ICC Prosecutor should play in the launching of investigations was very controversial during the Rome Diplomatic Conference. There was substantial disagreement among States whether the Prosecutor should be empowered to initiate investigations *ex officio*. Some States preferred a system whereby an investigation can only start after a matter or situation has been referred to the Court by a State or the Security Council, and where the complainant State as well as the territorial State and State of nationality have accepted the exercise of the Court's jurisdiction over the alleged crimes. At the final session of the Preparatory Committee, the delegations of Argentina and Germany presented an elaborate proposal on a power for the Prosecutor to initiate investigations *ex officio*[30]. It was adopted with some modifications by the Rome Conference. While Article 13(c) of the Statute recognizes that the Prosecutor can initiate an investigation and thus start the triggering of the Court's exercise of jurisdiction, it must be read against the background of Article 15 which reflects the Argentine/German proposal. Article 15 reads *in extenso*:

> (1) The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

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[29] These criteria include the representation of the principal legal systems of the world and equitable geographical distribution, as well as other criteria such as gender balance.

[30] UN document A/AC.249/1998/WG.4/DP.35 of 25 March 1998.

(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. 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 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.

In other words, the Pre-Trial Chamber is empowered to authorize the commencement of an investigation by the Prosecutor, based on his or her request. Prior to such authorization, the Prosecutor may only conduct preliminary collection and analysis of information.

Article 53(1) states that the Prosecutor shall initiate an investigation after having evaluated the information made available, unless he or she determines that there is no reasonable basis to proceed under the 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 (Article 53(1)).

However, it is necessary to interpret the power of the Prosecutor to initiate investigations pursuant to Articles 13(c), 15 and 53(1) in the proper context of certain stark jurisdictional limitations which the Statute imposes. First, Article 12(2) on preconditions to the exercise of jurisdiction requires that either the territorial State or the State of nationality of the suspect has accepted the Court's jurisdiction. This does not apply when the Security Council has referred the situation to the Court. It is not necessary that the State in question has become a State Party; it is sufficient if the State has accepted the exercise of jurisdiction by the Court through a separate declaration pursuant to Article 12(3).

Secondly, the case must pass the admissibility test based on the complementarity principle as formulated by Article 17. This principle was given fundamental importance in the negotiations on the Statute in the Preparatory Committee and during the Diplomatic Conference, both as an expression of concern of State sovereignty and as a way to bring on board as many States as possible in the process. A case is basically only admissible according to Article 17 when relevant national jurisdictions are "unwilling or unable genuinely to carry out the investigation or prosecution." The admissibility can be challenged by suspects against whom there is an arrest warrant or a summons to appear, by States which

have jurisdiction over the case, or by the territorial State or State of nationality (Article 19(2)). The Prosecutor shall suspend the investigation until the Court makes a determination on the admissibility challenge if the challenge is made by a State referred to in Article 19(2) (Article 19(7)). Given the complex nature of the admissibility test, it is reasonable to expect that the delay caused by admissibility challenges under this provision might become very significant. An important question is to which extent this provision will be abused by Governments hostile towards the Court. Article 19(8) tries to remedy the difficult situation in which the Office of the Prosecutor might find itself by granting that the Prosecutor may seek authority from the Court to pursue limited, "necessary investigative steps" pending a ruling by the Court on admissibility. The steps may only be 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" (Article 18(6), referred to by Article 19(8)(a)). The Prosecutor may also request authority from the Court to "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" (Article 19(8)(b)).

Furthermore, Article 18 of the Statute raises an additional jurisdictional obstacle based on a proposal put forward by the delegation of the United States at the final session of the Preparatory Committee[31], which the Diplomatic Conference adopted with some modifications in what seems to have been a hopeful spirit of compromise. It places an obligation on the Prosecutor to notify States Parties and States which would normally exercise jurisdiction over the crimes, of both a referral of a situation by a State Party to the Court (which the Prosecutor finds to be a reasonable basis to commence an investigation) and investigations initiated by him or her. The Prosecutor shall defer to State investigations which the Court may be informed of within one month of receipt of notice, at the request of that State, unless the Pre-Trial Chamber, "on the application of the Prosecutor, decides to authorize the investigation" (Article 18(2)).

If a matter successfully passes these jurisdictional hurdles and an investigation has finally commenced, the Prosecutor will in principle be able to control the way in which the actual investigation is being conducted. However, the Statutory provisions regulating the *execution* of requests for assistance from the Prosecutor to States may in most cases leave the actual implementation of requests on national territory to the authorities of the requested State. The requested national authorities can determine by law whether and to which extent representatives of the ICC Prosecutor may assist in the execution process (Article 99(1)). Although States Parties are obliged under Article 88 to "ensure that there are procedures available under their national law for all of the forms of co-operation which are specified under" the co-operation part of the Statute, it remains to be seen how Article 99(1) will work in practice, especially in territorial States which are seriously afflicted by armed conflict and may even have the war-time regime intact.

Article 99(4) makes an exception to subparagraph (1) for some limited investigative steps which can be executed without compulsory measures. Article 57(3)(d) is also relevant in this regard, insofar as it empowers the Pre-Trial Chamber to authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the co-operation of that State, if the Chamber has determined that the State is clearly unable to execute a request for co-operation "due to the unavailability of any authority or any component of its judicial system competent to execute the request for co-operation." Moreover, Article 56 gives the Pre-Trial Chamber a role in relation to unique investigative opportunities, both if there is a request from the Prosecutor and when the Prosecutor has not sought measures to preserve evidence.

On a more organizational note, the investigators of the Office of the Prosecutor will be the subordinates of the Prosecutor and as such they will be accountable to him or her. Article 44(1) provides that the Prosecutor's power to appoint such qualified staff as may be required to his or her office shall include the appointment of investigators. It is not anticipated in the Statute that there will be an investigation unit outside the Office of the Prosecutor. According to Article 42(2) which has been referred to above, the Prosecutor shall have full authority over the management and administration of his or her staff. But the Statute's State co-operation regime creates a different kind of dependency for the ICC

[31] UN document A/AC.249/1998/WG.3/DP.2 of 25 March 1998 ("Preliminary rulings regarding admissibility").

Prosecutor: on the police and judiciary of States in whose jurisdiction investigative steps need to be taken. This dependency is going to be particularly problematic in territorial States where many witnesses will be living and sites relevant to the alleged crimes are normally located, in particular those whose Governments do not appreciate or are opposed to the Court's inquiry.

Prosecutorial discretion

Once the Prosecutor's power to start an investigation has indeed been triggered, the Statute does not empower any State or person to require the Prosecutor to indict a particular person, or to refrain from indicting a particular person, on the basis of the results of that investigation. Article 13 only states that the Court "*may* exercise its jurisdiction" (emphasis added) when a situation has been referred to it by States or the Security Council, not that the Prosecutor is *obliged* to investigate and prosecute or to do so with regard to a particular case. Furthermore, States and the Security Council cannot refer specific cases to the Court, only *situations* (Article 13(a) and (b)).

However, Article 16 of the Statute grants the Security Council a more fundamental power to *postpone* ICC investigations and prosecutions. This deferral provision amounts in effect to a veto power for the Security Council over the work of the Office of the Prosecutor. The Article reads:

> 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.

As regards the more specific point of whether the ICC Prosecutor will be under an obligation to bring proceedings in all cases where there is sufficient evidence, or whether he or she has discretion, Article 53(2) regulates the situation upon investigation. As a basic rule it is the Prosecutor who determines whether there is sufficient basis for a prosecution. The Prosecutor may find that there is insufficient basis because the case is not admissible under Article 17 (Article 53(2)(b)), or because a prosecution "is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime" (Article 53(2)(c)). If the Prosecutor concludes that there is insufficient basis, he or she shall inform the Pre-Trial Chamber and the State making a referral under Article 14 or the Security Council in a case under Article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion (Article 53(2) *i.f.*).

The Pre-Trial Chamber may then, at the request of the referring State or the Security Council, review such a decision by the Prosecutor and request him or her to reconsider that decision (Article 53(3)(a)). If the Prosecutor's decision is based solely on interests of justice considerations pursuant to Article 53(2)(c), the Pre-Trial Chamber may review the Prosecutor's decision on its own initiative and the Prosecutor's decision "shall be effective only if confirmed by the Pre-Trial Chamber" (Article 53(3)(b)).The Prosecutor may at any time reconsider a decision whether to initiate a prosecution based on new facts or information (Article 53(4)).

Where the Prosecutor does decide to prosecute, the indictment cannot proceed to trial unless confirmed at a judicial confirmation hearing, which is also required in the ICTY and ICTR. The mechanism for the confirmation of indictments is contained in Article 61 of the ICC Statute. The test to be applied by the Pre-Trial Chamber to determine whether an indictment should be confirmed is whether there is "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged" (Article 61(7)). Article 61(1) also provides that the confirmation hearing shall be held in the presence of the person charged and his or her counsel. This provision contrasts with the position before the ICTY and ICTR, where confirmation hearings are *ex parte*.

Article 61(4) provides that the Prosecutor can withdraw or amend an indictment at any time prior to its confirmation. After confirmation and before the trial has begun, amendment or withdrawal of the indictment requires permission of the Pre-Trial Chamber, and where the amendment involved the addition of new charges or the substitution of more serious charges, the new or amended charges are subject to the confirmation procedure (Article 61(9)). After the commencement of trial, charges may only be withdrawn with the permission of the Trial Chamber (Article 61(9)).

Compulsory powers?

The conduct of investigations by the ICC Prosecutor is dealt with in part by Article 54 of the Statute. Article 54(2) concerns investigations on the territory of States. It determines that such steps must be taken in accordance with Part 9 of the Statute on State co-operation or Article 57(3)(d). Both avenues are very narrow indeed. The main rule on the execution of requests for assistance in Article 99 (in Part 9) has already been described above. The exception in Article 99(4) only concerns situations where investigative steps can be taken "*without any compulsory measures,*" and in any event it aims at "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" (emphasis added). As referred to above, Pre-Trial Chamber authorization under Article 57(3)(d) depends on a determination by the Chamber in the case that "the State is *clearly unable* to execute a request for co-operation due to the *unavailability of any authority or any component* of its judicial system competent to execute the request for co-operation under Part 9" (emphasis added). In other words, the application of the exception in Article 57(3)(d) is limited to situations of clear inability of the national criminal justice system to investigate and prosecute. There was no such inability, for example, in the Bosnian Serb *de facto* entity in Bosnia and Herzegovina during the critical phases of the armed conflicts there in 1992-94.

Article 54(3) simply lists the investigative steps which the Prosecutor may take. They are co-operative and include collecting and examining evidence and requesting the presence of and questioning persons being investigated, victims and witnesses. The Prosecutor must turn to the Pre-Trial Chamber and request "orders and warrants as may be required for the purposes of an investigation," and the Chamber may issue such orders and warrants pursuant to Article 57(3)(a). The general obligation of States Parties to "cooperate fully with the Court in its investigation and prosecution" of crimes within its jurisdiction is expressed by Article 86. Article 93 obliges States Parties to comply with the requests by the Court, procedural Court orders included, to provide assistance in relation to investigations and prosecutions. The Article contains a detailed list of forms of assistance relevant to such requests.

Article 64(6)(b), which deals with trial proceedings, provides that the Trial Chamber has the power to "[r]equire 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."

In cases of non-compliance by States Parties which prevent the Court from exercising its functions and powers under the 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 87(7)). Article 112(2)(f) only provides that the Assembly of States Parties shall "consider pursuant to Article 87, paragraphs 5 and 7, any question relating to non-co-operation"[32].

Conclusion

This is not the place for a thorough evaluation of the efficacy of the powers of the Prosecutor under the ICC Statute. Our cursory review of the main provisions in the Statute concerning the powers, role, and accountability of the ICC Prosecutor, however, does reveal certain obvious weaknesses. At a bare minimum the Prosecutor depends on jurisdictional acceptance by either a territorial State or State of nationality and Pre-Trial Chamber authorization before he or she can start an investigation, unless there is a referral by the Security Council or a State Party. Both requirements represent hurdles which do not confront the Prosecutor in the *ad hoc* Tribunals for the former Yugoslavia and Rwanda, which are not treaty-based bodies, but the results of enforcement action by the Security Council under Chapter VII of the United Nations Charter. Additionally, the Prosecutor must be prepared to fight the admissibility battle against a territorial State, State of nationality or any other State with jurisdiction over the case under investigation if that State challenges the admissibility with the argument that a national jurisdiction is able and willing to genuinely investigate the case. The burden of proof rests on the Prosecutor in such disputes. Proving unwillingness or inability will require the preparation and presentation of evidence of complex systemic facts in a dispute between the Prosecutor and a State. Needless to say, this places the ICC Prosecutor in a situation somewhat different from that of the Prosecutor of the *ad hoc* Tribunals and the Nürnberg and Tokyo Tribunals.

[32] Article 87(5) concerns non-States Parties.

The deficiencies in the State co-operation regime of the ICC Statute are maybe more serious. The ICC Prosecutor has no Statutory right to control the gathering of evidence for his or her investigations. States may conduct relevant investigative steps within their territories through the national police and judiciary based on national legislation in response to requests for assistance from the ICC Prosecutor. The problems this will lead to, especially in cases involving territorial States which do not support the work of the Court, need no further elaboration. It must be expected, however, that Security Council referral of situations to the ICC under Chapter VII of the Charter will remedy this problem, insofar as it is fair to assume that the Security Council will use its competence under the Charter, Article 103 included, to invest the ICC Prosecutor with at least the same powers as those of the Prosecutor of the *ad hoc* Tribunals. It is actually difficult to see how the ICC Prosecutor will be able to investigate and prosecute effectively without such a strengthening of his or her powers. Chapter VII referral also removes the requirement of State acceptance of jurisdiction pursuant to Article 12 and the resource-demanding admissibility disputes under Article 17.

In any event, even if it were to take considerable time before the Security Council and the ICC develops a constructive partnership, the ability of the ICC Prosecutor to seek and analyse information *proprio motu* at an early stage of conflicts involving serious violations of international humanitarian law is very significant. By seeking and analysing material from a variety of reliable sources and receiving written and oral testimony at the seat of the Court, the Prosecutor may be able to preserve evidence which would otherwise not be subsequently available. One also should not underestimate the preventive effects of a permanent Office of the Prosecutor with the capacity to monitor events as armed conflicts threaten or break out.

COOPERATION BETWEEN HUMANITARIAN ORGANIZATIONS AND THE INTERNATIONAL CRIMINAL COURT : A PROPOSAL FOR GUIDELINES

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(This is not an official UN document. The opinions expressed in this paper are the ones of the author and may not reflect the position of the United Nations or its agencies.)

1. There is no doubt that, in July of this year, we witnessed a major event in the history of the protection of war victims. For the first time, the international community as a whole gave itself a permanent and specific tool to ensure the respect of the rules of humanitarian law. I would like to discuss here what consequences the emergence of the International Criminal Court bear on the work of humanitarian organizations and how these should relate to the ICC.

2. Co-operation between the ICC and humanitarian organizations raises various questions.

- What type of co-operation is to be expected ?
- What type of information could be requested and in what form ?
- What consequences could such co-operation have on the activities of the organizations concerned in the country where the suspected crimes were committed, and elsewhere ?
- What guarantees can be offered to ensure the safety of witnesses ?

3. The issue of co-operation with the two existing International Tribunals already raises several of these points. However, the issue of co-operation with the ICC is seen as even more delicate in a humanitarian perspective since the ICC could be competent to investigate alleged crimes in situations where humanitarian organizations are still engaged, and not only as a post conflict response as in the case of the two ad hoc Tribunals.

4. The problem in our view originates from the specificity of the roles of the humanitarian organizations and of the ICC and the need to define a regime of complementarity in the protection of war victims.

5. The role of humanitarian organizations is to assist and protect victims of armed conflict with the support, participation, and consent of parties to the conflict. The ICC's mandate is to prosecute individuals that have committed serious violations of humanitarian law, thereby attempting to ensure the respect of the rights of victims of armed conflicts. There are, therefore, two distinct mechanisms of protection involved:

1) Humanitarian organizations' protection activities in the field, whose effectiveness depends on the will of the parties to the conflict to respect humanitarian law.
2) The ICC role in The Hague whose effectiveness depends on the will of the international community to ensure the respect of humanitarian law.

6. Common Article 1 of the Geneva Conventions refers explicitly to these two mechanisms when it requires States to respect and ensure respect for the rules of humanitarian law. The question of co-operation could be therefore seen as the relationship between these two mechanisms of implementation of humanitarian law; i.e. the extent to which Common Article 1 establishes two distinct and unrelated obligations, or if there is a level of complementarity expected between the two mechanisms, and how this complementarity dictates a regime of co-operation between humanitarian organizations and the ICC.

7. The predominant mechanism to promote the protection of war victims has been for more than a century, and remains to this day, the advocacy role of humanitarian organizations in relation to the parties to the conflict and their watchful presence in conflict areas. UN agencies, the ICRC, and non-governmental humanitarian organizations have been engaged, and are still fully involved in assisting the parties to the conflict in implementing the rules of humanitarian law. Some of these organizations have been more vocal than others when parties to conflicts fail to abide by the international standards. However, in most conflict situations, these parties remain the key partners of humanitarian organizations in protecting civilians against the effect of the hostilities.

8. We know that humanitarian access depends largely on the trust of the parties in the neutral and impartial character of the humanitarian organizations. This relation of confidence is crucial in maintaining presence and activities for any humanitarian organization in a conflict area. It is not surprising, therefore, to observe the rising anxiety of humanitarian organizations on the issue of co-operation with the International Criminal Court. How are humanitarian organizations expected to maintain a trustful relationship with the parties to the conflict while providing information to the Court on their alleged crimes?

9. In our view, the solution to this dilemma resides in the spirit of Common Article 1. Humanitarian organizations and the ICC are an emanation of the same will of the international community. In this sense, they share the same objective: to protect victims of armed conflicts.

10. The only issue is one of effectiveness. In any given situation, how can humanitarian organizations or the ICC promote the rights of the victims in the most effective manner ? There are certainly a lot of situations where humanitarian organizations should not provide information to the Court as it would jeopardize their access and actual protection work with the victims. However, equally, there will be situations where the ineffectiveness of the protection role of humanitarian organizations and the potential restraint that an efficacious Court could provide on the violation of the laws of war dictates the co-operation of all organizations, including humanitarian organizations. In other words, there is no principle, humanitarian or otherwise, that could justify that humanitarian organizations do not testify at the ICC. Only when organizations are in a position to demonstrate that their role in the field and relationship they maintain with the parties is providing actual protection to victims, should they not be requested to cooperate.

11. I would like to review the results of the debates in the preparatory committee, as reflected in the Statutes, as well as the response of humanitarian organizations elaborated within the Inter-Agency Standing Committee.

12. During the preparatory debates, some States argued that humanitarian organizations should respond fully to the requests of the prosecutor and transmit all relevant information to facilitate the work of the Court in gathering evidence. As participants to the Preparatory Committee of December 1997, the UNHCR and the ICRC responded quickly, expressing their concerns with regard to the specificity of their protection mandates. They succeeded in convincing the Preparatory Committee to limit the capacity of the Court to request information from humanitarian organizations.
Article 86, paragraph 6 reads:

> *The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of co-operation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.*

13. In legal terms, a different regime of co-operation has been established based on the governmental or non-governmental character of the organization concerned. There is a Statutory co-operation expected from intergovernmental organizations such as UNHCR, UNICEF or WFP. However, non-governmental organizations and the ICRC should not consider this characterization as a safeguard from co-operation

requests. The Court will certainly have the ability to approach other organizations, directly or via States, to gather needed information. In this case, co-operation may well be more a result of political arguments than legal ones.

14. At a more practical level, we doubt that humanitarian organizations can choose individually to cooperate with the Court. In countries where part of the humanitarian community would be co-operating with the ICC, voluntarily or through the Statutory requests, and others would refuse to cooperate, individual combatants will probably not make a difference between those who testify and those who do not. The security risks linked to reprisals for the arrest or indictment of suspected war criminals through the Court will affect all organizations equally, especially in areas where the distinction between Red Cross, MSF, MDM, HCR or WFP is not fully understood.

15. Concerning the intergovernmental organizations, particularly UN agencies, the Court has still another hurdle to jump before getting information. Article 86 has to be interpreted in the light of Sections 18 and 20 of the Convention on the Privileges and Immunities of the United Nations. Section 18 of the Convention provides that officials of the United Nations shall be immune from legal process in respect of words spoken and written and all acts performed by them in their official capacity. Section 20 of the Convention further provides that:

> *Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.*

16. For a staff member of a UN agency to testify before the ICC, a waiver of immunity by the Secretary-General would be required. To waive this immunity, the Secretary-General will have to determine if invoking the immunity of the staff member would, in the particular case, impede the course of justice, and whether the immunity could be lifted without prejudice to the interests of the Organization.

17. Already UN agencies have been requested to provide information to the ad hoc tribunals for the Former Yugoslavia and Rwanda. Arguments in favour of and against waiving the immunity of staff to testify before these tribunals have been elaborated. Practical arrangements were reached in the case of the ad hoc tribunal for Former Yugoslavia which offered some safeguards for the security of staff testifying before the court, including measures under Rule 70 of the ICTY which guarantees the confidentiality of information and sources in the pre-trial stage. Experience, however, shows how difficult it has been for the ICTY to keep these judicial proceedings confidential.

18. In situations similar to those for which the ad hoc Tribunals were created, where protection mechanisms in the field were rendered meaningless, and assuming that the ICC could offer an effective alternative to assure some restraint in these circumstances, humanitarian organizations will have to cooperate. It is in this context that the Inter-Agency Standing Committee, composed of all major UN agencies, with the participation of NGOs and the ICRC adopted a common position.

> *The members of the Inter-Agency Standing Committee stand ready to cooperate with the Court. This co-operation 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 co-operation between the Court and organizations involved in humanitarian activities.*

19. This Statement was transmitted to the delegations in Rome by the UN Secretary General. It is interesting to note that the ICRC, although not a full member of the IASC, participated in the debates within the Inter-Agency Standing Committee and welcomed the adoption of this common position.

20. There is no doubt that this complementarity must be achieved. As in the case of the two ad hoc Tribunals, important decisions must be taken that may change the way humanitarian operations have been taking place during the last decades. To develop this regime, all sides will need to establish an open and realistic dialogue about the efficacy of their own intervention and the actual risks that such co-operation may incur. The recent history of armed conflicts shows that there is simply no alternative to co-operation, as a symbol of a common effort to put an end to the massive atrocities that we are witness to.

Item 2:

RELATIONS TO STATES NON-PARTY TO THE INTERNATIONAL CRIMINAL COURT

AND

THE PRINCIPLE OF UNIVERSALITY

IN THE EXISTING INSTRUMENTS

CHARACTER OF FUNDAMENTAL RULES OF INTERNATIONAL HUMANITARIAN LAW, REPRESSION OF THEIR VIOLATIONS AND STATES NON-PARTY TO THE COURT

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I The character of humanitarian law

The International Institute of Humanitarian Law, as its title shows, is concerned with international humanitarian law (IHL) in all its aspects, including the reinforcement of that law and the suppression of the serious violations which threaten it.

In this respect, the Institute has in mind this law in its broad sense, protecting in the first place war victims, but extending its scope to categories of victims of other emergency situations. This concept of IHL is based on the practice of the Institute, which examines humanitarian problems in conformity with such a concept, both arising from armed conflict situations and other events, internal disturbances, flows of refugees and IDPs, natural disasters. The establishment of the contents of customary rules would not be easy in every case, therefore the importance of the present efforts of ICRC to define them. The starting point of the Institute is, I think, the demand for the respect of the rule of law. This means that international rules exist, are generally accepted, and all subjects are expected to respect them, to comply with them, and to be responsible for their behaviour. These rules are known in advance, and all persons have the choice to respect them, or not to respect them. The rule of law is the foundation of all civilizations. It is the substitute for arbitrariness and self-will, and the law must be equal for all persons in the same situation.

International humanitarian law is a branch of law and as such it consists of treaty law and customary law. The main treaties in which traditional humanitarian law is to be found, are the Geneva Conventions of 12 August 1949, and their Additional Protocols of 8 June 1977. The first series of these treaties is really universally ratified or acceded to. They are meant to be universal, as war crimes are also a universally defined and condemned violation of the existing rules.

There are cases when one or the other treaty is not in force in a certain situation. But the basic rules described therein are generally accepted as customary law and could be defined, such as the wilful killing of a person who has laid down his arms, or who, as a civilian does not take part in the hostilities. These fundamental rules are universally accepted, all the subjects have an obligation to respect them, there cannot be regional validity of such rules, as the crimes in question committed in any part of the world are the concern of all the nations.

The application of the universally accepted fundamental rules of IHL as customary law was required in various types of situations; man-made disasters such as armed conflicts, international and non-international disturbances, natural and technological disasters, and also mixed disasters, caused by the combined effects of various types of disasters. All these are extraordinary situations affecting basic rights of human beings and requiring special protection and assistance, not necessary in normal times, and extended on the basis of IHL.

The duty of respecting fundamental rules of IHL lies not only on recognized states, but also on the states in the phase of formulation or recognition, insurgents and all kinds of armed groups to whom the status of belligerency has been recognized, expressly or implicitly.

The jurisdiction of the newly created International Criminal Court (hereafter: ICC) is to repress, "The most serious crimes of concern for the international community as a whole." They are most serious among the numerous possible crimes by their effects and consequences: affecting basic human rights, in particular the right to life and health, and to the protection of physical integrity, and threatening the very survival of human beings exposed to such crimes. These crimes are also characterized by the huge number of victims. The crimes in question are committed in violation of what is called international

humanitarian law in a broad sense. Starting from the circle of persons who are victims of armed conflicts, it extends also to other emergency situations which produce large numbers of victims whose fundamental rights are violated.

The extension of the traditional concept of IHL beyond the armed conflict situation is clearly visible in the Statutes of two ad hoc international tribunals, for the former Yugoslavia and Rwanda. In addition to crimes committed in armed conflict situations, punishable are also crimes of genocide and crimes against humanity committed in any situation – armed conflicts, disturbances, peacetime and mixed situations between war and peace. Putting aside the crimes of aggression, which requires further regulation, the other crimes of the jurisdiction of the ICC are the crimes of genocide, crimes against humanity and war crimes. These crimes have in common (a) the gravity of consequences, (b) a special quality of rights violated, those rights which are non-derogatory and whose violation is very inhuman in character and (c) a large number of victims.

The rules protecting persons against such crimes, for the reasons exposed above, enjoy a special treatment in the law of treaties, (Article 60), differing from the treatment of other rules. While the violation of other rules entitles the party victim of a violation to terminate or suspend the operation of a treaty, the "treaties of a humanitarian character do not give the party suffering damage by the non-respect of certain rules the right to respond in the same manner. Committing crimes against certain populations does not authorize the party representing these populations to respond with similar crimes. No reciprocity is permitted in the rules of humanitarian character or, as we would say, the rules of international humanitarian law. We consider that the Institute, as an assembly of people greatly concerned with international humanitarian law, should insist on that special character of this branch of law, and accordingly the special types of legal response.

The humanitarian character of this branch of law calls for specific principles on which its application is based. There are the principles of humanity, impartiality, and neutrality, they are an outstanding feature of humanitarian law. The fact that much of this law has been developed and adopted thanks to the initiative of a well-known world humanitarian organization, the Red Cross and Red Crescent Movement, which is itself based on these principles, is an explanation of the origin of the special character of international humanitarian law.

This was the starting point of the development of this branch of law. But later it expanded covering all extraordinary situations causing huge sufferings.

Further consequences of this special character is that the principle of neutrality demands that in the humanitarian action to enforce and suppress violations of humanitarian rules, all those concerned should not take sides in armed hostilities and in controversies of a political nature, but should have in mind only the interest of the victims, human beings, regardless of their affiliation. This implies an absence of daily political considerations and objectives. This type of law influences both the application of the rules of international humanitarian law and the action to suppress their violations.

The rules of humanitarian law protecting fundamental human values have also the character of jus cogens. They cannot be changed by the will of parties concerned, or imposed by one party on the other. They are universally binding, only changes which improve the protection of the victims are permitted.

All these specific features of humanitarian law have a bearing also on the action to suppress its violation.

All the rules mentioned above have their foundation in the fundamental requirement, the respect of basic humanitarian considerations. The existence of such considerations is confirmed by the International Court of Justice in several of its judgements, such as the Corfu Chanel case and the Nicaragua case. This requirement of general nature calling for humane treatment of persons found in an emergency situation, is then worked out in specific rules relating to different groups of people of different types of attacks on their basic right. As examples, prisoners of war or civilian internees require humanitarian treatment and safety in the camps in which they are assembled forcibly, the same for prisoners of all kinds, and especially the protection from maltreatment and the provision of basic health and survival, goods and services; populations of cities exposed to war require protection from armed attacks and bombardments by various types of weapons; refugees require safety, basic welfare services and the defence of their rights; sick people require adequate medical attention, etc. In this way, on the basis of humanitarian considerations, sets of rules to protect human beings from various dangers and threats to their fundamental rights are enacted.

The question requiring an answer is, why IHL should be universal and not divided into regional systems. The universal character of the rules of IHL is determined by specific features of IHL which have been exposed above. The gravity of the consequences of violations of the rules of this branch of law troubles the conscience of mankind and provokes reaction by various bodies of the organizations representing the international community as a whole, so that these violations, wherever they occur, become the concern of all the members of that community. Therefore, such violations must be repressed at the universal level. The universality of the concern for grave breaches of IHL calls for the universality of repression., and this finds its expression in the creation of ICC.

II Repression of violations

The rules of international humanitarian law are very developed and elaborate. Based on certain principles, they regulate in detail various aspects and various situations in which it is necessary to apply that law. In contrast to this, the mechanism for suppressing its violations is very modest. There is certainly, in the first place a duty of states and other subjects to suppress the violations of this so important and vital branch of law. Any legal system is not complete without an adequate mechanism for the suppression of its violations, this is inherent in law. Without this, the system of that law is not sufficiently effective.

There exists various ways of suppressing violations, preventive in the form of measures of implementation, but also repressive. Concerning repression, in contrast to the universality of the system of material law, there was no system of universal repression, until the creation ICC.

At present there are two basic mechanisms for repression: national jurisdiction and ad hoc tribunals.

National courts were supposed to render justice, to punish the perpetrators of the crimes committed. Their effects in suppressing violations and reaffirming humanitarian law were very disappointing. They were often motivated by internal political reasons, states and other subjects were very reluctant to bring the criminals to justice, they were very politically selective in choosing the person to be tried, and, especially, they avoided prosecuting their own citizens, bringing only foreigners to justice.

They often did not qualify the criminal acts adequately. In addition to that, they did not prosecute the persons really responsible, especially the high level people, but only small executors at a low level. In most cases of violations, however, national courts did not act at all. The effect of national repression as a factor to avert massive crimes was non-existent or very small. There was also the absence of uniformity in repressing the violations, including the definition of crimes and principles of prosecution.

The other way of repressing violations, through international ad hoc tribunals, was also deficient. In most conflicts or emergency situations producing large-scale violations after the end of World War II there were no international tribunals, and we know that there were many wars in which horrible crimes were committed, so that, the perpetrators went unpunished. Ad hoc tribunals were created recently for two cases (the former Yugoslavia and Rwanda.). It is premature to arrive at any conclusion, these tribunals are still working. They are no doubt an important step and precedent in the development of the law of repression of violations of international humanitarian law.

Their activity must be in conformity with the fundamental requirement, the rule of law. Created by an executive and highly politicized body, objections were made that this may bring in political partiality, negative selectivity and arbitrariness in selecting those to be prosecuted, difference in the treatment both of the accused and the victims. Certain indictments have been used by various political organs for their political purposes, thus increasing the influence of the executive bodies on the judicial ones, while these two functions should be separated and independent in any modern and democratic society. These tribunals should contribute to the general conviction that justice has been rendered. These objections are still to be studied, in order to see whether they are well-founded or not, and in order to evaluate their work properly. In any case, the ad hoc tribunals do not comply with the principle of universality, which is present in material law.

In comparison to these two methods of suppressing violations, the creation of ICC is a real step forward. First, it satisfies the principle of universality; all crimes, in all cases of armed conflicts and other emergencies, should be prosecuted, and this would bring the universality of material law in line with the universality of the law on prosecution by applying the same principles of procedure and definition of

crimes. The fact that it is a permanent court also strengthens the principle of universality and continuity. It would overcome the deficiencies of the two other methods and guarantee the objectivity and impartiality of justice.

The way to the creation of ICC is traditional, leaving the states the possibility and freedom to join in. This Court will reduce the role of political factors and arbitrariness in rendering justice, which is present particularly in national courts. It is in the interest of the victims to achieve this. There should be no Statutory limitation for prosecuting the violators of humanitarian law, and this again contributes to the principles of universality. All these advantages of ICC compared to other ways of suppressing violations would certainly enhance the reputation of the judicial function in the international community.

It is evident that other ways will still be open to the states and other entities in repressing violations of humanitarian law. They should be inspired by the Statute and practice of ICC, when this is developed.

There are certainly deficiencies in the legal construction of ICC. It is normal that a new legal body, created by general international agreement, is not perfect, it is a compromise on many points. But it is better to have such an imperfect body than none at all. Many of these deficiencies could be removed by way of amendments and by the Review Conference. This is, of course, the task for the future. But the whole project must be viewed in the long-term perspective.

The big problem that remains is whether the states would accept the ICC in large numbers, how many of them would abstain, and in particular whether the big powers would accept it. If too many states abstain, at least for the time being, what would be the value of the newly created judicial body of the international community, what would be its reputation? It is not possible to give an answer to this question, but it is necessary to draw attention to this fact.

III The conclusions

Certain conclusions could be drawn from the above considerations.

The ICC is an important step in creating the universal criminal jurisdiction in suppressing the most serious violations of international humanitarian law, reaffirming its value and increasing its efficiency. The functioning of such a court is overdue.

Therefore, ICC deserves full support. There is a legal duty of all the states to seriously consider accepting the ICC and using it.

The states not accepting the ICC are still bound by the fundamental legal duty to repress the violations of IHL; they have to see how to fulfil this duty and to render justice impartially and in conformity with the gravity of the crimes committed.

ICC should be looked upon as a long term project. It is not possible to expect quick results, but it is important that this project be launched. This would gradually lead to satisfying the principle of universality, which is important in this case. The world is composed of nations that are interconnected, have close ties, and their common interest is to establish and develop this system of repression of crimes of concern to all. This explains the necessity to give priority to establishing an international criminal court just for the enforcement of the rules of IHL. The general public would easily understand the urgent need for such a repression.

Other legal ways would continue to be practised even by states that have accepted ICC.They should be inspired by the Statute of ICC, and later by its practice, once this practice has been developed. The crimes suppressed by this Court are universally and without exception condemned, and ICC should contribute to rendering justice. It is not sufficient just to achieve this legal analysis. It is necessary to move all those concerned so that the political will to accept this new institution of the international community is promoted and to make it work in accordance with its Statute, respecting the rule of law as the supreme requirement.

If the XXIst century is going to be the era of human rights, violations of international humanitarian law as a part of general human rights must be suppressed.

Item 3:

WAR CRIMES AND CRIMES AGAINST HUMANITY

COMMENTS

Professor Theodor MERON, New York University, USA

Regarding the crime of genocide, Article 6 repeats verbatim Article 2 of the Convention on Prevention and Punishment of the Crime of Genocide as adopted by the U.S. General Assembly on December 9, 1948.

Article 7 on Crimes against Humanity is the first comprehensive multilateral treaty statement of crimes against humanity. It is accompanied by definitions of the principal offences. The Articles on crimes against humanity and on war crimes are, on the whole, enlightened, credible and up to date.

The chapeau of crimes against humanity mentions no nexus to armed conflicts, either international or internal in character. The Statute thus confirms that crimes against humanity are as applicable to peacetime as they are to wartime. Crimes against humanity under the Rome Statute, as well as some of the offences listed for non-international armed conflicts, overlap with some violations of fundamental human rights, which thus become criminalized under a multilateral treaty.

The chapeau does not require proof of discrimination against the targeted civilian population. Article 7 makes discriminatory intent pertinent only to the offence of persecution (Article 7 (1) (h)).

The chapeau adheres to the disjunctive approach ("widespread or systematic attack") already followed by The Hague Tribunal. The disjunctiveness of the Statute is, however, balanced by a definition of "attack directed against any civilian population" (para. 2(a)) as a course of conduct involving the multiple commission of acts (referred to in para. 1). This definition of "attack" should not be regarded as raising the threshold for crimes against humanity. It has always been unlikely that acts not involving a multiple commission of attacks would be tried by the International Criminal Court as crimes against humanity in the first place. The definition of "attack" further recognizes that crimes against humanity can be committed not only by states but also by various organizations ("pursuant to or in furtherance of a State or organizational policy to commit such attack"). For crimes against humanity to be established, an element of intentionality must be shown ("knowledge of the attack"). This provision is not entirely clear and could benefit from further elaboration through the elements of crimes (Article 9 of the Statute).

The chapeau is then followed by the enumeration of eleven offences, building on but significantly adding to the Nuremberg list. These offences or some of their terms are then specifically defined. These definitions in themselves make a considerable contribution to international law.

The additions to Nuremberg are forcible transfer of population (not only deportations), imprisonment and other severe deprivations of personal liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity, enforced disappearance of persons and apartheid.

Article 8 on war crimes contains, first, a section (a) tracking grave breaches of the Geneva Conventions, i.e., acts against persons or property protected by those Conventions, then a section (b) on other serious violations of laws and customs applicable in international armed conflict, and several sections on non-international armed conflicts.

Section (b) is a very important and rather comprehensive statement of offences which draws on the Hague Law and Additional Protocol I to the Geneva Conventions, and thus goes beyond the grave breaches provisions of the Geneva Conventions. The innovations include criminalization of various acts against UN peace-keepers and humanitarian organizations, their flags, emblems and assets, the criminalization of transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies (which, except for the addition of the words "directly or indirectly," is a grave breach of Protocol I, but not of the Fourth Geneva Convention), committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions, conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in the hostilities, and intentionally using starvation of civilians as a method of warfare by depriving them of

objects indispensable for their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions. One provision (para. 2 (b) iv)) concerns collateral damage or proportionality. It requires for the criminalization of an attack launched in the knowledge that such attack will cause an excessive damage to civilians or to the natural environment, that the attack be "*clearly* excessive in relation to the concrete and direct *overall* military advantage anticipated." The words which I italicized indicate departure from Protocol I language and constitute a certain clarification of the Protocol's principle of proportionality.

Section (c) repeats verbatim and declares criminal serious violations of common Article 3. Drawing on Article 1(2) of Additional Protocol II, the Statute (section (d)) states that section (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.

Section (e) – drawing on the Hague Law and the Additional Protocols, contains an important and significant list (but far shorter than the list of war crimes drafted for international armed conflicts) of other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. The recognition that war crimes under customary law are pertinent to non-international armed conflicts represents a significant advance. Section (e) – drawing on Additional Protocol II – also criminalizes the displacement of the civilian population for reasons related to the conflict, but this is qualified by a reference to the security of the civilians or imperative military reasons.

Sexual offences – rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of common Article 3 – are criminalized for non-international armed conflicts as well. Conscription or enlistment of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities is criminalized (note that there is no mention of national armed forces for non-international armed conflicts, as in section (b)). Non-inclusion of any weapon, even poison gas, for non-international armed conflicts is unfortunate. The possibility remains, however, of considering the use of gas against any civilian population in any internal conflict – or even in the absence of an armed conflict – as a crime against humanity.

Despite considerable pressure from some states, the Rome Conference resisted attempts to change the threshold for non-international armed conflicts to that contained in Article 1 (1) of Additional Protocol II. Accepting such changes would have made these sections virtually ineffectual. Instead, section (f) repeats the already mentioned language of Article 1 (2) of Additional Protocol II and adds that paragraph (e) applies to armed conflicts that take place in the territory of a state when there is a protracted armed conflict between governmental authorities and organized armed groups, and – reflecting recent developments of the law – between such groups. The reference to protracted armed conflict was designed to give some satisfaction to those delegations that insisted on the incorporation of the higher threshold of applicability of Article 1 (1) of Additional Protocol II. Attempts to interpret protracted armed conflict as recognizing an additional high threshold of applicability should be resisted.

The offences stated in the Statute will be amplified by "elements of crimes" to be adopted by a two-thirds majority of the Assembly of States Parties, (Article 9). Such elements shall assist the Court in the interpretation and application of Articles 6, 7 and 8. They must be consistent with the Statute.

ROLE OF THE INTERNATIONAL CRIMINAL COURT IN THE PROTECTION OF REFUGEES AND DISPLACED PERSONS

Ms Debbie ELIZONDO
Deputy Delegate of UNHCR in Rome

UNHCR strongly supported the establishment of an International Criminal Court. Its own experiences in places like the former Yugoslavia and the Great Lakes region, where refugees and displaced persons under its mandate have been victims or witnesses of serious international crimes, show that criminal justice has an important part to play in reconciliation and peace-building. An International Criminal Court with jurisdiction over international crimes would have a deterrent effect on such crimes, thus impacting positively situations which give rise to refugee flows and displacement.

At the same time, UNHCR, as a UN humanitarian body, along with other humanitarian agencies, is increasingly operating in situations where «war crimes» and «crimes against humanity» may be committed.

In this sense, I would like to set out UNHCR's position on a number of specific issues of direct concern to the office which are covered in the Statute of the Court under genocide, war crimes, and crimes against humanity, to mention a few.

1. Exclusion clauses

We believe that the Court will ensure a more effective implementation of the « exclusion clauses » contained in the international refugee instruments (Statute of UNHCR as well as the 1951 Convention relating to the status of refugees) whereby individuals, in regard to whom there are serious reasons for considering they have committed genocide, crimes against peace, war crimes or crimes against humanity, are excluded from international protection as refugees. In interpreting the exclusion provisions, UNHCR has resorted to guidance from international instruments existing at the time the 1951 Convention came into force. It has also resorted to guidance from such recent instruments as the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Statute of the International Criminal Tribunal for Rwanda (ICTR). In this regard, the Statute of the Court will provide more authoritative guidance on the interpretation of the clause and by making sure that those «excluded» are brought to justice.

It may be noted that UNHCR has previously deemed as « excludable » a number of individuals on the basis of their indictment by the ICTR.

Therefore, UNHCR welcomed the inclusion of genocide, war crimes and crimes against humanity as crimes within the jurisdiction of the Court.

2. War Crimes

Problem: In no treaty can you find a consistent definition of War Crimes.
This was one of the most complicated sections of the Statute. A rather high threshold was included relating to the whole category of war crimes, as the Chapeau of Article 8 provides that *the Court shall exercise jurisdiction over such crimes in particular when committed as a part of a plan or policy or as a part of a large-scale commission.* However, considering that some States supported an even more restrictive chapeau, (providing for a jurisdiction of the ICC over war crimes **only** when committed as a part of a plan, etc.), the definition finally adopted should be considered as an intermediary one between the above-mentioned restrictive language and the provision of no chapeau at all. This differs from definitions in international humanitarian law and there is serious concern that the difference weakens aspects of the Geneva Convention. Sections A and B of Article 8 deal with international armed conflicts, while sections C and D are applicable to acts committed in the context of internal armed conflicts.

UNHCR supported strongly the position that «war crimes» should be defined to include criminal acts committed in the context of internal armed conflicts as well as international conflicts. Civil war is more prevalent than international conflicts and are as heinous as those committed in international conflicts. This has been UNHCR's experience in both the former Yugoslavia and the Great Lakes region and perpetrators must not go unpunished. In addition, it is often crimes committed in internal armed conflicts which states may be unable or unwilling to prosecute. Although war crimes committed in internal armed conflicts were finally included in the Court's jurisdiction, the decision to retain internal armed conflicts in the treaty came only in the final days of the Conference after strong lobbying by the International Committee of the Red Cross, and after UNHCR and the High Commissioner for Human Rights circulated a letter among key delegates urging them to support inclusion. The lobbying paid off. Internal armed conflict was included in the final treaty.

UNHCR strongly supported the inclusion of the following war crimes in the jurisdiction of the Court:

a) **Armed attacks against civilians**

In UNHCR's experience with refugees and displaced persons, civilian populations are innocent victims of war; thus any deliberate attack on them is morally unjustified and particularly heinous.
Protocol I to the Geneva Convention specifically prohibits attacks against civilian populations.

b) **Denial of humanitarian assistance**

The intentional starvation of civilians as a method of warfare is an act prohibited under Protocols I and II Additional to the Geneva Convention; and the impeding of relief supplies may result in starvation of civilians. UNHCR's own experience demonstrates that in many modern-day conflicts the denial of humanitarian access to vulnerable populations is often intentional and used as an instrument of warfare. Regrettably, «impeding relief supplies» was not recognised as a crime in the context of internal conflicts but only in international conflict.

c) **Forceful displacement** with the deliberate aim to achieve ethnic homogeneity in a given geographical area. Within the context of international armed conflicts, **the deportation or transfer of the population of an occupied territory within or outside this territory** constitute a grave breach of the Geneva Convention. Within the context of internal conflict, 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,** constitutes an act prohibited under Protocol II Additional to the Geneva Convention. Its own experience in the Former Yugoslavia has convinced UNHCR that the deliberate displacement of civilians as the objective of a conflict is particularly deplorable and heinous. UNHCR lobbied hard for delegates to name **forcible deportation of civilians** as crimes in international and internal armed conflicts. The inclusion of these crimes in both internal and international armed conflict in the Statute of the Court was important. Displacement of the civilian population was also included in the list of crimes against humanity.

d) **Laying of anti-personnel mines**

Such mines are often used to prevent those who have been forced out of their homes from going back. Injuries caused by landmines are indiscriminate and excessive: and they can be inflicted long after the conflict is over. UNHCR supported the criminalization of the use of landmines in the context of both international and internal conflicts. Regrettably a specific reference to anti-personnel mines was dropped. The Statute, however, provides the possibility of increasing the list of prohibited weapons in later stages, as and when weapons come under comprehensive ban.

e) **Attacks on humanitarian workers**

This is a matter of gravest concern to all humanitarian agencies, and not least to UNHCR. Over the last six years, over 140 UN civilian staff have been killed in the course of duty, and a similar number taken hostage or imprisoned. The inclusion of attacks against humanitarian workers in the jurisdiction of the ICC, in the context of internal armed conflict, represented a very important step in this direction.

f) **Outrages upon personal dignity, in particular humiliating and degrading treatment**

Certain acts of sexual violence were also included as war crimes within the jurisdiction of the Court. Gender-related crimes raised substantive debate during the whole conference and were included both as war crimes and as crimes against humanity. The category concerned covers a wide and comprehensive range of acts to which women are victims in wartime and in peacetime. The list of gender crimes included: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other comparable forms of sexual violence.

Forced pregnancy proved to be one of the most controversial part of this category of crimes insofar as a well-established definition of this heinous act does not exist in humanitarian law. A definition was drawn according to which this crime is composed of: unlawful confinement of a woman, who has been forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

In order to address the concerns of those States which fear an indirect legitimization of abortion, a language has been included making clear that the definition concerned does not affect national laws relating to pregnancy.

g) **Recruitment of children into armed forces or groups**

The inclusion of such crimes under the jurisdiction of the Court in both international and internal armed conflict, is the result of a compromise between different interpretations given by countries to this concept. The final language prosecutes the crime of conscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities.

The inclusion of the above-mentioned acts as war crimes represents a significant development in humanitarian law. It is however, unfortunate that starvation of civilians and wilful impeding of relief supplies as a war crime were included only within the jurisdiction of international armed conflict. This represents a serious gap in the protection of internally displaced persons.

3. Crimes against humanity

No nexus with armed conflict. They may occur in peace time as well. Crimes against humanity are in essence crimes which are so heinous that they shock the human conscience; therefore, they should be distinguished from common crimes.

A compromise language was adopted for the chapeau of Art. 7, according to which any of the acts regarded as Crimes against humanity shall be prosecuted when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack. The list of acts considered as "crimes against humanity" was extended to include apartheid, enforced disappearance, certain acts of sexual violence and enslavement.

Deportation or forcible transfer of population is also included in the list of crimes against humanity as well as gender-related crimes.

4. Witness protection

Last but not least, because of the nature of its work, UNHCR is too often the unfortunate witness to atrocities. We are committed to co-operating as much as possible with the International Criminal Court in sharing information which may help to bring the perpetrators of such crimes to justice as we have done with the Tribunals for former Yugoslavia and Rwanda. At the same time, we have a responsibility to protect our staff and safeguard our operations. For this reason, it was important that broad provisions

concerning witness protection and the maintenance of the confidentiality of information provided to the Court or Prosecutor were incorporated, addressing most of our concerns in this respect.

5. Conclusion

The establishment of a permanent International Criminal Court is an historical development, but there remains widespread dissatisfaction over restrictions placed on the exercise of its jurisdiction. These include a provision whereby State Parties may opt out of the Statute for an initial period of seven years in relation to war crimes committed by their nationals or on their territory (as if war crimes were less important than crimes against humanity…) Additionally, a precondition for the exercise of jurisdiction of the Court is the consent of the territorial State or the State of which the indicted person is a national. Nonetheless, the overwhelming support given by States to the Court's establishment is an indication of the growing interest of the international community to ensuring that victims of crimes against humanity and serious breaches of humanitarian law have a final recourse to justice and perpetrators are brought to justice.

Inevitably, the Court that emerged from the Conference is a watered-down version of what HCR and others had envisioned. But, the challenge now is to obtain the 60 ratifications that would bring the Court to life and then work to gradually expand its scope.

INTERNATIONAL CRIMINAL COURT:
Role of the ICRC during and after the negotiations of the Statute

Ms Marie-Claude ROBERGE
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After years of relentless efforts and five weeks of intense and difficult negotiations, a Statute for an International Criminal Court (ICC) was finally adopted and opened for signature in Rome on 18 July 1998. This historical event represents a major step in the battle against impunity and the better respect for international humanitarian law. The commission of atrocities in total impunity has been the reality for too long and has given *carte blanche* for the further perpetration of such crimes. The present system of repression obviously has its shortcomings and the time has long come to set up a new system to ensure effective prosecutions. A criminal court, whether at the national or international level, does not put an end to the commission of crimes but it may serve as a deterrent and consequently may contribute in seeing a reduction of the number of victims. Hence, it is undoubtedly worth welcoming the results reached in Rome in the hope that the Court will be able to effectively fulfil its mandate.

The basis for ICRC's participation in the process

The ICRC is intensely involved in conducting relief and protection operations in the midst of armed conflicts. Moreover, it also has a mandate conferred on it by the States party to the 1949 Conventions to work for the better respect of international humanitarian law by all those which have a duty to apply it and to encourage its development. Accordingly, the ICRC welcomes the undertaking of implementation measures which require preventive action, such as education and training, as well as measures of repression. In this regard, and through its Advisory Service, the ICRC provides technical assistance to States in adopting laws necessary for the investigation and prosecution of suspected war criminals as required by the Geneva Conventions. It also supported the establishment of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda and participated in its role of expert in international humanitarian law during the negotiations leading to the adoption of the Statute in Rome.

ICRC's role during the negotiations

The ICRC has been involved in the negotiations both in New York and in Rome on issues directly related to its mandate. It intervened in its role of expert and guardian of international humanitarian law. It also encouraged States to establish an effective international criminal court, empowered to take adequate and effective action to fulfil its mandate. It took a strong position on the following issues: 1) Definition of war crimes, including the proposal to add a threshold in this definition; 2) Automatic jurisdiction of the Court; and 3) Importance of an independent Prosecutor.

Emphasis, however, will be made on the definition of war crimes.

Definition of War Crimes

The ICRC participated most actively in the definition of war crimes. In February 1997, it contributed to the work of the United Nations Preparatory Committee for the Establishment of an International Criminal Court (PrepCom) by submitting a working paper containing a list of war crimes which the ICRC believed should fall under the jurisdiction of the Court.[33] The list of war crimes was divided into three categories. Under the first category were included the grave breaches of humanitarian law committed in international armed conflict listed in the 1949 Geneva Conventions and the 1977 Additional Protocol.[34]

[33] Working Documents by the ICRC on the ICC can be found on the ICRC Website: www.icrc.org
[34] In February 147 States had ratified Protocol I. As of 11 September 1998, 151 States.

Under the second category, other serious violations of international humanitarian law applicable in international armed conflicts were included. This list contained violations of the laws and customs of war not found under category one and some relating to the means and methods of warfare which are considered to be unacceptable or clear violations of customary international law rules. This, amongst the crimes included in this second category : the recruitment of children under the age of fifteen years into the armed forces or allowing them to take part in hostilities, and the employment of weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate.

Finally, under the third category a list of war crimes committed in non-international armed conflicts was provided. This list was of particular concern to the ICRC since most conflicts today are internal, and the Court needed to assert its jurisdiction over these war crimes for its effectiveness. This list contains violations of the most fundamental principles of humanitarian law as codified under common Article 3 of the Geneva Conventions, as well as other serious violations considered to be war crimes whether they are committed during international or non-international armed conflicts. Many of these are codified under Additional Protocol II to the Geneva Conventions.[35]

Assessment of the Statute adopted in Rome on some of the points of concern to the ICRC

The ICRC is overall satisfied with the results of the negotiations which led to the adoption of the Statute for an international criminal court in Rome. Yet, beyond the overall picture, it is also important to have a closer look at the results reached on some issues.

Emphasis will be made on the definition of war crimes and on the automatic jurisdiction of the Court.

Jurisdiction of the ICC over war crimes committed in both international and non-international armed conflicts

Although not all serious violations of international humanitarian law have been listed in the definition of war crimes, a large number have been included. The major accomplishment certainly resided in the inclusion in the list of war crimes, despite some resistance, of a section on war crimes committed during non-international armed conflicts.

With regard to particular offences, it is noteworthy that rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilisation are all specifically included as war crimes in the Statute. Conscripting or enlisting children under the age of fifteen years into the national armed forces (or, in the case of internal armed conflict, into armed groups) or using them to participate actively in hostilities is also recognised as a war crime under the jurisdiction of the Court.

The ICRC, however, regrets the exclusion of some war crimes in the list adopted in Rome. To name only a few, no provisions are to be found on the unjustifiable delay in the repatriation of prisoners of war or civilians and on the launching of an indiscriminate attack affecting the civilian population or civilian objects. The provision on weapons has been kept to a minimum due to the difficulty of reaching consensus, largely because of the desire by some States to see the inclusion of nuclear weapons in the list of prohibited weapons and the resistance of others to such inclusion. Accordingly, nuclear, biological, blinding laser weapons, and anti-personnel mines are excluded. As a reminder, the ICRC favoured the inclusion of a generic clause stating the long-standing rule regarding the prohibition of using means and methods of warfare of a nature to cause a superfluous injury or unnecessary suffering, or which are inherently indiscriminate. It is hoped that the list of prohibited weapons will be extended at the next Review Conference.

As regards to the list of war crimes committed during non-international armed conflicts, the ICRC deeply regrets that the prohibition of intentionally starving the civilian population has been excluded, that no prohibited weapons list is to be found, nor provisions on the prohibition to cause wilfully widespread, long-term and severe damage to the natural environment.

Nevertheless, the ICRC remains hopeful and determined to act for a more complete list of war crimes to be adopted at the Review Conference due to take place seven years after the entry into force of

[35] In February 139 States had ratified Protocol II. As of September 1998, 143 States.

the Statute. This should be made possible with the increasing number of States Parties to the Additional Protocols to the Geneva Convention (to this date respectively 151 and 143) which would have less difficulty in accepting a more complete list of war crimes.[36]

As regards to the inclusion of a threshold in the definition of war crimes, although one has been introduced, it is not exclusive. The Statute provides that 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. Although emphasis is given to the necessity of a certain threshold, the Court is left with the faculty to look into single acts; therefore, the ICRC feels that this provision is acceptable.

The ICRC's most serious disappointment resides in Article 124 which singles out war crimes. This Article provides that on becoming a party to the Statute, a State may declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes when they are alleged to have been committed by its nationals or on its territory. This, in fact, creates a different regime for war crimes which appears to send a message that war crimes are not as serious as the other above-mentioned core crimes. Yet, international law already recognises that obligation for States to prosecute war criminals no matter their nationality or where the crime was committed. The ICRC strongly encourages States not to make such declaration and wishes that this Article be deleted at the Review Conference.

Automatic jurisdiction over genocide, crimes against humanity and war crimes

After very intense debate on this fundamental point, States finally agreed to accept the principle that when a State becomes Party to the Statute it accepts the jurisdiction of the Court with respect to the four core crimes of genocide, crimes against humanity, war crimes, and aggression. When the jurisdiction of the Court is triggered by the Prosecutor or a State party, the Court may exercise its jurisdiction if one of the following States are bound by the Statute or have accepted the jurisdiction of the Court: the State on the territory of which the act or omission in question occurred or the State of which the person being investigated or prosecuted is a national. If the consent of a State that is not Party to the Statute is necessary in light of above conditions, it may make a declaration to the effect that it accepts the exercise of jurisdiction of the Court with respect to a crime.

No consent is required from a State when the Security Council refers situations to the Prosecutor under Chapter VII of the Charter of the United Nations. The Security Council may also require that no investigation or prosecution commence or proceed for a renewable period of 12 months. This can only be done once a resolution to that effect is adopted under Chapter VII of the UN Charter.

The issue of jurisdiction was certainly amongst the most difficult and important issues to be resolved. Although the outcome is positive, a clear practical achievement will be reached only if a large number of States ratify the treaty, thus allowing the Court to exercise its jurisdiction when necessary, especially due to the limited role of the custodial State.

It is very unfortunate that the proposal to give automatic jurisdiction to the Court in cases when the custodial State had ratified the treaty has not been accepted. In practice, the custodial State can play an important role in the effective prosecution of war criminals. Accordingly, only wide ratification of the Statute would overcome these limited alternatives for the Court to exercise its jurisdiction.

ICRC's role after Rome

Now that the Statute of the International Criminal Court has been adopted, an enormous task remains before the Court is fully established and operational, as some issues still remain to be resolved. One of these issues is the drafting of an Annex on the elements of crimes which is intended to assist the Court in the interpretation and application of Articles 6, 7, and 8 dealing with genocide, crimes against

[36] It is noteworthy that the possible consequences of the exclusion of some war crimes from the list or the departure from texts already widely agreed upon in the Additional Protocols have been limited. As such, Article 10 of the Statute provided specifically that "Nothing in this Part [which includes the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

humanity, and war crimes.[37] The ICRC intends to participate actively in this process and in particular with respect to the elements of war crimes.

It is clear that for the Court to be truly effective, a very large number of States must ratify the Statute. In this regard, the ICRC will encourage the ratification of the Statute through its delegation and with the assistance of the Red Cross and Red Crescent Societies worldwide.

Furthermore, in light of the principle of complementarity between the Court and national criminal jurisdictions, efforts must also be intensified to develop national legislation implementing the universal obligation to prosecute suspected war criminals wherever they may be. States will continue to have a duty to exercise their criminal jurisdiction only when suspected criminals have not been tried in domestic courts. Accordingly, the need to ensure national implementation measures will become more evident for States. In this context, the ICRC will continue to offer its support through its Advisory Service by giving technical assistance to States in adopting laws necessary for the investigation and prosecution of suspected war criminals.

In conclusion, the ICRC sincerely hopes that the new Court will make an effective contribution for a better respect of international humanitarian law and for the reduction in the number of victims. It appeals to all States to become Party to the Statute of the International Criminal Court and to take all necessary steps to ensure a successful beginning to and efficient functioning of the Court's activities.

[37] The draft text for the elements of crimes shall be prepared by a Preparatory Commission which will consist of representatives of States which will have signed the Final Act of the Conference and other States which will have been invited. They shall be adopted by two-thirds majority of the Assembly of States Parties and be finalised before June 2000.

L'INFLUENCE DE LA COUR PENALE INTERNATIONALE SUR LA LEGISLATION INTERNE

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1. Bien qu'*a priori*, le Statut de la Cour pénale internationale (CPI) ne doive lier que les Etats qui l'ont ratifié ou y ont adhéré (Statut, art.125), il ne devrait pas influencer la législation de ces seuls Etats. A partir du moment où le Statut entrera en vigueur (le 1er jour du mois suivant le 60e jour après le dépôt du 60e instrument de ratification ou d'adhésion, art.126), la CPI pourra être saisie soit par le Procureur agissant *proprio motu* ou à la demande d'un Etat partie, soit par le Conseil de Sécurité (art.13). Or, si dans la première hypothèse - saisine par le Procureur - la Cour n'est compétente que si le crime visé par le Statut a été commis sur le territoire d'un Etat partie ou par le ressortissant d'un Etat parti (ou dans chacun de ces deux cas par un Etat ayant reconnu la juridiction de la CPI, art.13§3), dans la seconde hypothèse - saisine par le Conseil de Sécurité -, la Cour devrait être compétente quelque soit le lieu du crime ou la nationalité de son auteur (art. 12§ 2 *a contrario*). En d'autres termes, la Cour serait compétente à l'égard de l'ensemble des Etats membres des NU, et non plus seulement à l'égard des seuls Etats parties ou ayant reconnu sa compétence.

L'incidence du Statut sur la législation interne des Etats doit donc être considérée indépendamment du point de savoir si les Etats sont parties ou non au Statut.
Cette incidence peut jouer de manière directe (**I**) et indirecte (**II**).

I. L'incidence directe du Statut de la CPI sur la législation interne des Etats

Le Statut oblige directement les Etats parties à adapter leur législation interne dans la mesure où ces Etats sont tenus de collaborer avec la Cour (art.86-102) (A). Ils peuvent également être amenés à modifier leur législation dans la mesure où ils acceptent de prêter leur assistance à l'exécution des peines prononcées par la Cour (art. 103-111) (B).

A. L'obligation de coopération avec la Cour

Les Etats parties doivent coopérer avec la Cour notamment:
- en arrêtant et en remettant à la Cour les personnes qu'elle recherche (art. 87 §§ 1 et 3; art. 92 § 1);
- en collaborant avec la Cour pour les recherches et les enquêtes: identification et localisation de personnes ou de biens, récolte de dépositions, interrogatoire de personnes recherchées, signification de pièces, etc. (art. 93 §1);
- en autorisant le Procureur à se rendre sur leur territoire aux fins d'interrogatoire ou d'inspection de sites publics (art. 99 § 4).

Le Statut donne un certain nombre de précisions sur ces demandes, mais il n'est pas sûr qu'elles soient suffisantes pour que le Statut puisse s'appliquer directement comme tel dans l'ordre juridique interne et compléter ou se substituer, si nécessaire, à la législation existante. Autrement dit, il ne semble pas être *self-sufficient*, c'est-à-dire de nature à permettre aux Etats d'y donner suite sans devoir adapter leur législation, même si le Règlement de procédure et de preuve, lorsqu'il aura été adopté par l'Assemblée des Etats parties (art. 51 § 1), devrait préciser davantage un certain nombre de règles.

Il est significatif que dans le cas des TPI, la plupart des Etats ont adopté des dispositions visant à mettre en œuvre au plan interne leur obligation de coopération prévue par les Statuts de ces tribunaux (TPIY, art. 29; TPIR, art. 28). Par exemple, la Belgique, dans sa loi du 22 mars 1996 relative à la reconnaissance des TPI et à la coopération avec ces tribunaux[38], réglemente:

- la procédure de dessaisissement des juridictions nationales au profit des TPI (compétence de la Cour de Cassation belge);

[38] M. B., 27 avril 1996

- l'entraide judiciaire pour la collecte d'éléments de preuve, l'expédition de documents, la recherche de personnes (application des lois belges régissant cette matière);
- l'arrestation et le transfert de personnes aux TPI (compétence de la chambre du conseil du tribunal de l'instance du lieu de résidence ou d'arrestation de la personne recherchée).

De fait, dans le cadre plus général de l'extradition, ces questions sont réglementées par la loi (lois du 1er octobre 1833 et du 15 mars 1874 sur les extraditions, modifiées à diverses reprises), et comme il n'y a pas mal de différences entre le droit classique de l'extradition, et la coopération avec une juridiction pénale internationale, il était impossible dans le cadre d'une réglementation pénale - toujours d'interprétation restrictive - d'appliquer *mutatis mutandis* et par analogie ces lois à la coopération avec TPI. Il a donc fallu compléter l'arsenal législatif.

Il devrait en aller de même avec le Statut de la CPI qui, d'une part, oblige les Etats parties à prévoir dans leur droit national les "procédures appropriées" pour mettre en œuvre les différentes formes de coopération (art. 88), d'autre part, soumet expressément à la législation nationale de l'Etat requis l'exécution des demandes d'arrestation et de remise d'une personne (art. 89 § 1; 92 § 3), ainsi que l'exécution des demandes d'entraide judiciaire en matière d'information et d'instruction (art. 93 § 1; 96 § 2,e; 99 § 1).

B. L'exécution des peines prononcées par la Cour

Les considérations qui précèdent s'appliquent également à l'exécution des peines prononcées par la Cour. Celles-ci sont en effet purgées dans un Etat désigné par la Cour sur la liste des Etats qui lui ont fait savoir qu'ils étaient disposés à recevoir des condamnés (art. 103 § 1,a).

Même si, en vertu du Statut (art. 103 § 3, a), ces questions seront réglementées de manière plus précise dans le futur Règlement de procédure et de preuve, l'exécution des peines prononcées par la CPI est une situation qui n'a guère de précédent: la venue de la personne condamnée sur le territoire de l'Etat ne résulte en effet ni d'un accord d'extradition, ni d'un accord de transfèrement, et la personne reste dans une large mesure sous le contrôle de la Cour (cfr. art. 104 ss.). Pour la plupart des Etats, l'exécution des peines prononcées par la CPI est dont du cadre législatif national en vigueur. C'est pourquoi il importe d'adapter celui-ci aux exigences de l'espèce.

La Belgique l'a fait pour l'exécution des peines prononcées par le TPI au cas où le gouvernement déciderait d'inscrire la Belgique sur la liste des Etats prêts à accueillir des personnes condamnées pour l'exécution de leur peine (loi de 1996 précitée, art. 14). Il devrait en aller de même pour la CPI.

Pour d'autres aspects liés à l'exécution de la peine, le Statut de la CPI renvoie expressément à la législation interne: conditions de détention qui doivent être conformes aux règles conventionnelles internationales sur le traitement des détenus (art. 106 § 2), transfèrement éventuel de l'étranger condamné, à l'issue de sa peine, dans un autre Etat (art. 107 § 1), extradition de cette personne vers un autre Etat (art. 107 § 3), exécution des peines d'amende et de confiscation (art. 109 § 1).

C'est dire si les exigences de la coopération pénale avec la CPI obligent les Etats à adapter leur législation.

II. L'incidence indirecte du Statut de la CPI sur la législation interne des Etats

Outre les règles de fonctionnement et de procédure de la CPI, le Statut contient des règles qui, soit impliquent une obligation à charge des Etats de poursuivre les auteurs des crimes visés dans le Statut (A), soit, par leur spécificité, tendent à modifier le droit pénal international positif en certains de ses aspects (B). Ces règles n'obligent pas directement les Etats à modifier leur législation interne, mais elles peuvent les inciter à le faire.

A. L'obligation de poursuivre les auteurs des crimes visés au Statut

Les faits dont la Cour peut connaître *ratione materiae* - génocide, crimes contre l'humanité, crimes de guerre, voire agression sous certaines conditions (art. 5-8) - doivent être réprimés par tous les Etats.

C'est une obligation qui trouve sa source dans des règles coutumières et conventionnelles[39] rappelées par le Statut lui-même (préambule, 4e et 6e considérants).

En outre, la philosophie de la complémentarité qui est une des bases du Statut (préambule, 10e considérant et art. 17) implique l'obligation pour les Etats de poursuivre les auteurs des crimes visés au Statut. Ce n'est que dans l'hypothèse où un Etat élude cette obligation parce que sa justice est inexistante, défaillante ou récalcitrante, que la Cour, dans les conditions prévues par le Statut, peut se substituer à lui pour remplir ladite obligation. La CPI devrait donc jouer un rôle d'incitant à la répression des crimes visés au Statut.

Les Etats ne sont cependant pas toujours parfaitement armés au plan juridique pour poursuivre ces crimes, surtout lorsqu'ils sont commis par des étrangers à l'extérieur de leur territoire. Certes, l'exercice de la compétence universelle à l'égard de crimes de guerre ou de crimes contre l'humanité peut se fonder sur des sources coutumières qui font partie du droit des Etats - *international law is part of the law of the land* - mais c'est la théorie, et les parquets sont généralement peu enclins à poursuivre des faits commis à l'étranger par des étrangers sur une base aussi "légère" qu'une règle coutumière. Même si la justice consécutive à la 2e Guerre mondiale offre des précédents à des poursuites pénales fondées sur des règles coutumières[40], il reste que depuis lors, les exemples de poursuites de ce type ne sont pas légion.

Le Statut de la CPI pourrait donc induire les Etats à renforcer leur appareil législatif en matière de répression des crimes visés au Statut non seulement pour remplir leur obligation internationale de répression, mais aussi afin de ne pas être désignés à l'attention de la communauté internationale par la CPI qui, en se substituant à eux pour réprimer des violations graves du droit international humanitaire, mettrait en évidence leurs carences judiciaires.

B. La spécificité de certaines règles de droit matériel du Statut

Le Statut comporte quatre incriminations: agression, génocide, crime contre l'humanité et crimes de guerre.

La mise en œuvre de l'incrimination de l'agression est toutefois subordonnée à sa définition par l'Assemblée des Etats parties, définition qui ne pourra être adoptée - au plus tôt - que 7 ans après l'entrée en vigueur du Statut (art. 5 § 2 combiné aux art. 121 et 123). Dans l'immédiat, elle n'a donc pas d'incidence sur le droit interne des Etats.

L'incrimination du génocide reprend l'incrimination qui figure dans la Convention du 9 décembre 1948 pour la prévention et la répression du crime de génocide. Elle n'entraîne donc pas d'autre obligation pour les Etats que celle qu'ils avaient déjà contractée en devenant parties à cette Convention.

L'incrimination des crimes contre l'humanité et des crimes de guerre comporte en revanche un certain nombre de nouveautés par rapport au droit international positif: d'une part, le crime contre l'humanité est défini avec plus de précision que dans les instruments internationaux antérieurs (Statuts des TMI de Nuremberg - art. 6 c - et de Tokyo - art. 5 c; Statut des TPI pour l'ex-Yougoslavie - art. 5 - et le Rwanda - art. 3), d'autre part, le crime de guerre couvre des faits (par exemple, utilisation de balles "dum-dum", pratique des "boucliers humains", enrôlement d'enfants de moins de 15 ans, etc., art. 8 § 2, b) et des situations (conflits armés non internationaux, art. 8 § 2 c) qui n'étaient pas explicitement visés par les énonciations antérieures de l'incrimination (voy. notamment Conventions de Genève de 1949, art. 50/51/130/147; 1er Protocole additionnel de 1977, art. 11 § 4 et art. 85).

Eu égard à ces nouveautés et eu égard au fait que peu d'Etats ont introduit dans leur législation des règles de compétence universelle pour la répression des crimes visés au Statut, notamment des crimes de guerre lorsqu'ils sont commis dans un conflit armé non international[41], on se trouve en présence d'une

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[39] Réf. in DAVID, E., *Eléments de droit pénal international*, Presses universitaires de Bruxelles, 1997-1998, 7e éd., vol. IV, pp. 435, 454, 553-554.

[40] Ibid., pp. 423-427

[41] Pour un exemple, loi belge du 16 juin 1993 relative à la répression des infractions graves aux Conventions de Genève de 1949 et aux Protocoles I et II de 1977, M.B., 5 août 1993; voy. aussi, BOTHE, M., "War Crimes in Non-international Armed Conflicts", in *War Crimes in International Law*, ed. by Y.Dinstein and M. Tabory, The Hague, Nijhoff, 1996, p. 297; GRADITZKY, Th., "La responsabilité pénale individuelle pour violation du droit international humanitaire applicable en situation de conflit armé non international", CICR, 1998, pp. 38-44.

évolution du droit humanitaire qui, dans la plupart des cas, n'a pas de relais au plan interne. Par conséquent, si les Etats ne veulent pas se retrouver juridiquement impuissants pour assurer la répression de certains des crimes visés au Statut, ils doivent adapter leur législation interne à cette évolution.

Le Statut contient toutefois des dispositions qui tendent aussi à limiter ou à affaiblir la portée de certaines règles du droit pénal international en vigueur.

Ainsi, on se posera la question de savoir si le caractère exhaustif et limitatif des crimes de guerre énumérés dans le Statut (art. 8 §2) implique une limitation de l'incrimination correspondante du droit international positif. Par exemple, là où le Statut du TPIY érige en crimes de guerre l'emploi d'armes conçues pour causer des souffrances inutiles (art. 3, a) et où le jurisprudence du TPIY étend cette incrimination aux conflits armés internes[42], le Statut de la CPI limite cette incrimination aux seuls conflits armés internationaux et subordonne sa mise en œuvre à une détermination précise de ces armes (art. 8 § 2, b, xx).

Est-ce à dire que la limitation de la règle dans le Statut devrait permettre aux Etats d'assouplir leur droit interne (à supposer qu'il règle ce genre de question)?
Certes non car l'art. 10 du Statut précise que:

> *"Aucune disposition de présent Chapitre du Statut ne doit être interprétée comme limitant des règles du droit international existantes ou en formation ou leur portant atteinte d'une façon quelconque à des fins autres que celles du présent Statut."*

De même, l'art. 21 dispose que la règle *nullum crimen sine lege*

> *"n'empêche pas qu'un comportement soit qualifié de crime au regard du droit international, indépendamment du présent Statut."*

On ne saurait donc tirer prétexte des silences du Statut pour prétendre atténuer la portée de certaines règles de droit humanitaire et du droit pénal international.

La même question peut se poser à propos de certains motifs d'exonération pénale. Ainsi, le Statut laisse entendre qu'une personne ne serait pas pénalement responsable d'un des crimes visés au Statut si

> *"Elle a agi raisonnablement pour se défendre, pour une autre personne ou, en cas de crime de guerre, pour défendre des biens essentiels à sa survie ou à celle d'autrui ou essentiels à l'accomplissement d'une mission militaire, contre un recours imminent et illicite à la force d'une manière proportionnée à l'ampleur de danger qu'elle courait ou que couraient l'autre personne ou les biens protégés." (art. 31 § 1, c)*

Ce moyen de défense fondé sur l'état de détresse (au sens du projet d'Articles de la Commission du droit international sur la responsabilité des Etats, art. 32). contredit la règle classique selon laquelle l'état de nécessité en général, ne peut jamais justifier une violation du droit international humanitaire est elle-même fondée sur une situation générale de détresse - la guerre. Il serait absurde qu'on puisse encore ajouter des causes de justification autres que celles déjà prévues par ce droit.

On peut donc penser que la portée de cette disposition - véritable recul par rapport du droit existant - doit être confinée au seul et ne peut en aucune manière conduire un Etat à réduire sur ce point ses obligations au regard du droit international humanitaire. Les Articles 21 ss. du Statut relatifs aux principes généraux du droit pénal précisent d'ailleurs à divers endroits que leur portée se limite au Statut.

Cette deuxième partie du présent rapport montre que le droit matériel du Statut incrimine davantage de comportements que ne l'exigeait le droit pénal international. Cela devrait conduire les Etats à suivre le mouvement et à compléter leur législation par des dispositions appropriées s'ils ne veulent pas risquer de se trouver, parfois, dans l'incapacité de poursuivre les auteurs de ces comportements.

Même s'ils ne le font pas, les lacunes de leur droit interne au regard des incriminations portées par le Statut ne soulèvent cependant pas un gros problème d'application de ces incriminations au plan interne. Il suffit de montrer que le comportement considéré viole une interdiction existante et tombe en même temps sous le coup du droit pénal ordinaire. Dans ce cas, les parquets peuvent poursuivre ainsi que cela

[42] TPIY, App., aff. IT-94-1-AR 72, 2 oct. 1995, *Tadic*, §§88 ss, combinés avec l'art. 3 (a) du Statut du TPIY.

c'est fait dans un certain nombre d'Etats après 1945, sans que l'autre présumé de fait puisse justifier son comportement par la situation de guerre.

L'inverse n'est pas vrai : si les Etats peuvent se prévaloir des développements du droit humanitaire dans le Statut de la CPI pour amender leur législation et mieux réprimer les violations du droit humanitaire, ils ne devraient pas pouvoir se fonder sur les reculs de Statut dans certains cas pour faire preuve de plus tolérance à l'égard des violations du droit humanitaire: les dispositions mêmes du Statut ou l'économie générale du droit international humanitaire positif s'y opposent clairement.

Item 4:

PROMOTION OF THE INTERNATIONAL CRIMINAL COURT AND ITS FUTURE WORK

INTERVENTION

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The adoption of the Statute of the International Criminal Court is undoubtedly a big negotiating success *per se*, given the fact that 120 delegations often with different approaches to various questions have eventually succeeded in producing an instrument of 128 Articles on some 60 pages. When one compares this product with the Statutes of other international military tribunals, past and present, of some 30 Articles, an unavoidable reflection will be: is this Statute so much better than the other ones, securing so much more effective prosecution of international criminals; or, has the elaboration of such a «heavy» instrument with many compromises resulted in a jungle of provisions, including the procedural ones, which are sometimes confusing or inconsistent with one another and which involve a risk of rendering the whole machinery unworkable. Article 9 envisages the elaboration of the so-called «Elements of Crimes» to «assist the Court in the interpretation and application of Articles 6, 7, and 8», that is, specification and definitions of the respective categories of crimes. It remains to be seen whether these «Elements…» will bring some clarity in at least this matter, or on the contrary, further complicate it.

However it might be that, to a person who was not a participant at the Rome Conference nor otherwise involved in the elaboration of the Statute – and especially if such a person happens to be an *advocatus diaboli* – the test adopted raises a series of questions and comments. I do not intend to touch upon all those questions, and I hope that at least some of them can be answered by those directly involved in the negotiations.

To start with, there is a question of the interplay between Article 12, paragraph 2, and Article 124 of the Statute. According to the former provision, the Court has jurisdiction if either the state on the territory of which the crime was committed *or* the state of which the accused is a national is a party to the Statute. It suffices thus that only one of these states is a party to the Statute. But according to the latter provision a state, upon becoming a party to the Statute, may exempt «war crimes» (Article 8) from its acceptance of the Court's jurisdiction, if such crimes were committed on its territory *or* by its nationals. Now, there is no reference to this exception in Article 12, and the reference to Article 12 in Article 124 is related specifically to paragraph 1 – not to paragraph 2 or to the whole Article 12. Thus, if the reserving state – whether that of nationality or that of territoriality – is not the only one which is party to the Statute, and if the other state involved has not made an identical reservation, it can turn out that the reservation will be without legal effect.

Most serious questions arise when Articles 5-8 on jurisdiction are read together with Articles 17 and 53 on admissibility. Article 5, paragraph 1, reads:

> "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: 8a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression".

Now, the question arises (leaving «aggression» aside for the time being) is the second part of the quoted sentences an elaboration on the first one, indicating that the crimes sub (a)-(c) are just the «most serious crimes of concern to the international community as a whole» or, should the second sentence be interpreted as limiting the Court's jurisdiction to «the most serious crimes…from among those enumerated in sub-paragraphs (a)-(c) of Article 5, paragraph 1 ?

There is thus the question of the possibility of grading the gravity of the crimes in question, which seems to be of key importance for practice. For, according to Article 53 the Prosecutor may decide not to pursue an investigation having regard, among others, to the degree of gravity of the crime; and according to Article 17, paragraph 1, the Court «shall determine that the case is inadmissible» because it «is not of sufficient gravity» although within the Court's jurisdiction.

At first glance, the possibility of grading the gravity of crimes seems to be well conceived. For it cannot reasonably be expected that every single person, however insignificant his or her involvement in whatever crime enumerated in the Statute, who was not put before national justice, will be brought before an international court – be it only because its capacity would not allow for that. But at a closer look, the problem is not so simple. Are all the crimes dealt with in Article 5 equally susceptible of grading? Paragraph 2, of Article 33, to which I shall also revert later, implies in another context that the three categories of crimes are not of the same character.

War crimes, dealt with in Article 8, certainly can be graded. Indeed, this has already been done in the Geneva Conventions of 1949 which explicitly single out «grave breaches» from other violations. The present Statute partly confirms that differentiation when it extends the Court's jurisdiction over war crimes to no less than 25 acts other than the «grave breaches» of the Geneva Conventions, partly by going still further in grading war crimes when it provides that the Court's jurisdiction comprises war crimes «in particular when committed as a part of a plan or policy as a part of a large-scale commission of such crimes» (paragraph 1). As Article 8 is drafted, this qualification would apply even to «grave breaches» of the Geneva Conventions.

I leave Article 7 aside for the moment – crimes against humanity – and shall not dwell on somewhat contradictory, in my opinion, signals in the Statute about the possibility of grading these crimes. But what about genocide?

Article 6 reproduces verbatim the definition in Article II of the Genocide Convention, but punishable acts according to Article II, paragraphs (b)-(e) of that Conventions – for that matter, included in the definition of genocide of both the Yugoslavia and Rwanda Tribunals – are reflected in the present Statute only by interpretation of the general context of Article 25 («Individual criminal responsibility»). Only in its paragraph 3/e/ (direct and public incitement) is genocide mentioned separately and expressly – a signal that there is something special about that crime. Also in Article 33, paragraph 2, genocide is mentioned as a special case – for that matter, together with the crimes against humanity – but anyway as distinct in character from war crimes. By diluting with generalities and leaving greater part of Article III of the Genocide Convention to interpretation, the definition of genocide in the present Statute is somewhat reduced to, so to say, the very core of that crime, an «absolute crime» hardly susceptible of grading, especially in view of the fact that the definition of genocide, in contradistinction to the definitions of war crimes and crimes against humanity, does not contain any qualifications.

Now, when we turn back to Articles 17 and 53 on admissibility, we note that these Articles, unlike Articles 25 and 33, paragraph 2, do not single out genocide in any way. That means that also a case of genocide may be declared inadmissible because it is «not of sufficient gravity.» The Statute introduces thus the concept of «genocide of lesser gravity» - «light genocide,» like light cigarettes or light beer. This is a significant contribution to the progressive development of international law.

Another curiosity in Article 53 is its paragraph 1 according to which the Prosecutor may decide not to pursue investigation because «there are…substantial reasons to believe that an investigation would not serve the interest of justice.» Until 17 July 1998 I believed, in all my naivety in spite of an advanced age, that «interest of justice» - if the words are to be taken seriously in their literal meaning – is always best served by as thorough investigation as possible of any suspected crime. Another question is that an investigation may not serve political interest of a particular actor or actors; and that political interests not so infrequently – both on national and international level – present themselves under the disguise of "justice". Still, the proposition as it is formulated here, in a legal document, as a matter of principle and generally accepted possibility, must cause raised eyebrows, to say the least.

Article 33, which I have already mentioned earlier, is of interest also from another point of view. According to paragraph 1 (a), a person is relieved from criminal responsibility if he/she "was under a legal obligation to obey orders of the government or the superior in question". Now, to the best of my knowledge, only a minority of national military codes admit disobedience to superior orders as being unlawful. In most countries, obedience, expressed or implied, is a fundamental principle of military or parliamentary discipline. Consequently, nationals of such countries are automatically relieved from criminal responsibility for at least war crimes. Other concurrent requirements for the exoneration from criminal responsibility are: "(b) (t)he person did not know that the order was unlawful, and (c) the order was not manifestly unlawful." While paragraph 2 of the same Article provides that " orders to commit genocide or crimes against humanity are manifestly unlawful," it is not so with respect to war crimes. In

this case, an accused can simply say, "Your Honors, believe me, I did not know that killing of an enemy, whomever the accused may consider as such, can be a crime and I hear for the first time during this trial that there exists something that you call 'wilful killing,' which is a 'grave breach' from the Geneva Conventions, of which I have never heard before." Such a statement may be per se very true, and, consequently, the accused will be acquitted if the requirement of sub-paragraph (a) is also met. And what if, in spite of the provision of paragraph 2, the accused says, "I was not aware that what I was ordered to do is something that you call 'gen…geno…genocide' and that this is a name of a crime." However it might be that one of the basic principles of jurisprudence, ignorantia iuris nocet—generally, and not only with respect to certain offences—is thus abandoned in favor of criminals, and this is another important contribution of the Statute to the progressive development of international law. It is also an important message to all the criminal excellencies, present and future: If you want to protect your people from punishment, you have to recruit totally ignorant people in order to make their pleas credible.

Still safer from this point of view is to recruit criminals from among youth under the age of 18 (Article 26), who may be as cruel and effective murderers as the older ones—as demonstrated even by peacetime experience of politically stable countries. Such criminals need only show birth certificates and the reaction will be, "Oh, sorry. You are, of course, free. Please continue. But remember, you have to stop the day before your eighteenth birthday." Contrary to what is sometimes claimed, the age limit for criminal responsibility according to Article 26 has no support in the Convention on the Rights of the Child. For, according to Article 1, a human being under the age of 18 is considered to be a child only "for the purposes of the present convention," and even this "unless under the law applicable to the child, majority is attained earlier". To the best of my knowledge, in the big majority of countries, majority is attained at the age of 16, or even 15 years, and it is difficult to understand why international criminals should deserve extra leniency. Moreover, there appears to be an inconsistency between Article 26 and Article 8, paragraph (b) (xxvi). The latter provision qualifies as a war crime "conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively in hostilities." A contrario, active participation of youth over the age of 15 years is lawful. But this active participation can involve commission of war crimes which, irrespectively of their gravity, are a *limine* exempted from the Court's jurisdiction. What is the logic behind this construction?

If one, to all these provisions, also adds Articles 30-32 on other grounds excluding criminal responsibility, an almost inevitable reflection, with some exaggeration, will be: is any criminal left unprotected against prosecution and punishment under this Statute?

The reference to "national armed forces" in Article 8, paragraph (b) (xxvi), gives rise to the question of applicability of that Article to non-international armed conflicts. Article 8 does not provide generally for its applicability to such conflicts, but in paragraph 2 (c) enumerates rather summarily (specific mention of torture belongs to exceptions) acts which constitute crimes in such conflict, yet only "when 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…". Thus, for instance, a prisoner taken in combat may be lawfully tortured. Until 17 July 1998 it appeared that torture was absolutely prohibited in any circumstances. In any case, lack of a provision on general applicability of Article 8 to non-international armed conflicts clearly indicates more leniency to violence in such conflicts than in international ones.

In more than one place the Statute leaves an impression of a hurried work or poor legal drafting technique.

There is, for instance, a discrepancy between Article 5, paragraph 1, and Article 1 concerning the scope of the Court's jurisdiction—a problem which seems to be of a fundamental character. According to the former provision, which also appears in paragraphs 4 and 9 of the Preamble, the Court's jurisdiction is "limited to the most serious crimes of concern to the international community as a whole." But according to the latter, it comprises "most serious crimes of international concern, as referred to in this Statute." "Crimes of international concern" need not necessarily be "of concern to the international community as a whole." What is the criterion of such a particular concern ? On the other hand, if the phrase "as referred to in this Statute" in Article 1 means just a reference to the restrictive qualification in Article 5, why couldn't the same language be used in both Articles without cross references?

Another example… What is the difference, if any, between torture and rape in Article 7, paragraphs 1 (f) and (g), and torture and rape in Article 8, paragraphs 2 (a)(ii) and 2 (b)(xxii). Is the

meaning of torture in Article 8 different from torture as defined in Article 7, paragraph 2 (2)? Is the repetition of certain crimes in both Articles to mean that Article 7, in contradistinction to Article 8, applies also in time of peace, or perhaps only in time of war. If Article 7 is applicable both in time of peace and in time of war, is it better, in time of war, to be tortured or raped under Article 7, or under Article 8 ?

CADRE FONCTIONNEL POUR L'AVENIR DE LA COUR CRIMINELLE INTERNATIONALE: PERSPECTIVES ET REALITES

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Introduction

L'avènement de la Cour Criminelle Internationale (CCI) dans l'ordre juridique international constitue, certes, un événement exceptionnel, d'une portée juridique, politique et culturelle majeure. Il s'agit d'un "pas" de civilisation, un reflet universel d'une conscience humaine exigeante dans un monde en mutation, juste avant le tournant du siècle, peu avant le 50ème anniversaire de l'adoption des quatre Conventions humanitaires de Genève de 1949. Une naissance coïncidant avec une période où le droit international humanitaire connaît un développement et une consécration à travers les travaux parfois contestés- surtout ceux du Tribunal International Pénal pour l'ex-Yougoslavie, dont la jurisprudence en matière des crimes de guerre et crimes contre l'humanité s'avère importante (voir affaires Tadic, Erdemovic, Hôpital de Vucovar, Nilolic, etc.) sans négliger les premiers jugements du Tribunal International Pénal pour le Rwanda qui viennent d'être rendus (affaire Akayesu, et Kambanda, reconnus coupables d'actes de génocide et de crimes contre l'humanité).

La création de la CCI- répondant à l'aspiration de décennies d'efforts d'une partie de la doctrine et de l'opinion publique internationale, pour faire face à la barbarie humaine et à son impunité - renforce les éléments constitutifs d'un ordre public international à l'échelle mondiale et consolide les fondements de l'ordre international humanitaire.

Mon propos vise à présenter quelques brèves observations relatives à certaines dimensions de futur cadre fonctionnel de la CCI, dans un sens d'engager le débat, dès à présent, dans la perspective d'un fonctionnement efficace de la CCI, mais aussi de contribuer à remédier aux défaillances- omissions et autres faiblesses du Statut de la CCI. Autrement dit, rendre le Statut plus complet, concret et donc, juridiquement plus transparent, fonctionnel et efficace. C'est un exercice indispensable, avant même la ratification et la mise en vigueur du Statut de la CCI, dans un souci de prévoir l'avenir.

Remarques d'ordre général sur la CCI

Toute problématique autour du fonctionnement de la CCI et le travail futur de la Commission Préparatoire et de l'Assemblée des Etats-parties contractants au Statut, qu'elles pourraient apporter des modifications au libellé actuel des dispositions du Statut, devrait prendre en considération, d'un côté les réalités juridiques et surtout politiques formant le paysage en question et, de l'autre côté, les limites à ne pas franchir, imposées par certains gouvernements durant la bataille de Rome lors de la Conférence de juin-juillet '98.

Cette approche semble nécessaire, même s'il n'est pas sage sous un angle négatif ou positif, de prévoir l'avenir et la direction des développements des normes internationales.

En effet, les réalités politiques qui se sont manifestées de façon très marquée lors de la Conférence de Rome et surtout vers la fin de celle-ci n'ont pas permis le développement complet de la compétence juridictionnelle de la Cour. Il est vrai que le Statut est plein de preuves de l'existence des réalités en question. Des compromis difficiles se cachent, en effet, dans chaque Article, sous chaque paragraphe, chaque disposition. On pourrait énumérer sans difficulté des dizaines d'exemples dans le seul contexte du Chapitre 2 du Statut, comme ceux du principe de complémentarité, de crimes contre l'humanité, du mécanisme de déclenchement de la juridiction de la Cour ("triggering mechanism") etc. Il y a cependant deux cas spécifiques qui sont particulièrement éloquents: il s'agit des crimes de guerre et du crime d'agression.

Observations relatives au cadre fonctionnel de la CCI (Chapitre II du Statut)

Dans le domaine de la juridiction de la CCI et de la recevabilité des affaires se distinguent, parmi d'autres les questions suivantes:

a. Crimes de guerre

En ce qui concerne les crimes de guerre, deux points attirent mon attention: la liste raccourcie intégrée au Statut et le système opt-out prévu par le Statut.

En premier lieu, la liste des armes qui figure dans le Statut (dont l'emploi est un crime de guerre) a été sévèrement raccourcie par rapport aux possibilités qui existaient et aux propositions qui on été soumises durant la longue négociation. Elle contient maintenant seulement les armes toxiques, les gaz asphyxiants ou toxiques et tous liquides, matières ou dispositifs analogues et les balles qui se dilatent ou s'aplatissent facilement dans le corps humain, comme par exemple les balles dont l'enveloppe dure ne recouvre pas entièrement le centre ou est percée d'entailles (art. 8 par.2b. xvii-xx).

La liste ne comporte, par conséquent, ni les agents microbiologiques ou biologiques, ni les toxines, ni les armes chimiques. Elle ne contient pas non plus les armes nucléaires ou les mines antipersonnel. Les raisons de ces omissions sont bien connues. Certains Etats ont été très réticents à faire les pas nécessaires pour inclure dans cette liste des armes dont l'usage est, cependant, conventionnellement interdit, comme les mines antipersonnel ou les armes chimiques (voir le Protocole de 1996 sur l'interdiction ou la limitation de l'emploi des mines, pièges et autres dispositifs et la Convention de 1993 sur l'interdiction de la mise au point, de la fabrication, du stockage et de l'emploi des armes chimiques et de leur destruction.

Concernant le cas des armes nucléaires, il faut rappeler que la proposition, déposée par l'Inde au tout dernier moment des travaux de la Conférence de Rome, d'inclure ces armes dans la liste qui "menaçaient" l'équilibre du "paquet global" avancé par la présidence, ou plus exactement, le vote de la "motion of no vote" sur cette proposition de l'Inde ainsi que le résultat de ce vote, avaient un caractère procédural et de pure conjoncture politique. En fait, la volonté manifeste de la majorité écrasante des participants à la Conférence d'adopter un (le) Statut l'amena à en payer le prix; en l'occurrence, l'omission de l'usage des armes nucléaires comme crime de guerre qui se placerait sous la juridiction de la CCI.

Il est à signaler, que de l'insertion manquée de l'usage des armes nucléaires à la liste des crimes de guerre allait répondre, ainsi, à la question déjà posée devant la Cour Internationale de Justice sans recevoir toutefois une réponse juridiquement claire à cet égard (voir les deux avis rendus en 1996 sur la légalité de l'utilisation des armes nucléaires).

Quant à l'avenir du système opt-out prévu par le Statut (Art. 111bis)- résultat d'un compromis arraché in extremis par les grands pays qui tempèrent sensiblement la teneur de la disposition pertinente (Art.885 quarter) - deux possibilités sont offertes à l'occasion de la première *Review Conference*, sept ans après la mise en vigueur du Statut. D'une part, la possibilité de renforcer la disposition de l'Article 8, dans le sens d'éteindre le système opt-out à d'autres catégories de crimes tombant sous la juridiction de la CCI, d'autre part, améliorer la situation, c'est-à-dire affaiblir ou bien faire disparaître le bénéfice de l'exception temporaire. Cette deuxième approche constitue la bonne voie pour une application équitable et objective du Statut. D'ailleurs, un argument politique milite comme supplément en faveur de cette perspective. En effet, il s'agit de tenir compte de la situation selon laquelle des Etat-parties au Statut ayant fait la déclaration d'exception, seront à l'abri de la juridiction de la CCI tandis que des pays tiers pourraient se trouver sous le contrôle de la CCI.

b. Le cas d'agression

La question du crime d'agression se pose d'une manière différente. Là on se trouve, déjà, en présence d'une obligation bien concrète, d'un contexte juridique et politique, d'œuvrer afin de trouver une solution au problème de la définition de ce crime, ainsi qu'au problème des conditions requises pour activer l'exercice de la juridiction de la Cour par rapport à ce crime (art. 5 par 2 du Statut). La Commission préparatoire qui sera constituée prochainement, devra faire face à ces deux tâches fort importantes, pour le sort de cette question délicate dont la simple mention au Statut reflète déjà un symbolisme capital pour l'ordre juridique international.

En ce qui concerne le premier de ces deux problèmes, c'est-à-dire celui de la définition de l'agression aux fins de la responsabilité criminelle individuelle, je crois qu'il n'y aura pas de difficultés

insurmontables. Il me semble qu'au sein de la Conférence de Paris, il y a eu, en effet, deux approches qui ont été soutenues par rapport à cette question. L'une, l'approche générale, se limitait à mentionner les éléments généraux de l'agression, comme une attaque armée dont le but serait en contravention avec les principes de la Charte de Nations Unies etc. L'autre répétait ces éléments, en y ajoutant toutes ou quelques formules provenant de la définition contenue dans la Résolution 3314 de 1974 de l'Assemblée Générale des Nations Unies. Il me paraît qu'on pourrait, à travers d'une ligne médiane entre ces deux approches, aboutir à une solution acceptable.

La situation est bien différente en ce qui concerne le second problème, celui des conditions requises pour mettre en marche la juridiction de la Cour qui est, en effet, le problème du rôle du Conseil de Sécurité dans le cas d'agression.

On pourrait évoquer diverses solutions ici. Tout d'abord, je voudrais souligner que le contrôle total de la juridiction de la Cour pour le Conseil de Sécurité en ce qui concerne le crime d'agression, comme prévu dans le projet de la Commission de Droit International et très vigoureusement soutenue par les membres permanents de Conseil de Sécurité pendant les négociations, n'est pas, à mon avis, une solution envisageable.

Les arguments juridiques de cette position ne sont pas, bien sûr, nouveaux, surtout pour ceux qui ont participé aux travaux de la Conférence. Il est, en effet, connu que le Conseil de Sécurité ne s'est jamais exprimé -ou presque- sur l'incidence d'une agression. Il est significatif, à cet égard, que le Conseil de Sécurité dans la majorité des cas d'application du Chapitre VII de la Charte des NU, adopta des expressions diverses, vagues et parfois contradictoires, dans son exercice de qualifications des situations menaçant la paix et la sécurité internationale. Et même si, comme on l'a entendu à la Conférence de Rome, le Conseil de Sécurité, sous les nouvelles pressions que la Cour produirait, allait changer ses attitudes, on ne peut que rester très sceptique sur cette éventualité, puisque les réalités politiques régissent le comportement de la haute institution des Nations Unies, resteront les mêmes comme on les connaît déjà.

Sur le plan conceptuel et juridique, d'ailleurs, je ne crois pas qu'on éprouverait de grandes difficultés à séparer la question de la responsabilité criminelle individuelle en cas d'agression, sur laquelle la Cour pourrait statuer, de la question d'agression commis par un Etat, sur laquelle le Conseil de Sécurité garderait pleinement ses pouvoirs d'agir.

Mais il y a aussi des raisons politiques très convaincantes qui excluent la possibilité d'une solution aussi radicale que celle proposée par la C.D.I et les membres permanents du Conseil de Sécurité. C'est le fait qu'une large majorité de la communauté internationale ne serait en aucun cas disposée à accepter une solution pareille, comme on l'a constaté lors de la Conférence de Rome.

Prenant en considération ces faits, reste à trouver des solutions qui ne se heurteraient pas aux obstacles insurmontables. Quelles sont ces solutions dans ce domaine? Si on considère qu'il serait politiquement impossible de laisser à la Cour la compétence exclusive de juger la question de la responsabilité criminelle individuelle, on pourrait trouver des solutions en s'inspirant de quelques propositions présentées au cours de la Conférence et qui contiennent des éléments fort utiles pour les futurs travaux de la Commission préparatoire. Il s'agit des idées qui se situent à mi-chemin entre les deux positions radicales, c'est-à-dire d'une part la dépendance complète de la Cour d'une décision (révolution)du Conseil de Sécurité en matière d'agression et, d'autre part, d'indépendance absolue de celle-ci vis-à-vis du Conseil.

Eléments des crimes (Article 9)

Une question se pose - plutôt comme hypothèse de travail - sur le risque éventuel d'une prolongation de la procédure relative à la formation des éléments des preuves à adopter par l'Assemblée des Etats-parties, destinée à assister la CCI dans l'interprétation et l'application des Art.s 6-8 du Statut (génocide, crimes contre l'humanité, crimes de guerres), ayant ainsi des retombés sur le fonctionnement de la CCI. Certes, il est positif que la disposition proposée au document de Travail de la Présidence pendant la Conférence, selon laquelle le déclenchement de la compétence de la CCI était lié à l'adoption des éléments de crimes, n'était pas retenue suite à des réactions, parmi les premières celle de la délégation hellénique à la Conférence.

Compétence ratione temporis de la CCI

Concernant le principe de la non-rétroactivité, consacré formellement par le Statut (art. 11), une question pourrait se poser dans le cadre de la compétence ratione temporis de la CCI. En effet, la question relève de la notion de la violation continue et de son éventuelle application. Il est évident, que dans des cas pareils, la situation incriminée change en fait et en droit, entraînant les conséquences qui en découlent.

Recevabilité - Décision préliminaire (Article 18)

Selon le paragraphe 2 de l'art. 17 du Statut, il est prévu que le Procureur de la CCI est obligé de renvoyer une affaire devant les instances juridictionnelles nationales, suite à une demande de la part d'un Etat prétendant qu'il procède à l'investigation ou à la persécution dans la dite affaire.

Cette disposition constitue une faiblesse de Statut, car il pourrait y avoir d'une manière indirecte des problèmes au fonctionnement de la CCI et son efficacité d'action avec des prolongements de la procédure. Toutefois, cette constatation est tempérée par le fait que la Chambre préliminaire de la Cour à la requête du Procureur pourrait autoriser la poursuite de l'investigation par la CCI.

Conclusions

Bien que la création formelle et organique de la Cour Pénale Internationale soit la tâche la plus urgente en ce moment, notamment avec la ratification de la Convention portant sur l'institution de la CCI, il ne faut pas perdre de vue le fait que la Cour n'est pas et ne faudrait pas être une institution immuable, un accomplissement juridique fixe et figé dans le temps. Par contre, il devrait être envisagé comme un organisme présent et actif. Les procédures d'amendements et de révision donneront l'occasion de le faire et il faut déjà commencer à se préparer en vue d'une telle perspective. D'ailleurs, la devise "Pas de Paix sans Justice" dominant la Conférence de Rome, pour devenir un acquis de l'ordre juridique international nécessite un activisme juridique et politique sans cesse afin de donner corps à ce qui semble- encore aujourd'hui - comme un espoir pour le 21ème siècle.

LA FORCE DE LA LOI CONTRE LA LOI DE LA FORCE : LE PRINCIPE D'UNE JURIDICTION PENALE INTERNATIONALE DANS L'OPTIQUE DU SAINT-SIEGE

[43]Dr. Giorgio FILIBECK
Conseil Pontifical "Justice et Paix"

[43] Observateur du Saint-Siège à la 23ème Table Ronde de l`Institut International de Droit Humanitaire, Sanremo, 4 septembre 1998.

«Entre le fort et le faible, c'est la liberté qui opprime et la loi qui affranchit». Les paroles que je viens de citer ont été prononcées en 1848 par Henri Dominique Lacordaire, le célèbre conférencier français, prêtre catholique. Elles correspondent d'une façon étonnante à la pensée d'un grand esprit de notre siècle, Isahia Berlin, qui dans une interview autobiographique publiée en 1994, quelques années avant sa mort, disait «Si nous donnons au loup et à l'agneau la même liberté et s'il n'y a pas une autorité supérieure qui interdise au premier de saisir le second entre ses crocs, pour ce dernier la liberté sera seulement une moquerie».

Ces paroles me semblent synthétiser efficacement le thème de notre Table Ronde. Le fort, à savoir le loup, peut être identifié aux différents auteurs des crimes définis dans le Statut du Tribunal Pénal International; toute victime est évidemment le faible, à savoir l'agneau. Peut-on ignorer que c'est justement la force de la loi qui peut protéger le faible et donc le libérer des tragiques conséquences du génocide, des crimes contre l'humanité, des crimes de guerre, de l'agression ?

Au moment où la communauté internationale vient de se doter, enfin d'un organisme judiciaire pénal permanente, je voudrais rappeler que le Saint-Siège n'avait pas manqué, depuis longtemps, d'appuyer une telle démarche. Je désire me référer en particulier au discours que le Pape Pie XII adressa le 3 octobre 1953 aux participants du VIème Congrès international de droit pénal, dans lequel il aborda la question d'une juridiction pénale internationale avec des accents d'une actualité surprenante, si l'on considère le temps écoulé.

En fait, il avait exprimé son soutien à l'élaboration d'un droit pénal international afin que «tous les coupables soient obligés, sans considération de personne, de rendre compte»; ce, dans la mesure où «le sens humain spontané de la justice exige une sanction». Il avait indiqué des «critères objectifs pour délimiter les délits» en mettant à la première place «le crime d'une guerre moderne, qui n'exige pas la nécessité inconditionnée de se défendre». Il avait recommandé l'application que le coupable ne propose pas une loi qui établit sa culpabilité et le livre au châtiment. Il avait souligné la nécessité d'adopter des «règles juridiques claires et fermes», pour l'action judiciaire, de garantir "la possibilité pour l'accusé de se défendre réellement" et d'assurer l'impartialité du collège des juges, en envisageant l'institution d'un "tribunal international". Il avait réaffirmé que «aucune instance supérieure n'est habilitée à commander un acte immoral». Il avait rappelé que l'établissement d'un droit positif présuppose une série d'exigences fondamentales empruntées à l'ordre ontologique, «il faut édifier le droit pénal sur l'homme, comme être personnel et libre», que «seul peut-être puni celui qui est responsable devant une autorité supérieure», que «la peine et son application sont en dernière analyse des fonctions nécessaires de l'ordre juridique».

De son côté, le Pape Jean-Paul II a donné un appui fort et clair au Tribunal Pénal International (TPI), dès sa phrase préparatoire. Recevant le Corps diplomatique auprès du Saint-Siège le 13 janvier 1997 il avait affirmé : «Les tentatives pour organiser une justice pénale internationale sont en ce sens un réel progrès de la conscience morale des nations».

Une telle attitude a été confirmée par l'encouragement exprimé à la veille de la Conférence Diplomatique de Rome (14 juin) et le souhait, formulé dans une phase délicate des négociations (4 juillet), que «cette Conférence aboutisse, comme tous l'espèrent, à la création d'une nouvelle institution afin de protéger la culture des droits humains à l'échelle mondiale».

La délégation du Saint-Siège s'est engagée activement pendant la Conférence, en offrant une contribution aux débats sur différents points que je vais citer rapidement.

La dignité de tout être humain comme principe inspirateur du TPI, la conviction que les crimes, de compétence du TPI, sont contraires à la conscience de la famille humaine, la nécessité que l'action du TPI soit dictée non pas par la vengeance mais par la réconciliation et que, par conséquent, la peine de mort ne figure pas dans le Statut du TPI, l'exigence que le TPI soit un organisme indépendant à l'abri de pressions de nature politique, l'opportunité d'une forte figure du procureur et de la plus ample garantis des droits de la défense, l'utilité d'une définition plus soignée du crime de "grossesse forcée", la suggestion que les crimes relatifs au trafic de drogues et d'armes soient pris en considération dans un Protocole additionnel ou dans la prochaine «Review Conference», la recommandation que l'emploi et la menace d'emploi d'une arme nucléaire soient inclus parmi les crimes de guerre.

Habemus tribunal! Pourtant nous savons bien que son institution, à juste titre défi historique, ne pourra pas, *per se*, comme par l'effet d'un coup de baguette magique, empêcher que les crimes se poursuivent. De plus, nous savons bien, hélas, que ces crimes sont en train de s'accomplir encore à l'heure

actuelle, au moment même où nous nous trouvons ici réunis, dans la paisible et accueillante ville de San Remo.

Le défi qui se trouve aujourd'hui devant la Communauté internationale est, en définitive, toujours celui qui faisait l'objet de la lancinante réflexion de Pascal, il y a trois siècles : «ne pouvant faire que ce qui est juste fût fort, on a fait que ce qui est fort fût juste» (*Pensées*, n. 298, éd. Brunschvicg).

Enoncée dans des termes paradoxaux c'est la grande question que nous nous posons avec anxiété : le TPI sera-t-il à même d'exercer une justice d'emblée forte ou sera-t-il l'expression d'une force appelée par la suite à être juste ?

Le problème des rapports avec le Conseil de Sécurité semble susciter une telle question et la réponse pourra venir uniquement du fonctionnement du TPI.

En toute hypothèse, nonobstant les efforts importants qui ont été accomplis pour favoriser un respect croissant du droit, nous savons que l'instrument juridique ne suffit pas, à lui seul, pour atteindre ce but. Il ne faut pas nourrir l'illusion qu'il suffise une condamnation—surtout quand celle-ci comporte la peine capitale—pour faire cesser les crimes prévus par le Statut du TPI.

L'instrument juridique, nous en sommes conscients, doit être accompagné par une œuvre d'éducation en profondeur. La répression d'ordre pénal ne peut pas faire l'économie d'un investissement dans le domaine éducatif : il s'agit d'une priorité pour prévenir la criminalité commune, qui vaut aussi pour les crimes contre l'humanité. Quand on lit la liste des crimes contenue dans le Statut du TPI, on se rend compte de l'immense tâche pédagogique qu'il faut accomplir si l'on veut réduire effectivement les comportements criminels. Concernant le droit à la vie, je voudrais faire remarquer que tout homicide en tant qu'acte commis contre la vie d'un être humain (contre son droit à la vie depuis sa conception jusqu'à sa mort naturelle) est fondamentalement un délit contre l'humanité tout entière, car un lien mystérieux mais réel unit tous les membres de la famille humaine.

Si l'on parle d'une «culture de l'impunité», l'expression même est un signe révélateur de l'importance que revêt la dimension pédagogique. Je me permets de suggérer à l'Institut qu'une prochaine Table Ronde de San Remo puisse traiter ce sujet.

Surtout dans les situations qui ont pu se multiplier les crimes de guerre, les crimes contre l'humanité, les crimes de génocides, l'action pénale devrait être doublée d'une action visant à changer les mentalités. Parfois, un tel changement peut être favorisé par un jugement pénal; dans d'autres cas, un meilleur résultat peut être obtenu par des mesures différentes. La méthode à suivre peut être «juste» sans être forcément «judiciaire».

En particulier, dans les conflits où se sont produits de profondes déchirures entre diverses communautés ethniques ou nationales, la dignité bafouée et la paix éclatée ne se restaurent pas par la seule dynamique du droit. Il faut plutôt s'interroger sur les causes du conflit et sur les conditions dans lesquelles se sont déchaînés les comportements criminels : si on peut les éliminer d'une façon durable, il faut les extirper à la racine, il faut savoir parcourir le chemin de la réconciliation, un chemin très exigeant car il demande la conversion du cœur : il s'agit en fait de passer de la haine à l'amour. Sous cet angle, une collaboration appropriée entre acteurs humanitaires et responsables religieux pourrait révéler une synergie féconde.

Si l'on n'atteint pas le niveau des consciences, notre engagement pour le TPI risque d'être annihilé car c'est dans la conscience de chaque personne que toute loi commence à vivre ou à mourir. C'est le drame du droit international humanitaire, si développé d'un point de vue normatif et si violé dans la pratique.

Ce sera demain l'effroyable perspective d'un autre crime potentiel contre l'humanité, dont on n'a pas tenu compte aujourd'hui : l'utilisation, dans le cadre d'un conflit armé, des résultats des nouvelles techniques génétiques.

Si nous ne sommes pas persuadés que la dignité humaine est une valeur transcendante, qu'elle renvoie à une référence supérieure, qu'elle est un bien indispensable car elle marque d'une façon indélébile chaque être humain, si nous ne nous persuadons pas de cet enjeu, alors le respect de la loi arrive à dépendre non pas de la justice mais de la volonté du plus fort. Dans un intéressant volume publié en Allemagne en 1990, intitulé *Mettre sous procès l'ennemi*, le Professeur Alexander Demandt note : «L'humanisation de l'homme demeure incertaine comme un axiome théorétique, mais elle est de plus en plus urgente comme exigence pratique, précisément dans la mesure où elle se trouve offensée. L'humanité est la norme supérieure qui permet de juger et d'améliorer les systèmes et les concepts juridiques. Ce n'est

pas relevant de savoir si cette humanité découle de l'histoire, de la Bible, de la nature humaine. En définitive, la nature ne donne à personne un droit, mais donne à tous les hommes la faculté de comprendre que chacun a son droit».

Même si je ne suis pas convaincu que le fondement de la dignité humaine soit dépourvu de relief, comme le pense le Professeur Demandt, car en dernière analyse c'est sur une telle base que s'appuie la motivation de notre engagement, la convergence vers la primauté de l'humanisation est cependant possible.

La Table Ronde de San Remo en est certainement une preuve encourageante.

INTERVENTION

Amb. Naste CALOVSKI
Permanent Mission of the Republic of Macedonia to the United Nations

Mr. President,

Let me first express my thanks to the President of the Institute, Professor Patrnogic, for inviting me to attend its 23rd Round Table. Of course, I am very happy to be once again in San Remo.

I participated at the Rome Diplomatic Conference as representative of the Republic of Macedonia. I listened carefully to the Introductory Statement of Mr. Bos, legal adviser at the Netherlands Ministry of Foreign Affairs.

It is correct to state, Mr. President, that after huge efforts over the years the New International Institution has been born of which all forces of peace and justice will benefit.

At present, we are facing a difficult task - making the success in Rome a reality. This effort requires the political will of the UN Member States and effective activities of the relevant international or national organizations and institutions. The mobilization of public opinion in this regard is extremely important and within that framework the role of the media in favor of the establishment of the Court.

So, it is very convenient that the Institute has decided that the 23rd Round Table should focus on the establishment of the International Criminal Court so soon after Rome and before the start of the UN General Assembly, which under provisional agenda item 155, will consider the results of the Rome Diplomatic Conference.

In my opinion, the present and the future efforts, international or national, should be focused on urging Governments and National Parliaments to accede or ratify the Statute of the International Criminal Court as soon as possible.

The question, Mr. President, "are the solutions in the Statute, the best we have hoped for?" is a legitimate one. The answer, I think is obvious. But, taking into account the current character of international relations, one should not be satisfied with the Statute of the Court. It is clear that many who have devoted so much energy in the promotion of international humanitarian law are not very happy with all the solutions in the Statute and that they have many critical comments to make. However, our wish to have a better Statute than the one negotiated in Rome, in my opinion, should be focused on the positive side of the Statute and in particular, on the need to have the Court established in the Hague, and not in a far distant future.

So, I am sure that our deliberations here in San Remo will represent an important contribution in that direction.

INTERVENTION

Mr. Mohamood M. HUSSEIN
Counsellor, Permanent Mission of the Republic of Kenya
to the United Nations, Geneva

Mr. President,

Thank you, Mr. President, for giving me the floor. Mr. President, I do not wish to take much of the time as I note that we are now about to come to the conclusion of the 23rd Round Table, so I will be brief.

Mr. President, I am delighted to have this opportunity to attend this 23rd Round Table. The theme of the Round Table, "Evaluation and Progress of the UN Diplomatic Conference in the International Criminal Court", is timely and concerns all humanitarian actors, and I wish to thank the Institute for organizing this timely and relevant discussion. I also take this opportunity to express my deep appreciation to all the people involved in the preparation of this 23rd Round Table. It is quite certain that this Round Table, attended by distinguished persons and scholars who have particular experience, has made a valuable contribution towards this complex issue.

The adoption of the Statute of the International Criminal Court was one of the most laudable, recent achievements of the nations of the world. By making this decision, the international community demonstrated its readiness for a qualitative leap in international relations based on the effective system of international justice.

It is gratifying, therefore, that the Court has been granted the right to charge persons with criminal responsibility for the gravest crimes including genocide, war crimes, and crimes against humanity. This demonstrates the resolution by the international community to fight against the horrors for which there are no and cannot be any political and ideological boundaries.

Indeed, for those of us representing our respective governments, this Round Table has provided us with both knowledge about the Statute of the ICC and first-hand information on the complex issues and problems concerning the establishment of the International Criminal Court. The experience acquired here will no doubt contribute to solutions, which could guide our governments in understanding and assessing this very complex issue. During the last few days, participants have pinpointed, defined the problems, weighed arguments, examined the relevant legal instruments, and assessed the actions taken so far. This will enable the Round Table to come up at the end of its deliberations with important and new ideas on the strengthening of the cause of the International Criminal Court.

I hope that we shall be very successful, and thank you for listening to me.

INTERVENTION

M. Christophe LANORD

Juriste, Secrétariat de la Fédération Internationale des Sociétés
de la Croix-Rouge et du Croissant-Rouge

Mesdames, Messieurs,

A ce stade, la Fédération Internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge n'a pas adopté de position officielle sur la question du témoignage du personnel d'organisations humanitaires, mais je voudrais néanmoins vous faire part de quelques réflexions sur le sujet.

Tout d'abord, sur l'importance de la question. Sans aller jusqu'à dire, comme l'aurait fait récemment une personnalité du Mouvement International de la Croix-Rouge et du Croissant-Rouge, que le témoignage d'un membre des composantes du Mouvement auprès de la Cour Pénale Internationale signifierait la fin du Mouvement, on doit reconnaître qu'un tel témoignage aurait des conséquences imprévisibles, impossibles à estimer complètement aujourd'hui, mais dont on peut penser qu'elles influeraient profondément les activités opérationnelles des organisations humanitaires.

Pourtant, il faut tout d'abord clarifier une question terminologique: dans le débat en cours, lorsque le terme «coopération» est utilisé, inclut-il le témoignage ou s'agit-il de deux actes complètement distincts? La question n'est pas résolue, y compris dans la déclaration du Comité permanent inter-organisations; mais, clairement, si la coopération technique sur l'analyse du droit, par exemple, ne semble pas poser de difficulté majeure, il n'en va pas de même pour la question du témoignage sur des cas concrets, qui constitue dès lors le principal problème pour les organisations humanitaires.

La question est pertinente pour l'ensemble des organisations humanitaires. Au-delà des distinctions juridiques entre les organisations intergouvernementales, les organisations non-gouvernementales et les composantes du Mouvement, ce sont bien les fonctions humanitaires des organisations qui doivent être considérées, et la compatibilité entre l'exercice de ces fonctions et le témoignage. Et si on ne doit pas faire de distinction entre les divers types d'organisations humanitaires, on ne doit pas non plus faire de distinction entre les diverses composantes du Mouvement. Les Sociétés nationales de la Croix-Rouge et du Croissant-Rouge sont concernées au premier plan. Pourtant, au moins sur le plan théorique, la question du témoignage du personnel d'organisations humanitaires n'est pas nouvelle. Le risque de voir ce personnel appelé à témoigner existait déjà bien avant la Conférence de Rome, et même avant l'établissement des Tribunaux ad hoc pour l'ex-Yougoslavie et le Rwanda: plus encore, le risque existait et existe encore à propos de tout procès devant une juridiction nationale. Mais c'est certainement le développement des outils de répression des crimes internationaux, associé, sur un plan très différent, au développement des organisations humanitaires et à une approche différente de ces fonctions par certaines organisations, où l'assistance s'accompagne de la dénonciation, qui a conduit à mener une réflexion sur la question.

Ainsi, l'évolution de ces deux fonctions - justice, d'une part, assistance et protection, d'autre part - conduit à une situation dans laquelle les organisations humanitaires seront toujours plus pressées de dénoncer, de témoigner, de parler; en d'autres termes, de ne pas rester silencieuses. Les effets quant à l'impartialité et à la neutralité et, surtout, quant à la perception de celles-ci, sont dès lors évidents: le témoignage met en danger ces principes et valeurs indispensables à l'action humanitaire. Dans les contextes les plus sensibles, c'est la confiance, la confidentialité qui disparaît, mettant ainsi en péril la confiance des personnes protégées et assistées en ceux qui fournissent cette assistance et cette protection. Aussi, le témoignage du personnel humanitaire sur des crimes de guerre, de génocide ou sur des crimes contre l'humanité dont il aurait été témoin serait gravement préjudiciable aux organisations humanitaires.

Et les précédents rendront d'autant plus difficiles les demandes d'organisations humanitaires d'être exemptées de témoignage; dans le même temps, le témoignage d'une organisation à propos d'une situation donnée mettra en péril la sécurité de toutes les organisations actives dans ce même contexte. Comment croire que les combattants, notamment dans un contexte de désintégration de l'autorité étatique, sauront faire la différence entre les organisations qui témoigneront contre eux et celles qui ne le feront pas? Le témoignage de certains risque de mettre en péril la sécurité de tous, y compris des personnes à assister ou à protéger.

Pour savoir comment gérer d'éventuelles requêtes de tribunaux, nationaux ou internationaux, on peut raisonner en termes juridiques. En particulier, on peut invoquer l'immunité de juridiction établie par les accords de siège. Cet argument est sans aucun doute valide pour les organisations intergouvernementales; elle l'est aussi pour le CICR et la Fédération, dans les Etats avec lesquels ces deux

organisations ont conclu des accords de siège. Mais, outre le fait qu'il ne s'agit pas de l'ensemble des Etats, cette immunité de juridiction n'exclut pas une dimension politique: le responsable d'une organisation pourrait-il refuser de lever l'immunité de juridiction d'un de ses collaborateurs, au cas où la demande d'un tribunal serait forte? De la même manière, on pourrait invoquer, peut-être avec succès, une sorte d'immunité fonctionnelle qui serait le corollaire indispensable des fonctions exercées par le personnel humanitaire; mais cette immunité ne reposerait pas sur une base juridique clairement établie. Le parallèle avec le patient et son médecin (ou encore avec un prêtre, un avocat, etc.) a une pertinence indiscutable quant à la justification d'une telle immunité, mais le caractère juridiquement obligatoire d'une exemption de témoignage sur cette base reste à démontrer. Et encore, une fois, si la pression exercée en faveur d'un témoignage est importante, les arguments juridiques risquent de ne pas être suffisants. Alors, comment permettre aux organisations humanitaires de se prémunir du danger qu'elles courent si leur personnel est appelé à témoigner dans un procès ?

La communauté internationale - que l'on pardonne cet anthropomorphisme désormais classique - a demandé à certaines organisations humanitaires, en particulier, mais pas uniquement, au Mouvement, d'accomplir certaines tâches visant à permettre à des normes d'être mieux appliquées ou visant à la protection et à l'assistance de victimes de la guerre. Aussi, pour être cohérente, la communauté internationale doit donner à ces mêmes organisations les moyens matériels d'accomplir lesdites fonctions: en termes concrets, ne pas forcer leurs collaborateurs à témoigner.

Les organisations humanitaires peuvent certes dire: « nous ne témoignerons pas »; elles doivent même considérer qu'il s'agit d'une règle d'or. Mais il faut aller plus loin et obtenir des Etats et des tribunaux qu'ils ne placent pas les organisations humanitaires face à un dilemme. En d'autres termes, il s'agit moins d'établir une exemption formelle et générale - laquelle poserait d'ailleurs des problèmes ardus de définition - que de demander à la communauté internationale de reconnaître que ce témoignage placerait les organisations humanitaires dans une situation délicate et périlleuse, mettant en danger l'exercice de fonctions jugées importantes par la communauté internationale. On se référera ainsi à la formule classique de Jean Pictet, selon laquelle on ne peut se faire à la fois le champion de la charité et de la justice. On ne peut pas exclure le témoignage dans des cas particuliers, par exemple à décharge d'une personne accusée à tort. Mais le principe doit absolument être l'absence de témoignage, le témoignage étant l'exception. Ceci doit viser tant les cas où l'organisation propose de témoigner (le témoignage volontaire d'un membre du personnel de l'organisation humanitaire devant être nécessairement exclu par leur relation contractuelle) que les cas où un tribunal ou une autorité politique demande à une organisation humanitaire de laisser son personnel témoigner. Les deux cas sont différents, mais le raisonnement doit être le même.

Cette position n'est pas forcément facile à défendre, à première vue; elle rappelle trop aisément le silence coupable ou, pour le moins, perçu comme tel, à propos des camps de concentration durant la seconde guerre mondiale. Mais la comparaison doit être considérée avec prudence, en rappelant notamment que le refus de témoigner devant un tribunal n'implique pas nécessairement - et ne doit surtout pas impliquer - l'absence d'action en faveur des victimes. Pourtant, sur le long terme, ne pas témoigner est la seule route qui ne soit pas une impasse.

La réflexion sur ce sujet n'en est qu'à ses débuts. Il est important qu'elle se prolonge, lors de cette Table Ronde, mais aussi, le cas échéant, dans d'autres fora tels que la XXVIIe Conférence Internationale de la Croix-Rouge et Croissant-Rouge, qui aura lieu à Genève en novembre 1999. Ce qui importe, c'est que la réflexion ait lieu et permette de mener à bien un dialogue fructueux entre les organisations humanitaires et les Etats.

Je vous remercie de votre attention.

INTERVENTION

Prof. Konstantin OBRADOVIC
Membre de l'Institut

Je voudrais dire, Monsieur le Président, juste quelques mots sur certaines dispositions du Statut, mes premières impressions en quelque sorte, étant donné – comme nous sommes j'espère tous d'accord – qu'une analyse vraiment approfondie de ce texte s'impose afin qu'on puisse sérieusement le commenter.

Mon impression générale, celle de prime abord après une première lecture du Statut, serait qu'il s'agit au fond d'un bon texte. Il y a effectivement d'imperfections, mais les éléments principaux indispensables pour un texte régissant l'institution et le fonctionnement d'un tribunal pénal s'y trouvent. Vu les conditions dans lesquelles le Statut a été adopté, les trois ou quatre ans qui on suffit qu'on en pose les fondements et, finalement, l'atmosphère générale dans laquelle se sont déroulés les travaux, il me semble que tous ceux qui sont en faveur de l'institution d'une juridiction de ce type peuvent tout de même être satisfaits. La procédure relative aux amendements n'est pas trop compliquée et il appartiendrait donc aux Etats-parties de faire le nécessaire pour que le texte soit amélioré et mis tout à fait au point.

Il y a tout de même certaines choses qui m'ont surpris. Par exemple le libelle du par. 2 de l'Art.5. Mais non moins certaines interventions que nous venons d'entendre ici concernant le même sujet – le soi-disant problème d'agression.

Peut-on aujourd'hui vraiment prétendre que cette notion n'est pas suffisamment claire? Et cela même après que l'Assemblée Générale a adopté, en 1974, une définition relative à cette notion? Cela tout de même me semble inconcevable et je ne comprends vraiment pas la portée et le sens de cette disposition. En effet, dans le "bon vieux temps" du bi-polarisme, tout Etat qui voulait faire sa petite agression armée contre le voisin s'appropriait la protection de l'Est ou de l'Ouest et, se lançant dans l'attaque, la "petite guerre" de quelques jours, pouvait bien être que le fameux "veto" va intervenir au sein du Conseil de Sécurité pour empêcher que – malgré les faits généralement clairs et limpides – il n'y aurait (juridiquement au moins) aucune agression. Maintenant, n'oublions pas qu'après la grande Guerre le Président Wilson a bien signé le Pacte de la SDN, mais le Congrès n'a pas voulu le ratifier. Et pourtant les Etas-Unis ont été seulement vingt ans après le principal créateur des NU. Progressivement donc les Etats vont tout de même ratifier le Statut. D'autre part, si je comprends bien au moins, la procédure concernant les amendements au Statut est relativement simple, de sorte que les imperfections pourraient être éliminées.

Ce qui me paraît par contre très important c'est le fait même qu'on ait abouti à faire ce Statut. Vu encore les expériences de la CDDH où – et concernant une matière relativement moins délicate - il avait fallu quatre longues sessions pour arriver aux Protocoles. Je me suis attendu qu'il y ait au moins deux, même trois sessions de la Conférence de Rome. Et pourtant tout a été fait en quelques semaines. Une tâche sans doute très ardue, mais on a fait tout de même quelque chose. Pour le règne de la légalité internationale ce seul fait est, d'après mon opinion, un événement d'une grande importance. Si cette épée de la justice internationale n'est pas encore prête à frapper les coupables, un instrument a été forgé. Donc même à ce stade de sa création, la CCI va servir en guise de prévention. Ceux qui éventuellement se préparent à menacer la paix internationale ou, dans un combat armé, ont égorgé sans pitié leur prochain, doivent tout de même prendre en considération que cette "épée De Damocles" est présente et qu'elle pourra tout de même frapper.

Intervention

H.E. Amb. Mounir ZAHRAN*, Egypt

I General Comment

The American delegation to the United Nations Diplomatic Conference in Rome made many amendments to the proposed Statute of the International Criminal Court and several of them were accommodated. These amendments weakened the provisions of the Statute, in order to ensure that the United States would approve the Statute in its final form. However, the United States was one of the seven countries that voted against the Statute and the Final Act of the International Criminal Court.

II Relations between the United Nations and the International Criminal Court

The International Criminal Court and its jurisdiction should have been dissociated from the United Nations Security Council. The prerogative of the Security Council to refer cases to the ICC in accordance with Article 13 of its Statute, or to defer the submission of any case for one year, which could be renewed in accordance to Article 16 of the Statute, is a critical outcome of the Rome Conference. The Security Council should not have been given any role in this regard, not only because the Council is currently in the process of reform, but also because of the enjoyment of the Permanent Members of the Veto rights which could and would be used in any of the cases involving any of their nationals to be submitted to the ICC. This relationship between the Security Council, which is a political Body, and the ICC, which is an independent judiciary Body that was established to address impunity to gross violations of human rights would lead to further politicisation of the ICC. Any suspicion of double standards and misuse of power should have been avoided in order to ensure the achievement of full justice.

III The case of non-co-operation of a state-party to the ICC

States should refrain from resorting to Article 124 which allows for the postponement of the Court's jurisdiction for certain crimes that fall within its jurisdiction for seven years.

IV Relations to States non-party to the Convention which established the Court and the Principle of Universality of the Existing Instruments

The Statute did not stipulate any action against countries that refuse to cooperate with the court. Although the General Assembly of the States party to the ICC has the power to call for a Special Session to consider the non-co-operation by any country with the ICC, the Statute did not specify any time-frame for holding such special session. In addition, the consensus or two-third majority required for any decision by the Special Session would hinder the possibility of reaching any decision. Co-operation between ICC and Inter-Governmental organizations such as NATO and WEU is not adequately covered by the Statute. There are no guarantees to ensure the necessary co-operation in any cases that would involve the military personnel of either of these two organizations. Taking into consideration that the United States of America assumes the position of Chief-of-Staff of the NATO forces, it would be impossible to expect any fruitful co-operation of NATO with the ICC due to its vote against the establishment of the Court. The Security Council will not be in a position to take any action to address any case of non co-operation of NATO with the ICC due to the fact that three members of the said alliance are permanent members of the Security Council.

*The views expressed by the rapporteur are his personal views and do not necessarily reflect the views of his Government.

V Genocide, War Crimes and Crimes Against Humanity

The use of weapons of mass destruction and in particular the most devastating among them namely nuclear weapons is considered by the overwhelming majority of nations as a crime of genocide, a crime against humanity, a war crime and a crime of aggression which are the crimes that fall within the jurisdiction of the ICC. The Special Session of the United Nations General Assembly devoted to Disarmament (SSODI) considered the existence of nuclear weapons as a threat to mankind. Therefore, the non-inclusion of the use of nuclear weapons and other weapons of mass destruction is in itself a source of regret, deception and a contradiction to the Statute of the International Criminal Court which enlists the use of less destructive weapons to fall within the various categories of crimes falling within the mandate of the ICC. The mere possession of such weapons is in itself a threat to use them and thus a crime against humanity. As for aggression, the General Assembly clearly defined this term in its resolution adopted in 1974. To avoid double standards and to ensure the universality of International Law the said definition should have been maintained in the Statute of the Court. However, the definition of aggression was left over to be considered in the interim period until the entry into force of the ICC.

VI Promotion of the International Criminal Court and its Future Work

Although the provisions of the Statute of the ICC are far from being perfect, it is still considered to be the minimum possible instrument. It may be subject to further improvement. It is therefore very important to consider ways and means to strengthen the Statute and ensure its effectiveness, universality and impartiality. To achieve such objectives, the United Nations General Assembly should adopt a resolution in its 53rd session with a view to accelerate the entry into force of the Statute.

In addition, the United Nations and its Specialized Agencies should contribute to the efforts for the dissemination and promotion of the Statute of the International Criminal Court. The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies and UNHCR are invited to participate in an active way in the promotional efforts. Training courses and seminars should be envisaged in co-operation and co-ordination with the International Institute of Humanitarian Law to acquaint and familiarize military officers with the provisions of the Statute.

LE TRIBUNAL PENAL INTERNATIONAL
UNE URGENTE NECESSITE

Dr. Osman EL HAJJE
Université Jinane, Centre pour les Droits de l'Homme, Tripoli, Liban

Maintenant que le Statut du Tribunal Pénal International est adopté, il nous reste à le faire ratifier par le minimum nécessaire à savoir les 60 pays prévus par l'Article 126, ce qui représente une tâche immense vu l'importance des pays qui s'opposent ou qui sont réticents à sa mise en œuvre. Cela n'empêche qu'un espoir est né et je me sens très encouragé comme vous tous.

C'est d'ailleurs le cas de tous ceux qui se sentent concernés par l'application du droit international humanitaire. Il est temps, en effet, après plus d'un demi-siècle d'hésitation et de tentatives infructueuses et surtout, depuis la fin de la seconde guerre mondiale, d'établir ce tribunal. Les raisons ne manquent pas et l'urgence se fait de plus en plus sentir. Il suffit de regarder la géographie des conflits et la diversité des atrocités commises sous le couvert d'un combat sans raison ou d'un différend que les combattants auraient pu résoudre sans recours aux armes à une époque où les institutions de conciliation, de médiation et d'arbitrage ne manquent pas, les principes de droit humanitaire et des droits de l'homme sont diffusés à grande échelle et dans toutes les langues écrites ou uniquement parlées et dans des enceintes où les procédures ont démontré leur souplesse et leur efficacité.

Ceci dit, le travail n'est pas terminé. Il faut encore élaborer une définition de l'agression, l'un des quatre crimes indiqués à l'Article 5 du Statut. Or même, si une ébauche de définition existe déjà avec la résolution adoptée en 1974, le consensus n'est pas pour autant établi et il exige beaucoup de souplesse et du doigté sans sacrifier la rigueur dans l'établissement de la norme. Cela dit, cette lacune ne doit pas mettre en jeu l'ensemble du Statut qui est déjà acquis et accepté.

Mais en abordant les différents Articles du Statut, on ne peut pas s'empêcher de s'interroger sur le pourquoi de la forme de répartition des Chapitres et d'autre part sur leur contenu. Par exemple, les principes généraux sont inscrits au Chapitre 3 alors qu'ils auraient dû constituer le Chapitre 2, juste avant l'énumération des différents crimes. En outre, à quoi sert l'Article 22 visant un "tribunal sensé jugé des crimes graves réprouvés par la conscience humaine", et la présence de l'alinéa 3 de cet Article n'y change rien.

Mais revenons aux crimes de l'Article 5. Ils peuvent être caractérisés comme concernant généralement des atteintes intentionnelles et particulièrement graves portées à des groupes humains déterminés ou non mais affectant directement le corps, l'esprit et l'existence économique et culturelle pour le présent et le futur des membres du groupe, par conséquent, on aurait pu regrouper les trois premiers crimes sous un même intitulé sans diminuer en rien la précision du texte. Cependant, cette classification revêt en quelque sorte un caractère traditionnel ou plutôt historique et rend difficile toute innovation dans ce domaine.

La question de l'agression est toute à fait différente. Dans le langage diplomatique, l'agression oppose deux ou plusieurs Etats (le ou les Etats agresseurs et le ou les Etats agressés) et il peut en résulter suite à cette agression qui ne touche que le territoire d'un Etat sans toucher les habitants. Or beaucoup de conflits à l'heure actuelle sont des conflits de frontières et risquent par conséquent de détourner le tribunal de son objectif premier à savoir dissuader en prévenant et sanctionner, lorsque la prévention n'a pas réussi, les atteintes graves touchant l'être humain et handicapant de façon irréversible son avenir. Cela dit, il faut attendre l'élaboration de la définition prévue pour juger si la tâche de la Cour est homogène ou composite, et c'est à mon sens très important pour une bonne administration de la justice du Tribunal.

Ceci dit, l'existence du Tribunal constitue un événement d'une grande portée dans le processus déjà commencé il y a plusieurs siècles avec Spinoza, Kant et les philosophes du siècle des lumières, et qui n'ont eu de cesse de confectionner, pièce par pièce, l'armature nécessaire à la protection de l'être humain et au maintien de la paix. Je suis convaincu que ces deux thèmes, protection et paix sont indissociables et absolument nécessaires pour le progrès et le développement. Par conséquent, il nous appartient de nous montrer à la hauteur de l'événement et d'agir à tous les niveaux souhaités ou possibles pour que le

Tribunal Pénal International devienne une réalité tangible et que son activité constitue un modèle du genre.

HUMANITARISM AND THE RULE OF LAW

Prof. John CRABB
Member of IIHL

Humanitarism is *per se* a virtue of human nature. It is at least potentially present in every human being and collectively in every human society. It is a sympathetic reaction to observed or known distress or misery of fellow human beings. Such reaction varies without limit, from being passively and transiently a mere matter of observation to inspiring the most dedicated and persevering activity seeking to eliminate or alleviate such human misfortunes.

In a sense, all law to deserve a name must be humanitarian in that it must present a rational basis of seeking to improve human society. Obviously, opposing notions of what such rational basis consists can produce the most fundamental antagonisms and can be attributed to giving rise to the most catastrophic of armed conflicts. However, the English philosopher Hobbes perceived as the most pervading evil of the primitive condition of pre-historic man the chaos of the lack of any law regulating the relations between men, whereby no human society existed. Human life was short and dismal, in a perpetual state of insecurity and warring with his fellow man. Primitive man himself was intelligent enough to perceive this, and all men formed a mythical "social contract" among themselves whereby each transferred to a common "sovereign" his hitherto unlimited autonomy. The sovereign then had the authority to create rules governing relations between men, who implicitly promised to obey them. Hobbes was not concerned with the substance or ideology of the sovereign's laws, but with the mere existence of the laws whereby the greatest of all evils, chaos, could be mastered. Perhaps Victor Hugo's Inspector Javert of "Les Misérables" had never heard of Hobbes, but when Hugo has him say "Good, bad or indifferent is no affair of mine, but the law I will have, and the law to the letter" a pure Hobbesian emerges.

A contemporary of Hobbes was Hugo Grotius, who is often regarded as the "father" of public international law because of his seminal treatise "De Jure Belli ac Pacis". He did not "invent" this law, but related and analyzed the conduct of states ("sovereigns") towards each other under conditions of both war and peace, which were existing between them. It is justifiable to consider this as the seed out of which the great corpus of international law as we know it today evolved. There is a parallel to Hobbes in that both promoted law as the desirable solution to bring order out of primitive chaos.

Allied to the foregoing is the ideal of "the rule of law", which all responsible entities and individuals purport to uphold. But here again, the most acrimonious of disputes can rise over the existence or not of law validly covering a situation, over which more than one law is applicable, and over the authority whose jurisdiction is proper for making decisions. There is also potentially the issue of how far law should extend, and whether or not certain situations should be left free of legal regulation. The rule of law concept does not pretend that in substantive content law is necessarily "good" – let alone "perfect"! But it is designed to promote impartial and consistent application and eliminate arbitrary caprice and to avoid giving the aura of legality to matters, however justifiable, which are not suitable for intervention, by the law. This ideal is always under pressure, even in the courts, but upholding it is necessary for the prestige and effectiveness of law as an institution. Again, the alternative points in the direction of chaos.

Our contemporary international humanitarian law is the creature of sovereign states, reached through multipartite agreement among them. Its most celebrated and comprehensive text is found in the four Geneva Conventions of 1949, adhesions to which constitute essentially a consensus of the sovereign states of the world. The specific and ultimate concern of IHL was victims both, civilian and military, actual or potential, of international armed conflicts. To secure such broad and varied adhesions to its texts, IHL has had to present itself as strictly impartial between parties in conflict or potentially so. IHL dealt with and acted upon sovereign states as the entities ultimately responsible.

After World War II many armed conflicts arose which were of an internal and non-international nature, and as such were outside the scope of the developed legal texts of IHL. In 1977 two Protocols Additional to the Conventions of Geneva were adopted to extend IHL in a limited way into such conflicts.

However, the political atmosphere surrounding these Protocols was dense, and certain texts were adopted susceptible of being seen as a departure from the character of impartiality of IHL. The Protocols went into effect, but with far less in the way of adhesions than the Geneva Conventions had secured. This suggests that the Protocols had succeeded politically to a degree, at some sacrifice pro tanto of respect for the rule of law.

Reference was made at the beginning of this text to the universality of the humanitarian spirit as part of human nature. This has given rise to innumerable acts and activities responding to this humanitarian impulse, including international organizations directed toward specific humanitarian situations. Our IHL does not seek or purport to cover the broad humanitarian spectrum, but rather has its own particularities.

Of these the most fundamental and indispensable is the quality of impartiality as between antagonists in a dispute. It is necessary that IHL has the confidence of both sides in order to reach a maximum number of victims of the dispute. It is a matter for IHL to respect the rule of law, which governs its functioning. This can be an uncomfortable assignment where one side of a dispute is overwhelmingly viewed in public opinion with intense opprobrium, with exhortation to join in the crusade against the evildoers. But the impartiality of IHL is merely abstention from acting beyond its sphere, which does not include participating in solutions or outcomes of partisan disputes.

In July of 1998, a diplomatic conference was convened in Rome for the purpose of creating a permanent International Criminal Court, and this was the subject of the XXIII Round Table of our Institute the following September. Some 150 states were in attendance at the conference in Rome, which adopted a document containing a proposed draft for the Statute of an ICC, which secured 60 signatures among the participants. This qualified it for circulation to all states for the purpose of obtaining additional signatures and ratifications. This process is presently in course, and it remains in suspense as to whether an ICC will indeed result, and if so, how long it will take. Clearly this draft Statute derives from humanitarian concepts and engages the close attention of IHL. But it ranges into broad and diverse humanitarian concerns referred to previously, outside the scope and intended activities of IHL. So saying is not to criticize the proposed ICC. But in analyzing the provisions, IHL should keep in mind the particular rule of law under which it operates and the degree of consistency between it and the Statutes of the Court and at the same time the limits, which preclude IHL from participating in activities of the Court.

PRESENTATION OF THE CONCLUSIONS AND RECOMMENDATIONS OF THE ROUND TABLE

Amb. Erich KUSSBACH, Austria

1. Opening Session.

The XXIII[rd] Round Table on Current Problems of International Humanitarian Law held at San Remo from 2 to 4 September 1998, was devoted to an analysis of the Statute of the International Criminal Court (called hereafter the ICC) as adopted by the UN Diplomatic Conference in Rome (15 June - 17 July 1998). The Round Table also discussed questions relating to the implementation of the Statute once the Court became operational.

Prof. Jovan Patrnogic, President of the Institute, opened the Round Table with brief welcoming remarks. Referring to the 28[th] Anniversary of the foundation of the Institute, he recalled with satisfaction its significant achievements, while expressing the hope that the Institute would continue to fulfil its tasks dedicated to the humanitarian cause.

The participants were also welcomed by Mr. Giovanni Berrino , Deputy Mayor of San Remo. Duke Guido O. Borea d'Olmo spoke on behalf of the Order of Malta, wishing the meeting successful deliberations.

Prof. Giovanni Conso, President of the Diplomatic Conference, made an opening statement on the proceedings of the Diplomatic Conference emphasising the need to support the adoption and effective implementation of the Statute of the ICC. Prof. Conso also noted the important role played by Mr. Adriaan Bos in the preparatory work. Mr. Gualtiero Michelini addressed the Round Table in the name of the Italian Ministry of Justice. Finally, the Secretary-General of the Institute, Dr. Ugo Genesio, explained the purpose and programme of the Round Table to the participants.

After the opening statements, Mr. Adriaan Bos, Legal Adviser of the Ministry of Foreign Affairs of the Netherlands and Chairman of the Preparatory Committee to the Diplomatic Conference, gave a most informative introductory report on the main issues of controversy dealt with during the Conference. He underscored the overall significance of the Statute, which, eventually, will lead to the establishment of a permanent international criminal court. Despite some obvious weaknesses in the Statute owing to inevitable compromises, Mr. Bos insisted on the fundamental contribution of the Diplomatic Conference to the strengthening of the international public order and humanitarian law.

After the discussion on the introductory report the Round Table focused its deliberations on the following selected items:

- Relations between the United Nations and the ICC;
- Relations of States non-Party to the Court and the Principle of Universality in the Existing Instruments;
- War Crimes and Crimes against Humanity and finally,
- Promotion of the ICC and its Future Work.

The deliberations on the items were conducted by highly qualified moderators, who also made introductory statements on each main topic. Other experts presented contributions addressing one or more specific aspects or problems. These statements were followed by a general debate, in which participants further elaborated on particular aspects or raised questions.

2. Relations between the United Nations and the ICC.

The relationship between the ICC and the United Nations is one of the crucial issues concerning the functioning of the future Court. Consequently, there was a very lively discussion on this issue during the second session of the Round Table. It focused on three aspects:

- the nature and content of the relationship,
- the financing of the Court and
- the role of the Security Council.

With regard to the first aspect, it was underlined that the ICC would not become an organ of the United Nations, contrary to the ICTY and ICTR. The content of the relationship would be established by an agreement with the United Nations, according to Article 2 of the Statute. As it was noted during the discussion, the States present at the Rome Conference chose to maintain, through the Assembly of States Parties to the Statute, the responsibility of approving the Agreement: this choice is a confirmation of the consensual foundation of the ICC and of its independence from the United Nations.

Another aspect of this independence appeared to be clear during the discussion about the rules on the financing of the Court. Such financing should be ensured, first of all, by contributions made by States Parties. United Nations' funds can be provided subject to the approval of the General Assembly, in particular, in relation to the expenses incurred due to referrals by the Security Council. The Statute, therefore, as it was emphasised, does not establish any obligation of the United Nations to provide these funds.

As some participants in the discussion underlined, the proposal to utilise the ordinary United Nations' budget for ICC financing was rejected above all to guarantee complete independence to the Court. Other participants in the discussion, however, noted that this solution could represent a risk for the functioning of the Court, if the voluntary contributions provided in Article 116 did not materialise. Therefore, the international community would have to be seriously engaged in guaranteeing ICC funds "by voluntary contributions from governments, international organisations, individuals, corporations and other entities", in addition to assessed contributions made by States Parties and funds provided by the United Nations.

By far the most animated discussion in the second session of the Round Table concerned the role of the Security Council. As it was pointed out in the introduction of the moderator, the Security Council would have a double role: a negative one and a positive one. On the one hand, the Security Council can defer an investigation or prosecution for a period of 12 months with a resolution adopted under Chapter VII of the Charter of the United Nations. This deferral may be removed by the Council under the same condition. Concern regarding the independence of the Court caused by this provision was in part dissipated by the consideration that the provision of a Security Council decision for the deferral of an investigation or prosecution rather than the provision of an authorisation to investigate or prosecute, according to one of the options of the Preparatory Committee, would make the deferral very difficult. On the other hand, the Security Council, always acting under Chapter VII of the Charter of the United Nations, would have more power in the referral to the Prosecutor of "a situation in which one or more of such crimes appears to have been committed".

In fact, with such a decision, as it was noted, the Security Council could overcome the acceptance of ICC jurisdiction by the territorial State or by the national State of the accused as precondition to the exercise of this jurisdiction. And so, as it was critically underlined, the Security Council could also impose ICC jurisdiction to States non-party to the Statute and to States not having accepted its *ad hoc* jurisdiction. But, as emerged from the discussion, one may reply to the preoccupation about this relevant role reserved by the ICC Statute to the Security Council in the following way: in any case, the Security Council, always in accordance with Chapter VII of the Charter, has the power to create *ad hoc* international criminal tribunals and to confer to them the jurisdiction to repress crimes of international concern. The creation of a permanent international criminal tribunal through the consent of the States would certainly better ensure a neutral repression of these crimes.

Finally, the discussion focused on the co-operation between humanitarian organisations and the ICC. The question was raised if testifying and providing evidence might endanger the neutrality of these organisations and so expose the personnel to a risk for one's own safety.
On behalf of the International Humanitarian Fact-Finding Commission it was emphasised that the Commission was ready to co-operate closely with the ICC.

3. Relations between States non-Party to the Court and the ICC Statute, including the Problem of the Principle of Universality.

Relations between States non-party to the Court and the ICC Statute, including the problem of the principle of universality, were discussed at length during the second session of the Round Table. In connection with Article 12 of the Statute, it was pointed out that crimes which had already been recognised and defined by customary international law were to be prosecuted and punished even by non-parties to the Statute. In this context reference was made to the Law of the Sea Convention which also contains a number of customary law rules. The question was raised as to what the position would be if such States did not comply with customary law obligations, in other words, if they neither prosecute nor extradite the suspect (principle of "aut dedere aut iudicare") ? It was suggested that such State could be forced by international political pressure or for other reasons, to accept ad hoc the Court's jurisdiction. Article 5 paragraph 1 of the Statute was invoked where crimes falling under the jurisdiction of the Court are qualified as the "most serious crimes of concern to the international community as a whole". This definition in itself clearly indicates that those crimes are governed by the principle of universality.

The relation between Articles 8 (war crimes) and 124 (transitional provisions) was also discussed in detail. It was asserted that even if some or all war crimes had been excluded from the Court's jurisdiction, the general obligation of States parties to the Statute to co-operate with the Court would still remain untouched.

It was furthermore clearly stated that fundamental customary law rules concerning "elementary humanitarian considerations", as defined by the International Court of Justice in the Corfu Channel case and in the Nicaragua case, form part of ius cogens. It was also mentioned that humanitarian law, including the Statute, is characterised by the principles of impartiality, humanity and neutrality, although some doubts were expressed in this regard during the debate, at least with reference to the Statute.

Finally, regret was expressed about the fact that even though the relevant customary law rules have been recognised as universally binding, in practice crimes defined by those rules are still not universally prosecuted and punished. This was one more reason for the necessity of creating the ICC.

During the debate many questions were raised and comments made. One of them attracted particular attention because of its general nature. It concerned the distinction between International Humanitarian Law, which comprises the law of war, and the protection of Human Rights. It was submitted that there still exists an essential difference between these two fields of public international law. According to this view the Statute concerns international humanitarian law only, although it was admitted that Article 21 paragraph 3 refers explicitly to human rights.

4.War Crimes and Crimes against Humanity.

The afternoon session of the second day of the Round Table focused on the competence of the ICC *ratione materiae,* on the relation between customary humanitarian law, the rules of the Geneva Conventions and Protocols, the substantive rules of the ICC Statute, refugee law, the ICRC role and the influence of the ICC on domestic jurisdictions.

The moderator emphasised the following relevant aspects:

- for the first time in the history of international law international criminal law has become effective rather than rhetoric;
- with Article 7 of the ICC Statute we have the first multilateral comprehensive definition of crimes against humanity;

- with the Rome Statute it has been finally recognised that crimes committed during non-international armed conflicts are also to be considered as war crimes;
- with the Statute we have some new categories of war crimes and crimes against humanity, such as conscription or enlisting children under the age of fifteen and the disappearance of persons.

In the paper on the role of the Court-to-be in the protection of refugees, the fact that ICC jurisdiction would cover crimes such as denial of humanitarian assistance, forced displacement, attacks on humanitarian personnel and others, was positively evaluated. However, it was regretted that a specific reference to anti-personnel mines was dropped and that no mention was made of weapons of mass destruction, in particular, of nuclear weapons.

The influence of the ICRC with regard to ICC jurisdiction was underlined, taking into consideration the following points:

- the role played during the preparatory work of the Statute with a view to guaranteeing the implementation of international humanitarian law when States are unable or unwilling;
- the contribution to the definition of war crimes in international and non-international armed conflicts;
- the assessment of the Rome Conference results;
- the role in the future promotion of the ICC through national Societies of the Red Cross and through the work on the determination of elements of crimes.

The contributions concerning the influence of the ICC in domestic jurisdictions focused on two aspects:

- the obligation to co-operate and
- the principle of complementarity.

The non self-executing character of the ICC Statute was also clarified by reference to the practical implementation of ICTY and ICTR Statutes. The rules of the ICC Statute need specific implementation by national legislation, in particular, with regard to arrest and surrender of the accused and to the enforcement of sentences and penalties.

With regard to the principle of complementarity it was noted that, if the States do not want to be denounced vis-à-vis the international community as a whole, they better assure the repression of crimes of international concern according to the principle of universal jurisdiction by guaranteeing, through their domestic legislation, the implementation of the afore-mentioned principle and of the new crimes recognised by the ICC Statute.

The statement by Dr. Mariapia Garavaglia , President of the Italian Red Cross Society and Vice-president of the International Federation of the Red Cross and Red Crescent Societies, concentrated on the influence of the ICC Statute over the future destiny of humanity even before its entry into force. The United Nations Universal Declaration of Human Rights, despite its non binding character, is a significant example of such authority. It is, she underlined, the force of fundamental principles rather than of specific legal rules.

The discussion focused on the list of crimes, the political or juridical nature of the crime of aggression, the relation between the ICC Statute and other rules of international law, the practice of certain domestic jurisdictions in the implementation of international humanitarian law and the repression of crimes of international concern.

5. Promotion of the International Criminal Court and its Future Work.

The fourth working session of the Round Table turned to the question of future action. Two steps lie ahead: firstly, signature, ratification and entry into force of the Statute, and secondly, its implementation.

It is now necessary to obtain, as fast as possible, the 60 signatures and ratifications needed for the entry into force of the Statute. This process must be promoted and accelerated, which requires intensive lobbying. The questions are: how lobbying should be conducted efficiently and who should do it?

Any lobbying must emphasise the political benefits deriving from ratification and take into account the political costs. Benefits are not only reputation but also the dividends to be gained from the peace-promoting effect the activity of the Court may have in conflict-torn societies. International public opinion is also an important element. The "like-minded" States should set an example by an early ratification. It is equally important that the Third World is sufficiently involved in this opinion building process and that cultural differences are clearly considered.

Taking all this into account, lobbying for signature and ratification should include working for the non-use of the opting-out clause of Article 124 of the Statute of the Court. The big problem of lobbying is how to reach the right public. The role of the media is indispensable for this purpose. Therefore, it is essential to establish appropriate links between the world of the media on the one hand and the international legal and diplomatic community on the other. The Institute could, for instance, organise seminars for lawyers, diplomats and journalists in order to promote this mutual understanding.

The lobbying will and should be done by many organisations and institutions. The ICRC should play a role similar to the one it has played for the ratification of the Protocols additional to the Geneva Conventions. While various non-governmental organisations have their own respective methods and target groups, some networking, sharing of experience and common action is desirable. The Institute could provide a forum for this purpose. Other appropriate occasions must be sought, such as the World Decade for Information and Education on Human Rights, the Decade of International Law or the forthcoming celebration of the 100th anniversary of the First Hague Peace Conference in May 1999.

The role of intergovernmental organisations remains important. At its next session, the General Assembly of the United Nations should adopt a resolution calling for an early ratification of the Statute. The UNHCR and the UNESCO should also become involved.

As to implementation, it is necessary to stress the importance of the Preparatory Committee whose work should begin very soon. A prompt elaboration of the rules of procedure and work on the definition of aggression deserve priority. This process must not be used for attempts to re-negotiate the Statute. Therefore, the work of the Preparatory Committee has to be transparent. It should be observed by a critical public.

It is essential to ensure the efficiency and efficacy of the Court. It will only be able to play a salutary role in international relations and for conflict-torn societies if it can establish itself as a trustworthy institution in which both states and the peoples can have confidence.

A crucial institution is the Prosecutor. The Court can only be efficient and effective if the Prosecutor has enough resources. Thus, funding is essential right from the beginning. The double trade approach (private funding and financing according to the usual model of international organisations) is positive. The creation of a foundation for the purpose of giving financial independence to the Court might be a way to be considered.

6. Concluding remarks.

In conclusion, it is fair to say that it is very fortunate indeed that, on the initiative of President Patrnogic, the Institute took up the Statute of the ICC, recently adopted by the Rome Conference, and included it on the agenda of the XXIIIrd Round Table. It was a timely and forward-looking decision as the deliberations of the last three days have convincingly proven. The debates have been substantial, inspiring and promising. They have been conducted in a professional, objective and at the same time lively and engaged manner, characterised by a friendly atmosphere in keeping with the tradition of the Institute's Round Tables. It is, therefore, safe to say that the meeting has been a full success and an important contribution to the strengthening of the cause of the ICC.