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THE INTERNATIONAL CRIMINAL COURT: Making the right choices - Part V: Recommendations to the diplomatic conference



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16 FUNDAMENTAL PRINCIPLES FOR A JUST, FAIR AND EFFECTIVE INTERNATIONAL CRIMINAL COURT

1. The court should have jurisdiction over the crime of genocide. The statute should provide that the court has jurisdiction over this crime as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, in peace as well as during armed conflict.

2. The court should have jurisdiction over other crimes against humanity. The court should have jurisdiction over other crimes against humanity, including the following crimes when committed on a systematic basis *or* large-scale (there should be no requirement that they have to be *both* systematic *and* large scale): murder; extermination; forced disappearance of persons; torture; rape, enforced prostitution and other sexual abuse; arbitrary deportation across national frontiers and forcible transfer of population within national frontiers; arbitrary detention; enslavement; persecution on political, racial, religious or other grounds; and other inhumane acts. The court should have jurisdiction over these crimes whether they have been committed in peace or armed conflict.

3. The court should have jurisdiction over serious violations of humanitarian law in international and non-international armed conflict. The court should have jurisdiction over serious violations of humanitarian law in *international* armed conflicts, including: all grave breaches of the Geneva Conventions of 1949, grave breaches and denials of fundamental guarantees of Additional Protocol I to the Geneva Conventions and violations of the 1907 Hague Convention IV and its Regulations. The court should also have jurisdiction over serious violations of humanitarian law in *non-international* armed conflicts, including violations of common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions. There should be no threshold, such as a requirement that the violations of humanitarian law in either type of conflict were part of a plan or policy or part of a large-scale commission of such crimes. Similarly, there should be no threshold for violations of common Article 3.

4. The court must ensure justice for women. The statute should include jurisdiction over rape, enforced prostitution and other sexual abuse as crimes against humanity, when committed on a systematic basis or large scale, and as serious violations of humanitarian law in international and non-international armed conflict. The prosecutor must investigate these and other crimes against women and all staff in all organs of the court should receive training relevant to the investigation and prosecution of crimes against women. The court must be able to take certain measures to protect women victims and their families from reprisals and unnecessary anguish to which they might be exposed in a public trial, without prejudicing the rights of suspects and accused to a fair trial. The statute should also facilitate the selection of women with a view to achieving gender balance in all organs of the court.

5. The court must have inherent (automatic) jurisdiction. The statute should provide that all states when ratifying or acceding to the statute consent to the court having inherent (that is, automatic) jurisdiction over the three core crimes of genocide, other crimes against humanity and serious violations of humanitarian law. No further state consent should be required. Since such inherent jurisdiction is *concurrent* with that of states, the court would exercise its jurisdiction only when states were unable or unwilling to exercise their jurisdiction.

6. The court must have the same universal jurisdiction over these crimes as any of its states parties. Under international law, each of these three core crimes - genocide,

other crimes against humanity and serious violations of humanitarian law - are crimes of universal jurisdiction. That means that *any* state may exercise jurisdiction over a person suspected of having committed one of these crimes and bring *anyone* responsible for such crimes to justice *no matter where the crime was committed*. If the court is to be an effective complement to national courts, and not a weaker court, then it must have the same universal jurisdiction over these crimes as any one of the states parties.

7. The court must have the power in all cases to determine whether it has jurisdiction and whether to exercise it without political interference from any source. If the court is to be an effective complement to national courts when they are unable or unwilling to bring those responsible to justice for these crimes, it must be able to determine when they are unable or unwilling to do so. Otherwise the court will be at the mercy of states which are unable or unwilling to bring those responsible for the worst crimes in the world and which are also unwilling to have any other court do so.

8. The court should be an *effective* complement to national courts when these courts are unable or unwilling to bring to justice those responsible for these grave crimes. Every provision of the proposed statute must be tested against this requirement that the court be effective. Many of the proposals by states would make the court *less* effective than the national courts of states parties.

9. An independent prosecutor should have the power to initiate investigations on his or her own initiative, based on information from any source, subject only to appropriate *judicial* scrutiny, and present search and arrest warrants and indictments to the court for approval. There is only one truly effective method to ensure that all cases which should be brought before the court are brought. An independent prosecutor should be able to initiate investigations of any crime within the court's jurisdiction on his or her own initiative, based on information from any source, and present search and arrest warrants and indictments to the court for approval, without state interference. The Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals) has the power to initiate investigations of any crime which took place within the tribunals' jurisdiction on his or her initiative, and present indictments to the tribunals for approval, without any selection or prior interference by the Security Council or states, although states are free to seek judicial review of court orders. There are advantages to permitting the Security Council to refer situations involving threats to or breaches of international peace and security to the prosecutor for investigation pursuant to Chapter VII of the UN Charter, as the requests and orders of the court would benefit from the Security Council's Chapter VII enforcement powers, but referrals and state complaints should only be a supplement to other sources for the prosecutor. Both the Security Council and states are political bodies and likely to select situations on political, not legal, grounds. Moreover, neither are likely to submit many situations. The Security Council has established only two *ad hoc* tribunals in more than half a century and states rarely file complaints against other states under state complaint mechanisms of human rights treaties.

10. No political body, including the Security Council, or states, should have the power to stop or even delay an investigation or prosecution under any circumstances whatsoever. There is no legitimate ground under international law or morality to obstruct justice by stopping or delaying investigations of crimes of genocide, other crimes against humanity or serious violations of humanitarian law. Indeed, all states have obligations to repress these crimes. Justice must never be a bargaining chip in peace negotiations. Therefore, no *national* amnesty or pardon which has prevented justice and the emergence of the truth may prevent the *international* court from bringing those responsible for these crimes under

international law to justice. The Security Council has never sought to prevent the International Court of Justice or national courts from hearing cases involving situations which it was considering under its Chapter VII powers to address threats to or breaches of international peace and security. Any delays in an investigation would let memories of witnesses fade and facilitate the destruction of evidence and intimidation of witnesses.

11. To ensure that justice is done, the court must develop effective victim and witness protection programs, involving the assistance of all states parties, without prejudicing the rights of suspects and the accused. The court, in close cooperation with states, must be able to take certain security measures to protect witnesses and victims and their families from reprisals. Such measures must not prejudice the rights of suspects and accused.

12. The court must have the power to award victims and their families reparations, including restitution, compensation and rehabilitation. As recognized in a wide variety of international instruments, including the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, victims of grave human rights violations and their families have the right to reparations, including restitution, compensation and rehabilitation. The court itself should have the power to award such reparations since it is unlikely that national courts, which were unable or unwilling to bring the person responsible to justice, will be able or willing to award reparations or to enforce the award.

13. The statute must ensure suspects and accused the right to a fair trial in accordance with the highest international standards at all stages of the proceedings.

If the court is to be effective, particularly in the situations in which these crimes occur, justice must not only be done, but be seen to be done. Therefore, the court must be scrupulous in its respect for the highest possible international standards for fair trial. These standards include those found in Articles 9, 10 and 11 of the Universal Declaration of Human Rights; Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; the UN Standard Minimum Rules for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Articles 7 and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; and the UN Guidelines on the Role of Prosecutors.

14. All states parties, including their courts and officials, must provide full cooperation without delay to the court at all stages of the proceedings. Like the two *ad hoc* Yugoslavia and Rwanda Tribunals, the court will be largely dependent upon state cooperation, whether this involves voluntary measures such as on-site visits and interviews with witnesses, or compulsory process to search premises, compel testimony and production of documents or to arrest and transfer persons. Therefore, all states parties must provide the court the same cooperation and compliance that their executive authorities provide their national courts. To ensure that the court is not frustrated before it can begin, full cooperation must be provided in the period before the court determines whether it has jurisdiction and should exercise it. States may not refuse to comply with court orders or requests to provide information or to transfer persons to the court on any of the traditional grounds for refusal in state-to-state cooperation. The court must have the power to determine whether a state has fully complied with court orders and requests and it must determine whether a state or individual may be excused from complying with an order or request.

15. The court should be financed by the regular UN budget, supplemented, under appropriate safeguards for its independence, by the peace-keeping budget and

by a voluntary trust fund. The experience of the two *ad hoc* Yugoslavia and Rwanda Tribunals demonstrates that an international court must receive stable and adequate financial, human and technical resources to ensure its effective functioning. The independence of the court should not be affected by the method of its financing. Despite current difficulties, the best method over the long-term for providing regular and secure financing is through the regular UN budget, supplemented by the peace-keeping budget and a voluntary trust fund, provided that there are adequate safeguards for the court's independence. The court should not be financed by states parties or by complaining states, as this would discourage ratifications, cripple the court in its early years if a few wealthy states did not ratify the statute, be unreliable over the long-term and lead to domination by wealthy states.

16. There should be no reservations to the statute. The statute must expressly prohibit *all* reservations. Permitting reservations would defeat the object and purpose of the statute - to bring to justice those responsible for the worst crimes in the world - by allowing states parties to redefine crimes, to add defences not consistent with international law or avoid obligations to cooperate with the court. It would also lead to an unworkable system in which each state would have undertaken a different set of obligations, instead of common international commitments.

ABBREVIATIONS USED IN THIS PAPER

<i>Blaski</i>	<i>Prosecutor v. Blaski</i> , Judgement on the request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR-108 <i>bis</i> (Appeals Chamber), 29 October 1997
court	the permanent international criminal court
<i>Eredemovi</i>	<i>Prosecutor v. Dra•en Erdemovi</i> , Judgment, Case No. IT-96-22-A, Appeals Chamber, 7 October 1997
Fourth Geneva Convention	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide
Geneva Conventions	The four Geneva Conventions of August 12, 1949
Hague Regulations	Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907
ICCPR	International Covenant on Civil and Political Rights
ILC, followed by a number	Article of ILC draft statute, as modified by the Preparatory Committee in 1997
ILC draft statute	draft statute for a permanent international criminal court adopted by the International Law Commission in July 1994
Preparatory Committee	Preparatory Committee for the Establishment of an International Criminal Court
Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts
regulations	regulations of the court
rules	rules of procedure and evidence
Rwanda Tribunal	International Criminal Tribunal for Rwanda
SDT, followed by a number	Article of Secretariat Draft Text of final clauses
Third Geneva Convention	Geneva Convention Relative to the Protection of Prisoners of War of August 12, 1949
UN	United Nations
Yugoslavia Tribunal	International Criminal Tribunal for the former Yugoslavia
Zutphen text	draft consolidated text prepared at meeting of Bureau and chairs of working groups and informal drafting groups of Preparatory Committee in Zutphen, The Netherlands from 19 to 30 January 1998

THE INTERNATIONAL CRIMINAL COURT

Making the right choices - Part V

Recommendations to the diplomatic conference

INTRODUCTION

“The Special Rapporteur believes that the following measures could be taken to combat the problem of impunity . . . establishment of a permanent international criminal court, with universal jurisdiction over mass violations of human rights and humanitarian law; such an international criminal court would have to be bestowed with an adequate mandate and sufficient means to enable it to conduct thorough investigations and enforce the implementation of its decisions”

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1997/61, UN Doc. E/CN.4/1998/68, 23 December 1997

This is the fifth in a series of position papers which Amnesty International has published in support of the establishment of a just, fair and effective permanent international criminal court (court). Copies of all five of these easy-to-use manuals are being provided to decision-makers involved in the drafting of a statute for the court, including all delegates to the five-week diplomatic conference in Rome which opens on 15 June 1998 to adopt the statute. The first four papers in this series addressed topics scheduled to be considered at the four sessions in 1997 and 1998 of the United Nations (UN) Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee).

The scope and purpose of Part V. This paper is designed to be read together with the 210-page consolidated text of 116 articles, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, which is available on the NGO Coalition for an International Criminal Court Web Site: <<http://www.igc.apc.org/icc>>, and which is too long to include as an annex. Nevertheless, sufficient information about the relevant provisions in the consolidated text is provided so that much of the paper should be understandable even without the full consolidated text. When the wording in the consolidated text is unbracketed, it represents a consensus achieved during the course of 15 weeks of negotiations by the Preparatory Committee and, generally, it will be very difficult to have it changed during the diplomatic conference. Similarly, when a crime or a provision has been omitted from the consolidated text entirely, it is unlikely that it could be added to the text during the diplomatic conference. As a general rule, this paper concentrates on making recommendations of matters of greatest concern to Amnesty International, based on the choices in the consolidated text, although where the choices are completely unacceptable under international law or standards or the omissions would seriously interfere with the effectiveness or fairness of the court, alternatives are recommended, either for the statute or a separate instrument elaborated after the adoption of the statute by the preparatory commission or the court.

For reasons of space, the scope of *Part V* is largely limited to recommendations for retaining or amending the consolidated text, rather than analysis. However, the sections in *Parts I - IV* where the legal argument in support of these recommendations are located are cited:

The international criminal court: Making the right choices - Part I: Defining the crimes and permissible defences and initiating a prosecution (AI Index: IOR 40/01/97);

The international criminal court: Making the right choices - Part II: Organizing the court and guaranteeing a fair trial (AI Index: IOR 40/11/97);

The international criminal court: Making the right choices - Part III: Ensuring effective state cooperation (AI Index: IOR 40/13/97); and

The international criminal court: Making the right choices - Part IV: Establishing and financing the court and final clauses (AI Index: IOR 40/04/98).

As demonstrated in *Parts I-IV*, the recommendations are based firmly on a solid foundation of existing international law and standards. In a few cases, where the recommendations may involve to some extent the progressive development of substantive or procedural law, they are based on widely, if not universally, accepted international standards. With respect to some paragraphs, Amnesty International simply describes the relevant legal sources to assist the reader, without making any recommendations.

What is at stake at the diplomatic conference. There has been dramatic progress in the past four years since the International Law Commission completed the work it started half a century ago, and there is now a substantial majority of states from all parts of the world which agree that certain benchmarks must be satisfied if the statute is to establish a just, fair and effective court which will stand the test of time. Nevertheless, dangers lie ahead. Many governments are under pressure to adopt any statute, just so that they can say that the diplomatic conference was a success. Others are ready to compromise on questions of fundamental principle, just so they can persuade a few powerful states - which may not ratify the statute for decades - to sign almost any statute, no matter how weak the court would be. Such a result would be worse than no court at all. As Justice Louise Arbour, the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (Yugoslavia and Rwanda Tribunals) declared at the Preparatory Committee on 8 December 1997, the court

“should be strong and well equipped to operate as the authoritative mechanism through which an individual may be deprived of his or her liberty. Should it be a weak and powerless institution, not only will it lack legitimacy, but it will betray the very human rights ideals which will have inspired its creation. In such a case, regardless of the number of ratifications, the Court may be considered a retrograde development as it will not only fail to dispense fair justice, but it may exacerbate the sense of legitimate grievance of the disenfranchised.

In short, I am not persuaded that a weak permanent Court is better than no Court at all.”

Therefore, Amnesty International is asking all governments to pledge to support the *16 fundamental principles for a just, fair and effective international criminal court* reproduced at the beginning of this paper, which form the foundation of all its recommendations,

and to ensure that there is no compromise whatsoever on these principles under any circumstances.

Some of the many ways some governments are seeking to weaken the court. The number of proposals which some governments are making which would seriously weaken the court are too numerous to list completely here. Nevertheless, Amnesty International is particularly concerned about the following 10 proposals which would make the court an ineffective complement to national courts which are unable or unwilling to bring to justice those responsible for the worst crimes in the world:

TEN WAYS TO WRECK THE COURT

1. Permit the Security Council - or even only one permanent member - to prevent or delay - perhaps indefinitely - an investigation or prosecution of genocide, other crimes against humanity or war crimes when the situation where these crimes are taking place is being considered by the Security Council as a threat to or breach of international peace and security or as a case of aggression.

2. Prevent the prosecutor from investigating or prosecuting cases of genocide, other crimes against humanity or war crimes, based on information from victims or other reliable sources, even after a judicial determination that the court had jurisdiction and the case was admissible, unless the Security Council had referred the situation to the court or a state had made a complaint.

3. Permit states parties to the statute to decide themselves case by case after ratifying the statute to decide whether to consent to the court's jurisdiction.

4. Permit states parties to the statute to refuse to cooperate with the court in transferring suspects or accused to the court or providing information to the court if such cooperation would be contrary to national law or national interest.

5. Make the court's jurisdiction more limited than the universal jurisdiction over genocide, other crimes against humanity and war crimes which states parties now have over these crimes, by requiring that the state which has custody of the suspect or accused (custodial state), the state on whose territory the crime occurred (territorial state), the state of the suspect or accused's nationality, the state of the victim's nationality, the state seeking to extradite the suspect or accused and any other interested state to consent before the court can even start an investigation of one of these crimes.

6. Narrowly define the scope of genocide, other crimes against humanity or war crimes or impose very high thresholds not found in international law before the court could investigate these crimes.

7. Introduce defences to these crimes which are prohibited by international law, such as superior orders or duress, or weaken principles of criminal responsibility, such as superior responsibility.

8. Permit states to prevent an investigation or prosecution of genocide, other crimes against humanity or war crimes by establishing a national truth commission as a substitute or by granting an national amnesty for these crimes under international law.

9. Introduce statutes of limitations for these crimes which would mean that the international community could not investigate or prosecute persons who have successfully evaded justice for a prolonged period of time.

10. Permit reservations to the statute, thus allowing states to pick and choose whichever parts of the statute they wish to implement and undermining the entire structure of the court.

PREAMBLE OF THE STATUTE

The Preamble, which is an integral part of the statute, must state the reasons which motivated the international community to establish a permanent international criminal court, the purposes the court is to fulfil and the principles which should guide the court in fulfilling its purposes. It should do so in a way which inspires international support for the court and gives hope to victims and their families that the court will play a decisive role in securing international justice in all parts of the world in the same way that the Preamble of the UN Charter gave hope to millions that the new organization would “save succeeding generations from the scourge of war”, which twice in their lifetime had “brought untold sorrow to mankind”, and has inspired international civil servants from all parts of the globe to dedicate themselves to fulfilling the purposes of the UN. The Preamble of the statute of the permanent international criminal court must, therefore,

recognize that in the half century since the trials before the International Military Tribunals at Nuremberg and Tokyo millions of men, women and children have been victims of genocide, other crimes against humanity and war crimes;

acknowledge that the international system of justice, which has relied almost exclusively on national investigations and prosecutions, has largely failed to bring those responsible for these millions of crimes to justice;

further recognize that the experience of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda demonstrates that international criminal courts can be an effective complement to national criminal justice systems when they are unable or unwilling to bring those responsible for these grave crimes under international law to justice and can serve as an inspiration and model to states to fulfil their responsibilities;

decide that a permanent international criminal court is necessary to complement national jurisdictions when they are unable or unwilling to fulfil their duty to bring those responsible for these grave crimes to justice;

determine that a permanent international criminal court is necessary to ensure that victims and their families obtain justice, including full and fair reparations for their injuries and their sorrows; and

determine further that the permanent international criminal court must be independent, must be effective and must ensure that trials satisfy the highest international standards

of fairness, so that justice can become a solid foundation for lasting reconciliation and peace.

The current Preamble fails to satisfy these requirements.

PART 1. ESTABLISHMENT OF THE COURT

Article 1 - The Court [Zutphen 1; ILC 1]

The permanent international criminal court should be set up initially by a multilateral treaty. As soon as practicable after establishment, the UN Charter should be amended to make the court a principal judicial organ of the UN. See Part I, I.A.1. Article 1, which is unbracketed, declares that an international criminal court is established “which shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions” and states that “[i]ts jurisdiction and functioning shall be governed by the provisions of this Statute.” This article spells out certain essential aspects of the court, including the court’s power to bring persons to justice, thus excluding state criminal responsibility; the limitation of jurisdiction to “the most serious crimes of international concern”; the complementary nature of the court’s jurisdiction, thus implicitly recognizing that states have the primary duty to bring persons to justice for such crimes; and that its jurisdiction and functioning are governed by the statute. It should be retained unchanged. Making the court a principal organ of the UN should be a priority for any review of the statute pursuant to Article 111. See *Part I, I.A.2.*

Article 2 - The relationship of the court with the United Nations [Zutphen 2; ILC 2]

The court should be closely linked to the UN, but the statute, the rules and any agreement with the UN should preserve the court’s independence. See Part I, I.B. Article 2, which is unbracketed, requires that the court should be brought into a relationship agreement with the UN and implicitly protects its independence from the UN by requiring that the agreement be approved by the states parties and concluded by the president on behalf of the court. It should be kept unchanged.

Article 3 - Seat of the court [Zutphen 3; ILC 3]

The court should have the flexibility to conduct trials in places other than the seat of the court, subject to effective safeguards for the accused. Article 3, providing for the seat of the court (to be decided by the diplomatic conference), does not expressly authorize the court to conduct trials away from the seat, but the third paragraph authorizes the court to “exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State”, which would encompass this power, and the power to hold trials away from the seat is authorized in Article 62. Paragraph 2 authorizes the president, with the approval of the states parties, to enter into an agreement with the host state. Article 3, which is unbracketed, should be incorporated into the statute without change.

Article 4 - Status and legal capacity [Zutphen 4; ILC 4]

Article 4 (1), which is unbracketed, states that the court “is a permanent institution open to states parties in accordance with this Statute” and that “[i]t shall act when required to consider a case submitted to it”. The second sentence could be considered somewhat misleading in that it suggests that the court would not have a continuous existence and would not function between the periods when it was actively addressing a case submitted to it. Since the rest of the statute is likely to make clear that one or more of the organs of the court will function at other times (purchasing buildings and supplies, hiring staff, drafting rules, entering into agreements with states, etc.), and that it is likely to act based upon referrals of situations by the Security Council or states and the submission of information by other sources, this wording may be acceptable. Article 4 (2), which also is unbracketed, provides that “[t]he Court shall have legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” This essential paragraph should be kept unchanged.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5 - Crimes within the jurisdiction of the Court [Zutphen 5; ILC 20]

Genocide

The crime of genocide should be within the jurisdiction of the permanent international criminal court. See Part I, III. The statute should incorporate without any change the definition of genocide in the Genocide Convention. Each of the acts prohibited in Article II should be included without change in the definition of genocide in the statute to avoid weakening the definition, delaying adoption of the statute and raising questions concerning the meaning of changed or added provisions. Article II defines genocide for purposes of that treaty as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

The unbracketed definition in Article 5 (Crime of genocide) of the consolidated text reproduces the definition in the Genocide Convention exactly and should be retained unchanged. Several attempts to restrict this definition must be rejected. There is no requirement that genocide be part of a state policy or plan. There is no requirement that the aim be the total destruction of the group: “it suffices if the purpose is to eliminate portions of the population marked by specific racial, religious, national or ethnic features”. Moreover, there is no requirement in the term, “in part”, that the aim must be the destruction of the whole of a group

in a particular geographic region or that the aim must be the destruction of a substantial part of the group. It would also be incorrect to require that the accused have intended to destroy a substantial part of the entire group or even a substantial part of the group in a particular geographic region or town; it is sufficient to impose criminal responsibility for genocide if the accused aimed to destroy a large number of the group in a particular community. Of course, there is no requirement that the accused was able to destroy a large number of the group in the community as long as this was the aim. Footnote 1 in the consolidated text should be deleted or amended accordingly and moved to the separate instrument concerning the elements of the crimes. There should be no requirement, as one state has urged, to demonstrate that “serious . . . mental harm” to members of the group targeted for destruction must meet a high threshold unwarranted by the intent of the drafters. Footnote 3, which would permit a defence to acts of genocide based on the ability to cure the mental harm years or decades later, should be deleted and the question of the definition of mental harm should be left to a separate instrument.

Each of the four groups which are protected by the Genocide Convention, national, racial, ethnical and religious, should be included in the definition of genocide in the statute. The term, “ethnical”, should be retained; it is a term of art inserted to extend the protection of the Convention to a linguistic group and a group where race was not “the dominating characteristic, which might rather be defined by the whole of its traditions and its cultural heritage”. It certainly includes tribal groups. Many of the acts which constitute genocide under the Convention if committed against individuals who are members of social or political groups would constitute crimes against humanity if committed on a systematic or widespread basis. Indeed, persecution of members of political groups is a crime against humanity.

Another important aspect of the crime of genocide, a crime against humanity, is that it may be committed in time of peace or war. The omission of an express statement to this effect in the consolidated text must be taken to indicate that the drafters thought that it was unnecessary to reproduce Article I of the Genocide Convention, which so provides, here.

The Genocide Convention provides that the following acts are punishable:

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

As Footnote 4 to the bracketed part of Article 5 (Crime of genocide) listing these acts makes clear, the brackets are primarily because of doubts about the placement of this provision. Each of these acts should be punishable under the statute. If the provision is moved to Part 3 on general principles of criminal law, then these concepts, to the extent that they apply to genocide, should not be weakened.

War crimes

The jurisdiction of the court should include serious violations of humanitarian law in both international and non-international armed conflict. See Part I, V. Serious violations of humanitarian law in international armed conflict include grave breaches of the Geneva Conventions and Additional Protocol I, which are now recognized as war crimes; denials of fundamental guarantees included in Additional Protocol I; the 1907 Hague Convention IV, together with its Regulations; and customary law. In addition, in the light of recent developments in international law and the changing nature of warfare, certain acts which are criminal in international armed conflict also crimes in non-international armed conflict should be within the jurisdiction of the international criminal court. There should be no threshold for war crimes (see discussion of the proposed thresholds at the end of Article 5 (War crimes) below). This paper concentrates on the provisions which are of most direct concern to Amnesty International, although the organization supports the broadest possible jurisdiction over violations of humanitarian law appropriate for international criminal responsibility.

Mental elements of war crimes. *To avoid delay in the adoption of the statute, the elements of war crimes should be left to a separate instrument to be drafted by the preparatory commission or court, subject to approval by states parties, and drawing from different national legal systems, as appropriate.* However, when the mental element of a crime is expressly incorporated into the text of the statute, the terms should be consistent with the terms used in humanitarian law to ensure that all the prohibited acts are included within the court's jurisdiction and to avoid an entirely new jurisprudence evolving with meanings at complete odds with the intent of the drafters of humanitarian law treaties (see discussion of Articles 23 and 29 below). Article 5 of the consolidated text occasionally includes more restrictive mental elements in the crimes listed than required by humanitarian law. For example, a number of the options use the restrictive term, *intentionally*, rather than the more inclusive term, *wilfully*, which encompasses the concepts both of intent and recklessness, but excludes ordinary negligence. The ICRC Commentary to Article 85 of Protocol I (para. 3474) defines *wilfully* as follows:

“The accused must have acted consciously and with intent, i.e. with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, viz. The attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences (although failing to take the necessary precautions, particularly failing to seek precise information, constitutes culpable negligence punishable at least by disciplinary sanctions)[.]” (footnotes omitted)

1. International armed conflicts

A. Grave breaches of the Geneva Conventions. *The court should have jurisdiction over grave breaches of the four Geneva Conventions, applicable in international armed conflict.* Article 5.A of the draft statute gives the court such jurisdiction. See *Part I, V.A.1.*

B. Other serious violations of the laws and customs applicable in international armed conflict. *The court should have jurisdiction over grave breaches of Protocol I, which are*

now recognized as war crimes, denials of fundamental guarantees included in Protocol I, the 1907 Hague Convention IV, together with its Regulations, and customary law applicable to international armed conflicts. See Part I, V.A.2. The consolidated text includes many of these violations, but a number of the options seriously limit the scope of the court's jurisdiction over particular violations.

(a) Attacks on civilians. *The court's jurisdiction should include violations of the prohibition under humanitarian law of attacks on civilians in international armed conflict, which are defined as a grave breach of Protocol I in Article 85 (3) (a) of that instrument.* That provision states that

“the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

. . . .

(a) making the civilian population or individual civilians the object of attack[.]”

Option 1 is similar to Article 85 (3) (a) of Protocol I, but falls short in two respects. It requires that the accused have acted *intentionally* rather than *wilfully*. As stated above, the term *wilfully* is broader than *intentionally* as it includes *recklessly*. The mental element required should be the same as in Protocol I and Geneva Conventions to ensure that all of the same acts are covered. Option 1 also fails to incorporate the reference to other provisions of Protocol I which clarify the scope of this prohibition. The cross reference to other provisions should be included in the separate instrument defining the elements of the crimes. The limitation to attacks against the civilian population “as such” is based on Article 13 (2) of Protocol II and the requirement that the attacks on individual civilians be on those “not taking direct part in hostilities” is based on Article 13 (3) of Protocol II and common Article 3 of the Geneva Conventions. Option 2 (no provision) is unacceptable and should be deleted.

(a bis) Attacks on civilian objects. *The court should have jurisdiction over attacks on or reprisals against civilian objects in international armed conflict, as recognized in Article 52 (1) of Protocol I.* That article provides: “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.” Option 1 and the definition of the elements of crimes to be elaborated by the preparatory commission should be consistent with international humanitarian law, including the definitions of civilian objects and military objectives, and with most of the other provisions in Article 5 of the consolidated text, which do not identify the mental element required. Option 2 (no provision) is unacceptable and should be deleted.

The acts prohibited by Option 1 of Article 5.B (a *bis*) of the consolidated text appear also to be covered by Option 2 of Article 5.B (b) and, therefore, Option 1 could, perhaps, be deleted if Option 2 is included.

(b) Attacks which may cause incidental loss of life or injury to civilians or damage to civilian objects. *The court should have jurisdiction over attacks during international armed conflicts which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would*

be excessive in relation to the concrete and direct military advantage anticipated, which are a grave breach of Protocol I. Article 85 (3) (b) of that instrument provides:

“the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

.

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)[.]”

Article 57 (2) (a) (iii) of Protocol I provides:

“With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated[.]”

Option 2 incorporates the prohibitions in both Article 85 (3) (b) and Article 57 (2) (a) (iii) of Protocol I, but falls short in three respects. First, it requires that the accused have acted ***intentionally*** rather than ***wilfully***. As stated above, the term ***wilfully*** is broader than ***intentionally*** as it includes ***recklessly***. The mental element required should be the same as in the Protocol and Geneva Conventions to ensure the same acts are covered. Second, Option 1 also fails to incorporate the reference to other provisions of the Protocol which clarify the scope of this prohibition. The cross reference to other provisions should be included in the separate instrument defining the elements of the crimes. Third, Option 2 also omits the word, ***indiscriminate***. If the omission of this word means that ***all*** attacks which are likely to cause the prohibited effects are covered, then Option 2 will provide greater protection than in Article 85 (3) (b), but if only ***indiscriminate*** attacks are intended to be covered, then the separate instruments containing the elements of the crimes should include the explanation of the term found in Article 51 of Protocol I. Article 51 (4) of Protocol I prohibits ***indiscriminate*** attacks. Such attacks are:

“(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”

Article 51 (5) of Protocol I includes examples of prohibited indiscriminate attacks. Option 1, which would exclude attacks “justified by military necessity”, without balancing the effects against the “concrete and direct overall military advantage anticipated”, as required by Article 85 (3) (b), would exclude many acts which grave breaches of Protocol I and it should be deleted. Option 3, which would include all indiscriminate attacks which would be known to cause the prohibited effects, is broader than Article 85 (3) (b), but it is doubtful whether this gain would offset the exclusion of reckless attacks, and it also should be deleted. Option 4 (no provision) is unacceptable and should be deleted.

(b bis) Attacks on works or installations containing dangerous forces. *The court should have jurisdiction over attacks during international armed conflicts on works or installations containing dangerous forces, which are defined as a grave breach of Protocol I in Article 85 (3) (c) of that instrument.* That provision states that

“the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

. . . .

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)[.]”

Article 57 (2) (a) (iii) provides that the following precautions shall be taken with respect to attacks

“(a) those who plan or decide upon an attack shall:

. . . .

(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated[.]”

Option 1 incorporates the essence of Article 85 (3) (c) of Protocol I, but falls short in two respects. First, it requires that the accused have acted *intentionally* rather than *wilfully*. The mental element required should be the same as in the Protocol and Geneva Conventions to ensure that *all* the same acts are covered. Second, Option 1 also fails to incorporate the reference to other provisions of the Protocol which clarify the scope of this prohibition. The cross reference to other provisions should be included in the separate instrument defining the elements of the crimes. Option 2 (no provision) is unacceptable and should be deleted.

(c) Attacks on undefended places. *The court should have jurisdiction over attacks during international armed conflicts on all undefended places protected by humanitarian law.* Option 1 gives the court jurisdiction over attacks or bombardments prohibited by Article 25 of the Hague Regulations of Hague Convention IV of 1907 (“The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.”) and Article 1 of the 1907 Hague Convention Respecting Bombardment by Naval Forces in Time of War, which contains a similar prohibition. Option 2 gives the court jurisdiction over attacks prohibited by Articles 59 (1) (which reiterates the

prohibition of Article 25 of the Hague Regulations) and 60 (which protects zones demilitarized by agreement) of Protocol I. Although Option 1 probably is broad enough to include most of what is covered in Option 2, it should be possible to combine the two options for maximum protection.

(d) Killing or wounding combatants who have surrendered. *The court should have jurisdiction over the killing or wounding of combatants during international armed conflicts who have become hors de combat, which are prohibited as a matter of customary law and which could amount to extrajudicial executions or to torture.* Article 23 (c) of the Hague Regulations provides that “it is especially forbidden - . . . (c) to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion[.]” Similarly, Article 4 of the Third Geneva Convention provides that persons protected by that convention will be treated humanely when they “have fallen into the power of the enemy”. To avoid any possible gap in protection between the moment a combatant becomes *hors de combat* and falls into the power of the enemy, Article 41 of Protocol I was adopted. It provides that “[a] person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack[.]” and lists a number of factors which can be taken into account in determining whether a person is *hors de combat*. Article 5.B (d), which is without brackets, should be retained, although it would have been better to have adopted the approach in Article 41 of Protocol I to clarify that there was no possible gap in protection.

(e) Improper use of flags, insignia, uniforms or emblems of Geneva Conventions. Article 23 (f) of the Hague Regulations provides that “it is especially forbidden: . . . (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention”. Article 85 (3) (f) of Protocol I defines some of these acts as a grave breach when they are committed in violation of the relevant provisions of the protocol and result in death or serious injury: “the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol”. Article 37 (1) of Protocol I covers, in more detail, the other prohibitions of perfidy in Article 23 (f) of the Hague Regulations and expands protection to cover perfidious use of emblems of the UN or neutrals. Article 5.B (e) of the consolidated text gives the court jurisdiction over those responsible for “making improper use of the flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury”. This article appears to include most of the acts prohibited by Article 23 (f) of the Hague Regulations and Articles 37 and 85 (3) (f) of Protocol I, but it would appear to exclude those expressly protected only by the emblems of Protocol I.

(f) Transfers of population and deportation. *The court should have jurisdiction over transfers of local population and deportations during international armed conflicts of persons protected by the Geneva Conventions and Protocol I which are prohibited by international law.* Article 45 of the Fourth Geneva Convention provides in part: “Protected persons shall not be transferred to a Power which is not a party to the Convention. . . . In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” Article 49 of the Fourth Geneva Convention provides in part: “Individual or mass forcible transfers, as well as

deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.” Article 147 of the Fourth Geneva Convention provides that the “unlawful deportation or transfer . . . of a protected person” (referring to Articles 45 and 49 of that convention) is a grave breach of that convention. Article 85 (4) (a) of Protocol I expands the scope of this grave breach to include transfers by the occupier of parts of its own population into occupied territory, when committed wilfully and in violation of the Geneva Conventions or Protocol I.

Option 2, which gives the court jurisdiction over those responsible for “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory”, appears to cover all the acts prohibited by Articles 49 and 147 of the Fourth Geneva Convention and should be retained unchanged. Option 1 addresses only the transfer by the occupier of its own population into the occupied territory and, therefore, is unacceptable. Option 3 is the same as Option 2, except that it replaces the wording of Article 85 (4) (a) of Protocol I with a prohibition of “the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory”. Option 4 (no provision) is unacceptable and should be deleted.

(g) Attacks on cultural buildings and medical facilities. *As a way to increase the protection of civilians, the court should have jurisdiction over attacks on certain cultural buildings and medical facilities during international armed conflicts.* Article 27 of the Hague Regulations provides in part: “In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.” Article 5 of the Hague Convention of 18 October 1907 Concerning Bombardment by Naval Forces in Time of War (Hague Convention No. 9) contains an almost identical list. Article 56 of the Hague Regulations protects educational institutions from seizure, destruction or wilful damage. Article 85 (4) (d) of Protocol I supplements these prohibitions with respect to certain cultural buildings which have received special protection by special arrangement.

Articles 19 to 23 and 35 to 44 of the First Geneva Convention set forth detailed rules concerning the protection of hospital ships, hospitals, hospital zones and other medical facilities; Articles 12 to 45 of the Second Geneva Convention provides similar, but more detailed protection of various medical facilities; and Articles 14 to 22 of the Fourth Geneva Convention have rules concerning the protection of various medical facilities. Articles 12 to 31 of Protocol I protect medical vehicles, hospital ships and coastal rescue craft, other medical ships and craft and medical aircraft.

Option 1 of Article 5.B (g) of the consolidated text appears to protect all of the places protected by Article 27 of the Hague Regulations, Article 5 of Hague Convention No. 9, and the relevant articles of the Geneva Conventions and Protocol I. Option 2, which is identical, except that it provides greater protection than Option 1 by adding buildings dedicated to education, is preferable.

(h) Physical mutilation and unjustified medical or scientific experiments. *The court should have jurisdiction over physical mutilation and unjustified medical experiments during international armed conflict.* Article 11 of Protocol I provides detailed

rules prohibiting such treatment. Article 5.B (h) of the consolidated text, which is unbracketed, gives the court jurisdiction over anyone responsible for “subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his interest, and which cause death to or seriously endanger the health of such person or persons”. Although it is much shorter and general than Article 11 of Protocol I, it appears to cover all the prohibited acts and should be retained unchanged.

(i) Killing or treacherously wounding individuals belonging to the adversary. *The court should have jurisdiction over those who kill or treacherously wound individuals who belong to the adversary.* Article 23 (b) of the Hague Regulations provides that “it is especially forbidden: . . . (b) To kill or wound treacherously individuals belonging to the hostile nation or army”. Article 5.B (i) of the consolidated text, which is unbracketed, adequately covers this prohibition, which in certain circumstances could amount to an extrajudicial execution or torture, by giving the court jurisdiction over those responsible for “killing or wounding treacherously individuals belonging to the hostile nation or army”, and it should be kept unchanged.

(j) Declaring that no quarter will be given. *The court should have jurisdiction over persons who declare that no quarter shall be given.* Article 23 (d) of the Hague Regulations provides that “it is especially forbidden - . . . (d) To declare that no quarter will be given[.]” Article 40 of Protocol I, which confirms this rule of customary law, states: “It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.” Article 5.B (j) of the consolidated text, which is unbracketed, contains almost identical wording to Article 23 (d) of the Hague Regulations and should be retained, although it might have been better to use the contemporary language of Article 40 of Protocol I.

(k) Unjustified destruction or seizure of enemy property. *The court should have jurisdiction over the unjustified destruction of a house or other dwelling and its contents.* Article 23 (g) of the Hague Regulations provides that “it is especially forbidden: . . . (g) To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. Article 5.B (j) of the consolidated draft text, which is unbracketed, adequately covers these acts by giving the court jurisdiction over those responsible for “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war”, and it should be retained without change.

(l) Abolishing or suspending legal rights of nationals of the adversary. *The court should have jurisdiction over the suspension of the rights of nationals of the adversary.* Article 23 (h) of the Hague Regulations provides that “it is especially forbidden: . . . (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party”. Article 5.B.(l) of the consolidated text, which is unbracketed, adequately covers these acts by giving the court jurisdiction over those responsible for “declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party”, and it should be left as it is.

(m) Compelling nationals of the adversary to fight against their own country. *The court should have jurisdiction over the compulsion of persons to fight against their*

own country. The final paragraph of Article 23 of the Hague Regulations provides that “[a] belligerent is . . . forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.” Article 5.B (m) of the consolidated text, which is unbracketed, contains an almost identical provision, and it should be kept as is..

(n) Pillaging. Article 28 of the Hague Regulations provides that “[t]he pillage of a town or place, even when taken by assault, is prohibited.” Article 5.B (n) of the consolidated text gives the court jurisdiction over such acts.

(o) Employment of prohibited weapons. Article 5.B (o) of the consolidated text contains four options giving the court jurisdiction over the employment of prohibited weapons. Option 1, which contains a prohibition of the employment of a list of five types of weapons “which are calculated to cause superfluous injury or unnecessary suffering”, is based on a translation error in the English version of Article 23 (e) of the 1907 Hague Regulations. In the authentic French text, the term is “*propres à causer des maux superflus*”, which should be translated as “of a nature to cause superfluous injury”, and provides far more effective protection. Option 2 prohibits the employment of a list of five types of prohibited weapons “which are of a nature to cause superfluous injury or unnecessary suffering”, as in the Hague Regulations, and “such other weapons or weapons systems as become the subject of a comprehensive prohibition pursuant to customary or conventional international law”. Option 3 prohibits generally, without a specific exhaustive or illustrative list of prohibited weapons, the employment of “weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate”. Option 4 contains two alternatives, Option 3 or a provision identical to Option 2, except that it adds three prohibited weapons (nuclear weapons, anti-personnel mines and blinding laser weapons) to the list of prohibited weapons.

(p) Outrages upon personal dignity. *The court should have jurisdiction over outrages upon personal dignity, in particular humiliating and degrading treatment.* Common Article 3 of the Geneva Conventions, which reflects customary law, prohibits in Section 1, paragraph (c), “outrages upon personal dignity, in particular humiliating and degrading treatment”. This principle has been expressly recognized as applying to international armed conflict in Articles 75 (2) (b) and 85 (4) (c) of Protocol I, with additional prohibitions concerning enforced prostitution and indecent assault and *apartheid* and similar practices based on racial discrimination. Option 1 contains the exact wording of common Article 3 (1) (c) of the Geneva Conventions, without the additional prohibitions, which appear in another section (see Article 5.B (p *bis*) below) and in a separate option in this section. The additional prohibitions in Option 2, if retained, should be placed in a separate provision.

(p bis) Rape and other sexual abuse. *The court should have jurisdiction over rape, enforced prostitution and other sexual abuse, and these should be contained in a separate section from the prohibition in Article 5.B (p) of outrages upon personal dignity to make clear that they are crimes of sexual and gender violence.* Article 75 (2) (b) of Protocol I, which is one of the fundamental guarantees of that instrument, prohibits “enforced prostitution and any form of indecent assault”, but it appears to list them as outrages upon personal dignity rather than as sexual and gender violence. It states that “[t]he following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by

civilian or by military agents: . . . (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault[.]” Similarly, Article 76 of Protocol I classifies rape and forced prostitution as forms of indecent assault rather than crimes of sexual and gender violence: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”

Article 5.B (p *bis*) of the consolidated text gives the court jurisdiction over those “committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions”. The wording of the prohibitions of rape, sexual slavery, enforced prostitution and enforced sterilization poses no problem and, given the history of such abuses during the Second World War and international armed conflicts throughout history, it should not prove difficult to spell out the elements of these crimes in a separate instrument. However, Paragraph 132 of the 1995 Beijing Platform for Action uses the term, “forced pregnancy” in the English text, rather than “enforced pregnancy”, and there may be advantages to use a term which reflects an international consensus and has a generally accepted meaning. Although each of the specified acts in Paragraph (p *bis*) would amount to a grave breach of the Geneva Conventions, either as torture or inhuman treatment, including biological experiments, or as wilfully causing great suffering or serious injury to body or health, there seems little reason to restrict the acts covered to those committed against the specific classes of protected persons under the Geneva Conventions, thus excluding additional classes of protected persons under Protocol I. The current wording in English (the language in which this section was drafted) of the phrase “also constituting a grave breach of the Geneva Conventions” appears to apply to both the list of specified acts and to “any other form of sexual violence”. If the purpose of this phrase was to ensure that persons could also be charged under the grave breaches provisions in Article 5.A, then this intention should be made clear, perhaps in a separate sentence. If the purpose was only to restrict the scope of the court’s jurisdiction of “any other form of sexual violence” to acts which would also constitute a grave breach of the Geneva Conventions, then the language is too restrictive, since it excludes certain classes of persons protected by Protocol I. Since the concept of “any other form of sexual violence”, as reflected in the UN Declaration on the Elimination of Violence against Women, is potentially much broader than the concept of grave breaches under either the Geneva Conventions or Protocol I, the elements of the crime will have to be spelled out carefully in the separate instrument adopted after the diplomatic conference.

The definitions of rape and other sexual abuse in Article 5.B (p *bis*), concerning international armed conflict, in Article 5.D (e *bis*), concerning non-international armed conflict, and in Article 5 (Crimes against Humanity) (1) (g), which applies in peace as well as during armed conflict, should cover the same acts.

(q) Using civilians to immunize places or forces from military operations. Article 28 of the Fourth Geneva Convention states: “The presence of a protected person may not be used to render certain points or areas immune from military operations.” Article 28 (1) of Protocol I prohibits the use of the presence of medical aircraft to render military objectives immune from attack) and Article 57 (1) of that protocol provides that “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” Article 5.B (q) of the consolidated text, giving the court jurisdiction over

persons responsible for “utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations”, appears to covers most of these prohibited acts.

(r) Attacks on places and persons protected by the Geneva Convention emblems. *Attacks on places and persons protected by the Geneva Conventions and Protocol I should be within the court’s jurisdiction.* Article 12 (1) of Protocol I sets out the basic principle that “[m]edical units shall be respected and protected at all times and shall not be the object of attack”, which is spelled out in more detail in the rest of that article and in Article 13 to 31 of Protocol I, as well as in Article 19 of the First Geneva Convention and Article 18 of the Fourth Geneva Convention. Article 5.B (r) of the consolidated text gives the court jurisdiction over those responsible for “intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions”, thus excluding from protection those places and persons protected only by Protocol I.

(s) Starvation of civilians as a method of warfare. *The court should have jurisdiction over starvation of civilians as a method of warfare during international armed conflicts, which can amount to extrajudicial execution.* Article 54 (1) of Protocol I states: “Starvation of civilians as a method of warfare is prohibited.” Article 54 (2) provides that “it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population”, then listing examples of prohibited acts. Article 23 of the Fourth Geneva Convention requires each party to the conflict to “allow the free passage of all consignments of medical and hospital stores . . . intended only for civilians”, and spells out detailed rules concerning such shipments; it also requires that each party “shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”. Article 5.B (s) of the consolidated text provides that the court has jurisdiction over persons “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”. The relevant provisions include articles 53 and 59 to 62 of the Fourth Geneva Convention. It appears adequately to cover most of the situations envisaged in Article 54 of Protocol I and Article 23, 53 and 59 to 62 of the Fourth Geneva Convention, and should be retained. However, it would have been better to refer as well to Articles 68 to 71 of Protocol I, which also address relief supplies.

(t) Recruiting children or using them to participate actively in hostilities. *The court should have jurisdiction over the recruitment of children under the age of 15 years into armed forces or using them to participate actively in hostilities.* Both the recruitment of children under the age of 15 and the use of them in hostilities violate humanitarian law and almost universally accepted human rights law. Article 77 (2) of Protocol I provides in part: “The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.” Similarly, Article 38 (2) of the Convention on the Rights of the Child, ratified by all but two states in the world, provides: “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.” Article 38 (3) of that treaty provides in part: “States Parties shall refrain from recruiting any person who has not attained the age of fifteen

years into their armed forces.” Option 2, covering “recruiting children under the age of fifteen years into armed forces or using them to participate actively in hostilities”, as the drafters made clear in the note to this option, adequately “incorporate[s] the essential principles contained under accepted international law while using language suitable for individual criminal responsibility as opposed to State responsibility”. The note explains:

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

Neither Option 1 (“forcing children under the age of fifteen years to take direct part in hostilities”) nor Option 3 (recruiting children under 15 or “allowing them to take part in hostilities”) adequately reflects the prohibitions in humanitarian and human rights law. Option 4 (no provision) is also unacceptable and should be deleted. In the future, as international law evolves, the recruitment of persons under 18 years of age into armed forces and using them to participate actively in hostilities should be included in the court’s jurisdiction as a war crime.

2. Non-international armed conflicts

The court should have jurisdiction over violations of humanitarian law during non-international armed conflict, including violations of common Article 3 of the Geneva Conventions and Protocol II, and that jurisdiction should include violations of most humanitarian law prohibitions traditionally applicable to international armed conflict, such as the 1907 Hague Convention IV and its Regulations. See Part I, V.B.

Option I - Threshold. *There is no threshold required before common Article 3 of the Geneva Conventions applies and, therefore, there should be none in the statute.* It incorporates some of the fundamental principles applicable at all times, as recognized in the Martens clause a century ago, which is now incorporated in each of the four Geneva Conventions (stating that denunciation “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience”). As the ICRC Commentary to common Article 3 recognized in rejecting the view that this article was “not applicable in cases where armed strife breaks out in a country” but does not fulfil a number of conditions distinguishing “a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection”, “the Article should be applied as widely as possible”. The ICRC Commentary explained that common Article 3

“merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of

banditry, that Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?”

Option I of the consolidated text provides that Sections C (incorporating much of common Article 3) and D (which incorporates a number of provisions based upon Protocol II, as well as standards which traditionally applied in international armed conflicts) “apply to armed conflicts not of an international character and thus do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. To the extent that this threshold applies to Section C, it should be deleted as contrary to the intent of the drafters of common Article 3.

C. Common Article 3 of the Geneva Conventions

The court should have jurisdiction over all violations of common Article 3, not just “serious violations” of that article, as provided in Article 5.C of the consolidated text. This would be consistent with the jurisdiction of the Rwanda Tribunal, under Article 4 of its statute and the Yugoslavia Tribunal, under Article 3 of its statute (as recognized in the 1995 decision of the Appeals Chamber in *Tadić*). The court’s jurisdiction is already limited to serious crimes of concern to the international community as a whole and, under Article 11 (1) (d) of the consolidated text, cases which are not of “sufficient gravity” are not admissible. There should be no double hurdle of seriousness to overcome. Article 5.C of the consolidated text also omits Sub-paragraph 2 of common Article 3, requiring that “[t]he wounded and sick shall be collected and cared for”, a duty expressly recognized as early as 1864 in the first Geneva Convention. As the ICRC Commentary stated, “What Government would dare to claim before the world . . . that . . . it was entitled to leave the wounded uncared for[?]” “[S]ince”, as the ICRC Commentary explains, “the obligation to collect and care for the wounded and sick is absolute and unconditional, any act incompatible with the duty imposed by that obligation is prohibited”. Therefore, Article 5.C should be amended to give the court jurisdiction over this war crime.

D. Other serious violations of humanitarian law

(a) Attacks on civilians. ***The court should have jurisdiction over the same types of attacks on civilians in non-international armed conflict as in international armed conflict.*** Article 13 of Protocol II provides that in all circumstances, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Option 1, which is identical to Option 1 in Article 5.B (a), has the same strengths and weaknesses as that article and should be amended accordingly. Option 2 (no provision) is unacceptable and should be deleted.

(b) Attacks on places and persons protected by the Geneva Convention emblems. ***The court should have jurisdiction over attacks on places and persons protected by the protected by the Geneva Conventions and Protocols.*** Article 5.D (b) is identical to Article 5.B (r), applicable to international armed conflict. By limiting the protection during non-international armed conflict to places and persons protected by the Geneva Emblems, it excludes from protection those persons protected only by Protocol II. Article 5.D (b) should be amended to include places and persons protected by Protocol II.

(c) Attacks on cultural places and medical facilities. *As a way of increasing the protection of civilians, the court should have jurisdiction over the same types of attacks on cultural places and medical facilities in non-international armed conflict as in international armed conflict.* Option 1 of Article 5.D (c) is identical to Option 1 of Article 5.B (g), applicable to international armed conflict. Option 2 of Article 5.D (c) is identical to Option 2 of Article 5.B (g), which gives greater protection by including educational institutions, and should be retained unchanged.

(d) Pillaging. Article 5.D (d) is identical to Article 5.B (n).

(e) Outrages upon personal dignity. *The court should have jurisdiction over the same types of outrages upon personal dignity in non-international armed conflict as in international armed conflict.* Article 5.D (e) is identical to Article 5.C (b), which is based on the prohibition in common Article 3 (b) of the Geneva Conventions and Article 4 (2) of Protocol II (see *Part I, V.B.2*), and could be deleted here, as long as it is retained in Article 5.C (b) and as long as the double requirement of seriousness is deleted from that provision (see discussion above of Article 5.C).

(e bis) Rape and other sexual abuse. *The court should have the same jurisdiction over rapes and sexual abuse in non-international armed conflict as it does in international armed conflict.* Article 5.D (e bis) is identical to Article 5.B (p bis), except that instead of requiring the acts listed also constitute “a grave breach of the Geneva Conventions”, it requires that they also constitute “a serious violation of article 3 common to the Geneva Conventions”. This added requirement not only poses the same problems as the limitations in Article 5.B (p bis), but it also states that the violation of common Article 3 must be “serious”. This article should be amended along the lines suggested for Article 5.B (p bis).

(f) Recruiting or using children to participate actively in hostilities. *The court should have jurisdiction over the same type of recruitment and use of children in non-international armed conflict as in international armed conflict.* Option 2 of Article 5.D (f) is identical to Option 2 of Article 5.B (t), which applies to international armed conflict, except that it adds a prohibition of the recruitment of children under the age of 15 into “groups”, since some of the parties to non-international armed conflict are not regular armed forces. It should be retained unchanged, for the reasons explained above in the discussion of Article 5.B (t). The other options, like their counterparts in Article 5.B (t), should be deleted.

(g) Ordering displacement of the civilian population. *The court should have jurisdiction over the same type of displacement and deportations of civilians in non-international armed conflict as in international armed conflict.* Article 17 (1) of Protocol II, which prohibits the displacement of civilians as individuals or groups within the territory of a state, provides in part that “[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.” Article 17 (2) of Protocol II, which prohibits compelling them to move beyond the national boundaries or other territories, such as the territory within a country under the control of insurgents, provides that “[c]ivilians shall not be compelled to leave their own territory for reasons connected to the conflict.” Article 5.D (g) only expressly covers internal displacement of civilians. It would be better to add the prohibition on compelled departure of

civilians from their own territory, although any such forced departure would inevitably involve internal displacement as a first step.

(h) killing or wounding treacherously a combatant adversary. *The court should have jurisdiction over killing and wounding treacherously combatant adversaries in non-international armed conflicts as in international armed conflicts.* Article 5.D (h) is identical to Article 5.B (l), which applies to international armed conflict, except that it protects “a combatant adversary”, rather than “individuals belonging to the hostile nation or army”. It should be retained unchanged.

(i) Declaring that no quarter will be given. *The court should have jurisdiction over persons who declare that no quarter shall be given during a non-international armed conflict, just as in an international armed conflict.* Article 4 (1) of Protocol I prohibits ordering that there shall be no survivors. Article 5.D (I) is identical to Article 5.B (j), which applies to international armed conflict, and it should be kept unchanged.

(j) Physical mutilation and unjustified medical or scientific experiments. *The court should have jurisdiction over the same type of physical mutilation and unjustified medical experiments in non-international armed conflicts as in international armed conflicts.* Article 5.D (j) is identical to Article 5.B (h), which applies to international armed conflict, except that it uses the phrase “in the power of another Party to the conflict” rather than “in the power of an adverse Party”. This provision should be retained, but the terms used should be the same in both articles.

(k) Unjustified destruction or seizing of the property of an adversary. *The court should have jurisdiction over the unjustified destruction or seizure of the property of an adversary in non-international armed conflicts as in international armed conflicts.* Article 5.D (k) is identical to Article 5.B (k), which applies to international armed conflict, except that it uses the term “property of an adversary” instead of “the enemy’s property” and the term “necessities of the conflict” instead of “necessities of war”, both apparently to reflect the different type of conflicts involved. This provision should be retained unchanged.

(l) Employment of prohibited weapons. Article 5.D (l) is the counterpart of Article 5.B (o), applicable to international armed conflict, and its wording will depend on the outcome of the discussions of that provision.

Option II. Additional prohibitions.

The scope of protection of humanitarian law in non-international armed conflict should be as broad as possible and incorporate as many of the prohibitions of humanitarian law applicable which now apply to international armed conflict. The court should have jurisdiction over such violations. A number of serious violations of humanitarian law applicable to international armed conflict, as well as some applicable to non-international armed conflict, have been omitted from Option I, several of which are indicated below.

Starvation of civilians as a method of warfare. *The court should have jurisdiction over starvation of civilians as a method of warfare in non-international armed conflicts*

as in international armed conflicts. The paragraph giving the court jurisdiction over the intentional use of starvation of civilians as a method of warfare, using the language of Article 5.B (s), applicable to international armed conflict, should be included in the statute. **See Part I, V.B.2.**

Attacks causing incidental loss of life or injury to civilians. *The court should have the same jurisdiction over attacks causing incidental loss of life or injury to civilians in non-international armed conflicts as in international armed conflicts.* The paragraph giving the court jurisdiction over attacks likely to cause incidental loss of life or injury to civilians or damage to civilian objects, which is modelled on Option 3 in Article 5.B (b), applicable to international armed conflict, has all the flaws of that option, as discussed above, and should be replaced by Option 2 of that article, subject to the amendments indicated above.

Attacks against works or installations containing dangerous forces. *The court should have the same jurisdiction over attacks on works or installations containing dangerous forces during non-international armed conflicts as in international armed conflicts.* The paragraph giving the court jurisdiction over attacks against works or installations containing dangerous forces, which is identical to Option 1 of Article 5.B (b *bis*), applicable to international armed conflict, with the same flaws, and should be amended accordingly.

Slavery and the slave trade. *The court should have jurisdiction over enslavement in both non-international and international armed conflicts.* Enslavement is a crime against humanity (see discussion below), but if crimes against humanity are limited to those directed against a civilian population, then enslavement of captured combatants during a non-international armed conflict would not be within the court's jurisdiction. Article 4 (f) of Protocol II prohibits "slavery and the slave trade in all their forms". **See Part I, V.B.2.** The proposed paragraph at the end of Article 5.D uses exactly the same language and should be included.

Option III - Deletion of threshold to Sections C and D. As indicated above, the threshold, to the extent it applies to Section C, which partially incorporates common Article 3 to the Geneva Conventions, should be deleted. Consideration should be given to deleting the threshold with respect to other violations of humanitarian law applicable to non-international armed conflict.

Option IV - Deletion of Section D. This provision is unacceptable and should be omitted.

Option V - Deletion of Sections C and D. This provision is unacceptable and should be omitted.

Thresholds for war crimes. As stated above, Options 1 and 2 should be deleted, as provided in Option 3. There are no such thresholds in humanitarian law and the jurisdiction of the court is already restricted in Article 11 (1) (d) to cases of "sufficient gravity".

Article Y - No limiting effect on existing or developing rules of international law. This article, which provides that "nothing in this part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law", is an essential provision. It will ensure that the failure of the statute to give the court the full extent of possible

jurisdiction over a core crime will not be seen as an international consensus that the more limited jurisdictional definition is a definition of the crime itself under international law.

Crimes against humanity

Other crimes against humanity besides genocide should be included in the inherent jurisdiction of the permanent international criminal court. See Part I, IV. The jurisdictional definition should include the following acts when committed on a systematic basis or large scale and directed against a civilian population: murder; extermination; “disappearances”; torture; rape; enforced prostitution and other sexual abuse; arbitrary deportation and forcible transfers of population; arbitrary imprisonment; enslavement; persecution on political, racial, religious or other grounds and other inhumane acts.

1. Threshold and common elements. The definition should make clear that, like genocide, other crimes against humanity are independent of other crimes under international law and can be committed in time of peace as well as armed conflict. **See Part I, IV.K.** Since these crimes can be committed by non-state actors, such as armed opposition groups or even by private individuals, there is no requirement that they be committed as part of a state policy or plan. **See Part I, IV.** The intent requirement must be the same at every level in the hierarchy of the state or other group to ensure that all those responsible for these grave crimes are brought to justice. **See Part I, IV.**

The inhumane acts must be aimed at a civilian population, but it need not aim at the entire civilian population in a particular country, region or community. They may be committed against *any* civilian population. **See Part I, IV.** Indeed, there is an increasingly widespread view that the population targeted can include persons who are not civilians, such as former combatants, including prisoners of war. There is no requirement under international law that the inhumane acts be motivated by an intent to discriminate on political, racial, religious or other grounds, unless the crime of persecution is involved. Jurisdiction should cover inhumane acts which are either committed on a systematic *or* on a widespread basis. There should be no cumulative requirement that the inhumane acts be committed on *both* a systematic *and* a widespread basis, as this would unduly restrict the scope of the court’s jurisdiction.

Amnesty International preferred the term, “large scale”, used by the International Law Commission in its draft Code of Crimes against the Peace and Security of Mankind, to “widespread”. The International Law Commission in its commentary to the Code has defined “large scale” to mean that “the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim.” It explained that this term replaced “mass scale” in the first reading of the draft Code of Crimes in 1991 because “large scale” was “sufficiently broad to cover various situations involving a multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”

It is essential to define the terms, “systematic” and “widespread”, which are used in the consolidated text, properly. The International Law Commission has explained that “systematic manner” means “pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of

this requirement is to exclude a random act which was not committed as part of a broader plan or policy.” Thus, “systematic” crimes would include the case of a military or police unit obeying a decision by the commander to murder each person in a town or village or each person from a particular group in that town or village. A suggestion by one state to define “systematic” as involving an attack against a civilian population which constitutes or is part of, consistent with or in furtherance of, a policy or concerted plan, or repeated practice over a period of time, as advocated by one state, would be far too restrictive, and must be rejected. “Widespread” crimes would include murders committed in various parts of a particular geographic region, but not necessarily throughout an entire province or district. A proposal by one state to define “widespread” as involving an attack against a civilian population which is massive in nature and directed against a large number of individuals would be far too restrictive and must be rejected.

The jurisdictional definition must cover both state and non-state actors, including members of armed opposition groups and individuals acting at the direction of state officials or members of political groups or with their consent or acquiescence, to ensure that the court will have jurisdiction over the widespread crimes against humanity being committed around the world by non-state actors.

The definition of the intent required must be the same at all levels of the hierarchy in the state, organization or group to ensure that both those who commit the inhumane acts, as in the *Erdemovi* case, and those who planned and ordered the crimes, are subject to international criminal responsibility.

(a) Murder. *The crime of murder, when committed on a systematic or widespread basis, is a crime against humanity which should be included within the jurisdiction of the court. See Part I, IV.A.* For the difference between murder and extermination, see discussion in the following section on extermination. The definition of murder in the statute (or in the separate instrument on elements of crimes) should cover extrajudicial executions, which are “unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence”. Extrajudicial executions can be distinguished from other killings. An extrajudicial execution is a deliberate killing, not an accidental one. It is unlawful. It violates national laws, such as those which prohibit murder, or international standards prohibiting the arbitrary deprivation of life, such as the International Covenant on Civil and Political Rights (ICCPR), the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms. Reference to international standards is essential when national law falls short of such norms or, as in the case of Nazi Germany, national law itself authorizes such killings. The unlawfulness of extrajudicial executions distinguish them from justifiable killings in self-defence, deaths resulting from the use of reasonable force in law enforcement, killings in armed conflict which are not forbidden under international law and the use of the death penalty when imposed in conformity with international procedural and substantive standards. Extrajudicial executions can be distinguished from killings which are in violation of an enforced official policy because they are carried out by order of a government or with its complicity or acquiescence. Thus, an extrajudicial execution is, in effect, a murder committed or condoned by the state.

Murders which constitute crimes against humanity also include deliberate and arbitrary killings by armed political groups committed on a widespread or systematic basis. Such killings are deliberate, not accidental. They are arbitrary in that they are not countenanced by any

internationally recognized standard of law. They contravene fundamental standards of humane behaviour - as reflected in the Martens clause - such as national criminal laws prohibiting murder, international humanitarian law and international human rights standards. Their arbitrary character distinguishes them from killings in self-defence or the defence of others from an immediate threat, and from killings in armed conflict which may occur as a consequence of an attack or a defence of a military objective, such as killings in the course of clashes between violent opposing forces, killings in cross-fire or attacks in general on military and security personnel. They are committed on the authority of an armed political group and in accordance with its policy at some level deliberately to eliminate specific individuals, or groupings or categories of individuals, or to allow those under its authority to commit such abuses. Deliberate and arbitrary killings can be distinguished from killings for private reasons, which are shown, for example, through preventive measures and disciplinary action, to have been the acts of individuals in violation of higher orders.

There is no definition of murder in Article 5 (Crimes against humanity) (1) (a) of the consolidated text, but this definition could be incorporated in the separate instrument defining the elements of the crimes.

(b) Extermination. *It goes without saying that the crime of extermination should be within the jurisdiction of the court. See Part I, IV.B.* The International Law Commission has explained the difference between murder and extermination as follows:

“Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act of extermination involves an element of mass destruction which is not required for murder. In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed. It also applies to situations in which some members of a group are killed while others are spared.”

Section 2 (a) of Article 5 (Crimes against humanity) in the consolidated text, which provides that extermination includes the wilful or intentional “infliction of conditions of life calculated to bring about the destruction of part of a population” appears to be merely an illustration of one type of extermination, rather than a definition, and the term intentional is too restrictive as it would exclude reckless acts, which are sufficient to constitute a grave breach when committed during an international armed conflict. The definition, whether included in the statute or in a separate instrument, should be consistent with the International Law Commission explanation and the mental element required should be the same as required for a grave breach.

(c) Enslavement. *The crime of enslavement, when committed on a widespread or systematic basis, should be within the jurisdiction of the international criminal court. See Part I, IV.H.* It is closely related to the crime of arbitrary imprisonment in that it may include detention of political prisoners without charge or trial, often because of such factors as the nationality, race, language or religion of the persons detained. Persons detained on such grounds may also in certain circumstances be considered prisoners of conscience. Section 2 of Article 5 (Crimes against humanity) does not include a definition of enslavement. The definition, whether included in the statute or in a separate instrument elaborated after the diplomatic

conference, should be based upon the definitions in the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

(d) Deportation or forcible transfer of population. *The court should have jurisdiction over deportation across national frontiers and forcible transfers of populations within national borders; it should also have jurisdiction over refoulement to countries where they are at risk. See Part I, IV.F.*

The prohibition of deportation should at a minimum include the systematic or widespread arbitrary exile of persons from their own country. Such a prohibition would include forced population transfers or exchanges carried out without the free consent of the individuals affected. Moreover, it should be clear that this prohibition extends not only to formal measures taken to deport people from their own country (for example, de-nationalization coupled with an organized and forced departure), but also to the carrying out of acts of terror and intimidation which are clearly intended to sow fear and panic among sections of the population to compel them to leave their own country.

In addition to prohibitions on forcing people out of their own country, the statute should criminalize the systematic or widespread forcible relocation of people within the borders of their own country, when this is done for reasons of their race, religion, language, ethnic or social origin, or political opinion. If the prohibition is limited to deportation across an international frontier, it might omit to cover situations where in an “internal” conflict one or more secessionist groups in a state forces members of a particular ethnic group out of the area of the state they aim to carve out as their own. The prohibition in such situations should cover both formal and informal measures of forced relocation.

A third violation of the right to freedom of movement that should be covered by the statute is the *refoulement* (forcible return) of people to countries where their lives, security or freedom are at risk. When such a policy is pursued on a systematic or widespread basis it should be a crime against humanity. The transfer of a person protected by the Fourth Geneva Convention “to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs” is prohibited by Article 45 of that convention and defined as a grave breach of that convention in Article 147.

(e) Arbitrary detention. *The systematic or widespread prolonged detention of political prisoners without a fair and prompt trial in accordance with international standards and their detention after unfair trials, as well as detention of prisoners of conscience, amounts to a crime against humanity which the court should have power to address. See Part I, IV.G.* This crime is, of course, limited to *arbitrary* imprisonment, that is, without due process of law or in violation of fundamental rights. Indeed, the draft Code of Crimes uses the term “arbitrary imprisonment”. The term “imprisonment” necessarily includes all forms of detention, not just detention in prison after a trial, although this could be made more clear by using the word, “detention”, instead. The International Law Commission has explained that the concept of arbitrary imprisonment in the draft Code of Crimes “would cover systematic or large-scale instances of arbitrary imprisonment such as concentration camps or detention camps or other forms of long-term detention”. Arbitrary detention is a violation of human rights law and standards, including the Universal Declaration of Human Rights and the ICCPR. The

UN Working Group on Arbitrary Detention has further defined the concept of arbitrary detention in its consideration of individual cases.

(f) Torture. *The systematic or widespread practice of torture is a crime against humanity which should be within the jurisdiction of the international criminal court. See Part I, IV.D.* The definition of torture in the statute (or in a separate instrument defining the elements of crimes) should be based on, but not limited to, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture):

“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from or incidental to lawful sanctions.”

The definition should include torture committed by armed political groups on a systematic or widespread basis. The bracketed options in the proposed definition of torture in Section 2 (c) of Article 5 (Crimes against humanity), requiring that the victim be either in the custody or physical control of the accused or deprived of liberty, may be too restrictive and the concept of “lawful sanctions” under the Convention against Torture means “in conformity with international law”, so this phrase in brackets would simply reinforce the existing guarantee.

(g) Rape, enforced prostitution or other sexual abuse. *Rape, enforced prostitution and certain other sexual abuse when committed on a systematic or widespread basis should be within the court’s jurisdiction.* Rape of detainees by government officials or by armed opposition groups on a systematic or widespread basis is a crime against humanity.

See Part I, IV.E. Rape in such circumstances is also a form of torture, but because of its unique characteristics it also deserves being identified as a separate crime against humanity. Enforced prostitution on a systematic or widespread basis when government officials or armed opposition groups force detainees to carry out such conduct should also be considered as a crime against humanity which should be within the court’s jurisdiction. Some forms of other sexual abuse of detainees by government officials or armed opposition groups committed on a systematic or widespread basis may amount to crimes against humanity. The acts of sexual and gender violence which amount to crimes against humanity should be the same as those which constitute violations of humanitarian law (see discussion of Article 5.B (p *bis*) and 5.D (e *bis*) above).

(h) Persecution on political, racial, national or other grounds. *The international criminal court should have jurisdiction over systematic or widespread persecution on political, racial and religious, as well as other, grounds, as a crime against humanity. See Part I, IV.I.* The International Law Commission included ethnic grounds as one of the prohibited grounds in the draft Code and in its commentary on the draft Code noted that

persecution on gender grounds could also constitute a crime against humanity. The court should have jurisdiction over persecution on the broadest possible number of prohibited grounds. Persecution on political, racial or religious grounds has long been recognized as a separate crime against humanity, independent of the other crimes, such as murder, extermination and “disappearances”. Therefore, the bracketed language requiring that the persecution be “in connection with other crimes within the jurisdiction of the Court” should be deleted. The crime of persecution is a crime against individuals on prohibited grounds, such as political, racial or religious grounds, not against an “identifiable group or collectivity”, so this language should be amended accordingly. The suggested requirement in Section 2 (d) that “persecution means the wilful and severe deprivation of fundamental rights contrary to international law” should be clarified in a separate instrument on the elements of crimes. There is no reason to impose a specific intent to persecute on specified grounds, as suggested in this provision; this would simply extend the high and difficult to meet threshold which exists in the Genocide Convention to crimes against humanity, with all the problems that entails.

(i) Enforced disappearance of persons. *The crime of forced disappearance of persons on a systematic or widespread basis should be expressly recognized as a crime against humanity within the jurisdiction of the international criminal court. See Part I, IV.C.* Although “disappearance” falls squarely within the category “other inhumane acts” which are recognized as crimes against humanity, it deserves to be expressly defined as a crime against humanity to send a clear signal to those who commit this crime of the determination of the international community to bring them to justice wherever they may be found. The definition of the crime of forced disappearance of persons in the statute (or in the separate instrument defining the elements of the crimes) should be consistent with the definition approved by the UN General Assembly in the Preamble of its Declaration on the Protection of All Persons from Enforced Disappearance, which refers to enforced disappearances of persons occurring in many countries

“in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law.”

The proposed definition in Section 2 (e) of Article 5 (Crimes against humanity), although it is similar to the definition in the UN Declaration, differs in at least one important respect by omitting the concept of “otherwise deprived of their liberty”, which is designed to ensure that no method of “disappearance” escapes international criminal responsibility.

(j) Other inhumane acts. *The category of “other inhumane acts” committed on a systematic or widespread basis ensures that new forms of crime against humanity which are developed will not escape international criminal responsibility and it should be included in the statute. See Part I, IV.J.* The suggested addition, “of a similar character”, would ensure that the definition was consistent with the principle, *nullum crimen sine lege*, without unduly restricting its scope. The proposal that the other inhumane acts also cause either great suffering or serious injury to body or to mental or physical health could be one way to

ensure consistency with this fundamental principle. However, this particular standard might have excluded certain well-recognized crimes against humanity, such as arbitrary imprisonment.

The International Law Commission has suggested several criteria for determining other inhumane acts amount to crimes against humanity. Article 18 (k) of the draft Code of Crimes covers “other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm”. The International Law Commission stated that only acts “similar in gravity” to other crimes against humanity would be included. The Secretary-General in his analysis of the Nuremberg Judgment in his 1993 report to the Security Council on the proposed Yugoslavia Tribunal suggested that depriving part of the civilian population of the means of subsistence might be such another inhumane act. Although the approach of the International Law Commission has merit, care will have to be taken in defining this criteria to ensure that it covers all acts which should be subject to international criminal responsibility in a manner which is fully consistent with the principle of *nullum crimen sine lege*.

Other crimes

Amnesty International takes no position concerning whether other crimes under international law should be included within the court’s jurisdiction when it is first established. In the future, the statute should be amended pursuant to Articles 110 or 111 to provide that the court has jurisdiction over crimes of torture and other grave human rights violations and abuses not amounting to genocide, other crimes against humanity or war crimes.

Article 6 - [Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction] [Zutphen 6; ILC 23, 25]

The court should have the same universal jurisdiction which any state party has over the core crimes under international law. Thus, it should have inherent (automatic) jurisdiction over each of these core crimes, so that the court can exercise concurrent jurisdiction with respect to each state party in appropriate circumstances. The statute should provide that the court may exercise its inherent (automatic) jurisdiction with respect to the three core crimes - genocide, other crimes against humanity and serious violations of humanitarian law - if the prosecutor initiates an investigation of the crimes based information from any reliable source or referrals of a situation by a state party or by the Security Council acting pursuant to Chapter VII of the UN Charter. **See Part I, II.B.** Article 6 contains a number of terms or requirements which would unacceptable, including the use of “matter” (suggesting individual cases, rather than situations, could be referred, leading to politically selective justice); the requirement that a complaint be lodged by more than one state (decreasing the already limited likelihood of a state referral) and state consent requirements (requiring the consent of *any* state with jurisdiction, meaning *every* state, since the core crimes are crimes of universal jurisdiction). This heavily bracketed article should be deleted and replaced by the further option for Article 6.

Further option for Article 6. The further option for Article 6, provides that “[t]he court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute” if a situation has been referred to it by a state party pursuant to Article 11, the prosecutor has initiated an investigation in accordance with Article 12 or a situation has been referred by the Security Council. This further option incorporates the above

fundamental principles (although the references to Article 12 may need to be modified if it is replaced by the compromise Article 13) and should be adopted, but without any brackets.

[Article 7] - Preconditions to the exercise of jurisdiction [Zutphen 7; ILC 21 bis]

At the time a state ratifies or accedes to the statute it should consent to the court's jurisdiction over the core crimes in all cases and thereby agree to cooperate with the court, including to comply with court orders and requests. There should be no further preconditions for the exercise of jurisdiction in the form of further consent by states parties on a case-by-case or any other basis. Since it is uncontested that each of the three core crimes is a crime of universal jurisdiction, permitting *any* state to bring to justice those responsible for such crimes *without the need for consent by any other state*, see *Part I, II.B*, it necessarily follows that each state party may consent to the court exercising that universal jurisdiction without the need for the consent of any other state, including states which are not parties to the statute. Under current international law, there is no need for consent to an investigation and prosecution of genocide, other crimes against humanity or war crimes by the custodial state, the state on whose territory the crime occurred (territorial state), the state of the victim's nationality, the state of the suspect or accused's nationality, the state seeking extradition from the investigating or prosecuting state or any other interested state. Therefore, none of the preconditions in the various options in Article 7 are required under international law, and the entire article should be deleted.

Further option for Article 7. For much the same reasons, the further option to Article 7 is unacceptable and should also be deleted. Paragraph 2 (a) would mean that the court would not have jurisdiction if a person suspected of committing genocide by ordering the killing of 10,000 members of a religious group in the territory of a state party were to travel to a state party where the suspect was held in custody until just *before a referral* but then fled to a non-state party or unknown location, or even fled *after a referral* but *before the court could rule* on whether the case was admissible under Article 15. In each case, however, the custodial state would have had been able to exercise its universal jurisdiction to bring the suspect to justice had it been able or willing to do so.

Paragraph 2 (b), requiring the additional consent of the territorial state (whose officials might well be implicated in the crimes) before the court could exercise jurisdiction, would also be a step backwards for international justice. For example, assume a general suspected of grave breaches of the Geneva Conventions for ordering the killing of 10,000 prisoners of war in the territory of a non-state party has fled to a small neighbouring state party. This state might take the general into custody, pursuant to its universal jurisdiction over grave breaches. However, the leaders of custodial state might then realize that it did not have sufficient resources to ensure the safety of the general and victims and witnesses and to pay for the general's defence and they might also decide not to bring the general to justice because of overwhelming military, political or economic pressure from the neighbouring territorial state. Under Paragraph 2 (b), the court would not be able to exercise the same universal jurisdiction over the general as the small, underdeveloped and threatened custodial state. Therefore, the further option for Article 7 would prevent the court from being an effective complement to national criminal jurisdictions.

[Article 8] - Temporal jurisdiction [Zutphen 8; 21 ter]

Limiting the jurisdiction of the court to crimes committed after the entry into force of the statute, as provided in the unbracketed Article 8 (1) of the consolidated text will avoid criticisms of the court, similar to those made concerning the International Military Tribunals at Nuremberg and Tokyo, alleging that it was violating the fundamental principle of legality (*nullum crimen sine lege*). Nevertheless, since the adoption of the statute will constitute recognition that the core crimes within the court's jurisdiction are crimes under customary law or reflect general principles of international law, there is no further need to provide, as in the bracketed second paragraph of Article 8 (1), that when states become parties to the statute after it enters into force the court will not have jurisdiction over crimes committed by or against its nationals or on its territory before the date the statute enters into force for that state. Moreover, since the core crimes are crimes of universal jurisdiction, every single state would be able to bring to justice the nationals of the new state party or those who committed these crimes on its territory to justice regardless of their nationality even before the statute entered into force for the new state party. Therefore, the court should have jurisdiction over all crimes committed after the entry into force of the statute no matter where they were committed and no matter what was the nationality of the accused or victim.

[Article 9] - Acceptance of the jurisdiction of the Court [Zutphen 9; ILC 22]

The court should have inherent (automatic) jurisdiction, concurrent with states, over the core crimes of genocide, other crimes against humanity and war crimes. See Part I, II.B. Thus, when a state becomes a party to the statute it accepts the jurisdiction of the court over these crimes, as provided in the first paragraph of Option 1 or in paragraph 1 of the further option (see below). The *à la carte* or opt-in system envisaged for the three *core crimes* in Option 2 is unacceptable. However, an opt-in system of some sort (such as that in Paragraph 2 of Option 1) is reasonable for *non-core crimes*, since it is unlikely that all states parties would agree to the court's jurisdiction over these crimes and many of these crimes, unlike the core crimes, are not crimes of universal jurisdiction. The provisions for cooperation by non-states parties in Paragraph 3 of Option 1 and Paragraph 4 of Option 2 are completely unacceptable. They incorporate the severe restrictions in Article 7 on the court's jurisdiction, which would make the court an ineffective complement to national criminal jurisdictions. Instead of permitting the court to exercise the same universal jurisdiction as any of its states parties, Article 7, as explained above, requires the consent of the custodial state, the territorial state, the state of the victim's nationality and the state of the suspect or accused's nationality.

Further option to Article 9. Paragraph 1 provides that “[a] State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5 [paragraphs (a) to (d)]” (genocide, aggression, crimes against humanity and war crimes). This further option fully satisfies the principle of universal jurisdiction. See **Part I, II.B.** As the proponent of this further option explained,

“Under current international law, **all States may exercise universal criminal jurisdiction** concerning acts of genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed. This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is

confirmed by extensive practice.” The jurisdiction of the International Criminal Court: An informal discussion paper submitted by Germany, UN Doc. A/AC.249/1998/DP.2, 23 March 1998 (emphasis in original; footnote concerning aggression omitted).

Indeed, not a single state publicly argued during the 1997-1998 sessions of the Preparatory Committee that international law prohibited states from exercising universal jurisdiction over the core crimes. Therefore, the proponent of this further option added,

“Given this background, there is no reason why the ICC - established on the basis of a Treaty concluded by the largest number of States - should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes. This means that, like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted the jurisdiction of the Court.” *Id.*

Paragraph 2 of the further option provides for non-states parties, which are not expressly obliged under the statute to cooperate with the court, even if core crimes were committed in their territories or by one of their nationals, to “accept the obligation to cooperate with the Court with respect to the prosecution of any crime referred to in article 5” by lodging a declaration with the Registrar. Such a provision would facilitate cooperation by non-state parties with the court in bringing to justice those responsible for the worst crimes in the world.

[Article 10] - [[Action by] [Role of] The Security Council] [Relationship between the Security Council and the International Criminal Court] [Zutphen 10; ILC 23]

The Security Council should be able to refer a situation, but not an individual matter or case, where one or more core crimes may have occurred and which involves a threat to or breach of international peace and security pursuant to Chapter VII of the UN Charter to the court. The heavily bracketed Article 10 (1) should be amended to make this clear. See *Part I, VIII.C.* Article 10 (1 *bis*) and (1 *ter*) on the modalities of notification and decision should be deleted. Amnesty International takes no position on Article 10 (2), or Paragraph 1 of the further option to Article 10, concerning the core crime of aggression.

Further option to Article 10. Amnesty International takes no position on Paragraph 1 of further option 10 on aggression. Paragraph 2 of the Further Option for Article 10 should be deleted. Even a 12-month, one-time delay by the Security Council of an investigation or prosecution would be contrary to the international law obligation to bring to justice those responsible for genocide, other crimes against humanity and war crimes.

Article 11. Complaint by State [Zutphen 6; 21]

A state should be able to refer a situation - although this situation should not be limited to a situation involving a threat to or breach of international peace and security - to the court. As long as the prosecutor has the power to initiate investigations and prosecutions based on

information from other sources than referrals by the Security Council or state complaints, subject to appropriate judicial scrutiny, then states should not have the power to refer individual cases. The further option for Article 11, discussed below, is, with the suggested amendments, preferable to the current text of Article 11.

Further option for Article 11. Paragraph 1 of the further option Article 11, providing that “[a] State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes”, is consistent with this principle, but this paragraph must make clear that the state cannot limit the referral to include crimes committed by only one side to a conflict in a situation, as in the proposal for an *ad hoc* international criminal tribunal for Cambodia, or restrict the nationality of those who can be investigated and prosecuted, as in the Statute of the Rwanda Tribunal. The prosecutor must be free to investigate all persons who may be responsible for crimes within the court’s jurisdiction in a situation. Indeed, the danger that states can insulate persons from international criminal responsibility by selective referrals demonstrates the need for the prosecutor to be able to initiate investigations on his or her own initiative, subject to appropriate judicial scrutiny. Paragraph 2, concerning the information which should accompany the state complaint, is a useful provision, provided that it does not become the basis for declaring that the court lacks jurisdiction or that cases investigated are inadmissible because the referral did not submit all the information the state could have done with more diligence.

[Article 12]. Prosecutor [Zutphen 46; ILC 25 bis]

“For the proposed court to have international credibility and legitimacy, it will be essential for an international prosecutor to be able independently to initiate indictments of suspected perpetrators of crimes within the court’s jurisdiction. If such indictments were left to the decision of a political body, such as the Security Council, this could not but call into question the impartiality of international justice.”

Report of the Special Rapporteur on torture, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1997/38, para. 226

The prosecutor should be able to initiate investigations in any case where the court has jurisdiction, even in the absence of a referral by the Security Council or a state complaint, based on information from any source and to submit an indictment to the court. The current heavily bracketed text of Article 12 contains the essence of this fundamental principle, but it should be revised to provide that the prosecutor may (rather than “shall”, to preserve prosecutorial independence) initiate investigations on his or her own motion (*proprio motu*) based on information obtained from any source, including victims and their families, or persons acting on their behalf, governments, intergovernmental organizations and non-governmental organizations. It should be for the prosecutor to determine whether the sources are reliable. See *Part I, VIII.A.*

[Article 13]. Information submitted to the Prosecutor [new]

Article 13 is an improvement over Article 12 in implementing this fundamental principle by spelling out the procedure for prosecutorial review of the information received, providing that the prosecutor may seek additional information, defining the role of the pre-trial chamber in authorizing an investigation based on a judicial determination that “there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court” and guaranteeing a role for victims in the proceedings. Article 13 also permits the prosecutor to make a subsequent request, based on new information, to the pre-trial chamber for authorization to conduct an investigation. The prosecutor is also required to inform the source of the information if the prosecutor determines that there was no reasonable basis for an investigation. Article 13, which provides appropriate judicial scrutiny to ensure that there will be no abuse by the prosecutor of his or her authority, should be incorporated without any change in the statute.

Further option for articles 6, 7, 10 and 11 [new]. *Each of these options is discussed above under the relevant article number.*

Article 14. Duty of the Court as to jurisdiction [Zutphen 12; ILC 24]

This principle, as the note indicates, is reflected in Article 17 (1), and, therefore, Article 14 could be deleted.

Article 15. Issues of admissibility [Zutphen 11; ILC 35]

States have the primary duty to bring those responsible for grave crimes under international law to justice, but the court must be able to act as an effective complement to states when they are unable or unwilling to fulfil this duty. The court must have the power to determine whether to exercise its concurrent jurisdiction in such cases. The agreement on the unbracketed text of Article 15 was one of the great achievements of the August 1997 session of the Preparatory Committee. Despite the disclaimer at the beginning of this article that the text “represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation”, it represented the agreement of an overwhelming number of delegates at that session and no delegation has publicly sought to reject this compromise. Any attempt by a government to weaken Article 15 could endanger agreement on the rest of the consolidated text and cause the diplomatic conference to fail. The only changes which could be safely made to the text would be those which clarify some of the ambiguities mentioned in the footnotes, although it would be preferable if any ambiguities were resolved in other ways than reopening the agreed text of Article 15 (see discussion of amnesties for genocide, crimes against humanity and war crimes below).

States should not be able to shield those responsible for the worst crimes imaginable from international justice by pardons, amnesties or similar measures which prevent the emergence of the truth and subsequent accountability before the law. There should not be the slightest doubt that a *national* amnesty law or pardon which prevents the emergence of the truth and those responsible being brought to justice cannot prevent the *international* criminal court from bringing those responsible for genocide, other crimes against humanity and war crimes to justice. As the UN Special Rapporteur for torture stated in his most recent report, he was

“aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court’s jurisdiction. He considers any such move subversive not just of the project at hand, but of international legality in general. It would gravely undermine the purpose of the proposed court, by permitting States to legislate their nationals out of the jurisdiction of the court. It would undermine international legality, because it is axiomatic that States may not invoke their own law to avoid their obligations under international law. Since international law requires States to penalize the types of crime contemplated in the draft statute of the court in general, and torture in particular, and to bring perpetrators to justice, the amnesties in question are, *ipso facto*, violations of the concerned States’ obligations to bring violators to justice. Any such proposed move would be to turn things on their head, allowing national law to dictate international legal obligation.” Report of the Special Rapporteur on torture, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, UN Doc. E/CN.4/1998/38, 24 December 1997, para. 228.

Footnote 42 to this article indicates that some delegations thought that Article 15 “should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties” and suggested that Article 18 (*ne bis in idem*), as then worded, did not adequately address this matter. However, nothing in Article 15 would prevent the court from exercising its concurrent jurisdiction when a state granted an amnesty, pardon or similar relief for genocide, crimes against humanity or war crimes before a final judgment. As the UN Special Rapporteur on torture has explained, such **national** measures which prevent the emergence of the truth and accountability before the law would violate **international** law. No state which is serious about international justice for the worst crimes in the world could give such measures any legitimacy whatsoever. They would negate the very purpose of the court and make the establishment of the court a futility. Article 19 would address the problems of post-judgment amnesties, pardons and similar measures by expressly authorizing the court to try someone who had been tried by another court “if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or commutation of the sentence excludes the application of any appropriate form of penalty”.

[Article 16]. Preliminary rulings regarding admissibility [new]

To ensure that the prosecutor is able to conduct investigations to determine whether there is sufficient information to seek an indictment and to arrest the accused pursuant to that indictment before it is made public, state challenges to the jurisdiction or admissibility of a case should be permitted only after the indictment has been approved and the accused arrested, unless the court otherwise decides. This article, which is entirely in brackets, would permit states to challenge the admissibility of any investigations concerning a situation **before** the prosecutor could start an investigation and prevent the prosecutor from conducting such investigations pending the result of these state challenges. There are serious flaws with this proposal which must be corrected if it is to be included in any form in the statute. Paragraph 1 provides that once a **matter** (which could, as the International Law Commission made clear in its commentary on the ILC draft statute, in contrast to a **situation**, be a single case) had been referred to the court by one of the three possible trigger mechanisms in Article 6 (Security Council referral, state complaint or the prosecutor acting on his or her own initiative (*proprio motu*)) and the prosecutor had determined that there was sufficient basis to proceed, the

prosecutor would have to make the referral known by public announcement and by notification to all states parties. This public announcement and, in some cases, the notice to states alone, could alert suspects to the investigation, leading to the concealment and destruction of evidence, the intimidation or murder of witnesses and the flight of the suspects. The advantages of the use of sealed indictments in the former Yugoslavia to effect arrests was widely recognized by states, including permanent members of the Security Council.

Under Paragraph 2, within *an unspecified number of days* after the announcement, a state, including a non-state party, could inform the court that it was investigating its own nationals or others within its jurisdiction with respect to the matter. At the request of that state, the prosecutor would be obliged to “defer to the State’s investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse of the State’s national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions”. This wording is different from the detailed list of factors which the court is to examine pursuant to a determination of admissibility under Article 15. However, before the prosecutor could commence an investigation after he or she made such a determination, the prosecutor would have to obtain a preliminary ruling by the pre-trial chamber confirming the determination. Paragraph 2 would place the burden to demonstrate that the existence of the above factors on the prosecutor, instead of the state, which would be best placed to provide the relevant information since most of it would be in the possession of the state. Despite the demonstrated need for prompt investigation and prosecution of crime, if the prosecutor deferred to the state investigation, he or she would be prohibited under Paragraph 2 from reviewing this determination for a period of *six months* or, possibly, *one year* after that deferral *even if information came to the prosecutor’s attention that the state was unable or unwilling to investigate or prosecute*. Thus, the requirement in Paragraph 4 that states parties have to respond “without undue delay” to requests to keep the prosecutor informed concerning the status of the state’s investigation would be of limited value.

If, instead of deciding initially to defer to the state investigation, the prosecutor determined that he or she should commence an investigation, under Paragraph 3 the prosecutor would have to seek permission to do so from the pre-trial chamber confirming that determination. Even if the pre-trial chamber confirmed the prosecutor’s determination to open one or more investigations, he or she could not do so until the appeal chamber decided an appeal by a state of the pre-trial chamber confirmation. This paragraph would require the appeals chamber, in contrast to decisions confirming or reversing a judgment of guilt which requires only a *simple majority*, a *unanimous decision* or a *two-thirds majority*. All appeals should be decided by a simple majority. A *state* could appeal a pre-trial chamber decision confirming the prosecutor’s determination to open an investigation; the *prosecutor* could not do so. If the state can appeal, then the interests of international justice would require allowing the prosecutor to do so as well. Paragraph 5 would give states get a *third* bite at the apple in being able to challenge the admissibility yet again pursuant to Article 17, despite the intention of that article to limit states to *one* challenge before trial to admissibility. Permitting repeated state challenges to the admissibility of cases could only undermine the authority of the court and slow down the work of the court, contrary to the fundamental principle that justice delayed is justice denied. There seems to be little in the lengthy, complicated and unfair proceedings required in Article 16 which would help make the court an effective complement to national jurisdictions. The state’s ability to ensure appropriate judicial review over the prosecutor’s decision that the court had jurisdiction and that cases would be admissible are adequately protected by Article 13,

requiring preliminary judicial review of the prosecutor's decision to open an investigation, and Article 17, which permits one pre-trial challenge to jurisdiction and admissibility by the state and other challenges by the accused.

Article 17. Challenges to the jurisdiction of the Court or the admissibility of a case [Zutphen 12; ILC 36]

Suspects who have been arrested on a pre-indictment arrest warrant and the accused should be able to challenge the jurisdiction of the court or the admissibility of a case at any stage of the proceedings, and states should be able to make such challenges only once after the arrest of the suspect or accused and before trial. Paragraph 1 (a), which requires the court to satisfy itself that it has jurisdiction at every stage of the proceedings should be included in the statute, since the court cannot act at all without jurisdiction (except to determine whether it has jurisdiction or not). Paragraph 1 (b), however, which permits the court to determine the admissibility of a case on its own motion pursuant to Article 15 at any stage of the proceedings, may pose problems. Once a determination has been made that the case is admissible and proceedings are under way, the court should not be under pressure throughout the proceedings from states belatedly claiming that they could conduct the proceedings. This problem does not appear to be addressed adequately in Paragraph 3 (see discussion below). Paragraph 2 (a), which permits the suspect or accused to challenge the jurisdiction of the court, should be amended to limit challenges by suspects to those who have been arrested pursuant to a pre-indictment arrest warrant, otherwise this would frustrate the very purposes of such pre-indictment arrest warrants - to prevent flight. Paragraph 2 (b), which contains a number of options, should be amended to limit state challenges to jurisdiction and admissibility to challenges made *after* arrest to ensure that the court can issue sealed warrants to arrest suspects and sealed indictments which will permit it to apprehend the accused. State challenges after that date will fully address state concerns, since if the state can demonstrate that the court lacks jurisdiction or that the case is inadmissible because it is able and willing to conduct a prompt, vigorous, thorough and fair investigation, then the suspect or accused and any evidence seized can be transferred to the state. The limitation in Paragraph 3 of state challenges to the admissibility of a case to one challenge before trial is essential to ensure that states cannot repeatedly disrupt or delay proceedings by such challenges. The various exceptions proposed to this rule in this paragraph should be rejected. However, the accused should be able to raise challenges to jurisdiction at any time, since the court itself must satisfy itself at any stage of the proceedings that it has jurisdiction. Paragraph 4, requiring states to challenge admissibility at the earliest possible opportunity, be amended to provide that such challenges should be made at the earliest possible opportunity *after an arrest*. The allocation of hearing challenges between the pre-trial and trial chambers in Paragraph 5 appears satisfactory.

Article 18. *Ne bis in idem* [Zutphen 13; ILC 42]

The fundamental principle of ne bis in idem, which prohibits the retrial of a person in the same jurisdiction for a crime he or she committed, should be reflected in the statute. That principle, however, applies only to retrials by the *same* jurisdiction, and the statute must ensure that the court has the power to retry persons who have been tried by national courts in proceedings which were designed to frustrate justice by shielding the person from criminal responsibility for core crimes or were otherwise unfair. Article 18 (1), which is unbracketed, incorporates this principle by prohibiting the international criminal court itself from retrying a

person for conduct which formed the basis of the crimes for which the person had been acquitted or convicted, but a footnote would weaken this prohibition by subjecting it to Article 83 (see discussion below of that article). Article 18 (2), which is unbracketed, prohibits the retrial of a person before another court for a *crime* within the international criminal court's jurisdiction "for which that person has already been convicted or acquitted by the Court". This provision would permit a national court to try a police chief for *acts* which constituted murder under national law who had been acquitted by the international criminal court of committing and inciting genocide who killed several hundred people in a village over a decade because they were members of a different political party or social class, not because of a genocidal intent, and acquitted of murder as a crime against humanity, because there was insufficient admissible evidence in that particular case that the killings were systematic or widespread. Since the international criminal court will not have jurisdiction over crimes under national law, Article 18 (2) would ensure that a person who commits a crime under national law does not escape criminal responsibility simply because the prosecutor was unable to prove beyond a reasonable doubt that the acts constituted a core crime.

Article 18 (3), which is unbracketed, facilitates the international criminal court's ability to act as an effective complement to national courts when they are unable or unwilling to bring persons to justice for core crimes. It provides that

"[n]o person who has been tried by another court for conduct also proscribed under article 5 [listing the crimes within the international criminal court's jurisdiction] shall be tried by the Court unless the proceedings in the other court:

. . . .

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

(b) otherwise were not conducted independently or impartially and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." (footnotes omitted).

Nevertheless, there are at least two problems with the wording of this provision, which are also found in Article 15 (2) (a) and (c). Article 18 (3) (a), by requiring a "purpose" to shield a person from criminal responsibility, would not cover proceedings where a prosecutor, acting in good faith, was unable to secure a conviction because the court, in practice, lacked the powers to seize evidence or compel witnesses to testify, for example, because of unsettled conditions in the country. Article 18 (3) (b), by requiring that the proceedings be "conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person to justice", could - unless the "intent" is read to include those outside the proceedings - fail to address the situation where the trial could not be conducted independently or impartially because of threats to the prosecutor, the judges, lawyers, victims and witnesses, directly or indirectly, by others. Moreover, there is a danger that the terms "independently" and "impartially" could be read so narrowly as to exclude cases where the independence of the prosecutors and judges were not threatened and they acted impartially, but the procedures fell far short of international standards for a fair trial.

As suggested in a footnote, additional provisions, consistent with the limited scope of the principle of *ne bis in idem*, should be considered. For example, should not the court be able to

retry a person who killed 500 people and was convicted in a national court of manslaughter, for which the maximum sentence is much shorter than for genocide,⁷ After the conclusion of the trials before the International Military Tribunals at Nuremberg and Tokyo, there were a series of national trials where those responsible for mass murders or employment of slave labour were convicted of less serious offences carrying derisory punishments. Of course, the alternative approach at the end of Article 18, which would preclude the international criminal court from exercising its concurrent jurisdiction in *any* case where a national court was exercising or had exercised jurisdiction, is unacceptable and should be deleted.

Article 19 [new]

Article 19 is designed to ensure that the court can be an effective complement to national jurisdictions which are unable or unwilling to enforce a sentence of a national court for a core crime by permitting the court to try a person sentenced in such a case “if a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty”.

Article 20. Applicable law [Zutphen 14; ILC 33]

The unbracketed text of Article 20 (a) and (b) providing that the court should apply, first, the statute and its rules of procedure and evidence, then, “if necessary, applicable treaties and the principles and rules of general international law”, together with the bracketed phrase, “including the established principles of the law of armed conflict”, should be retained. Option 1 for Article 20 (1) (c), providing that the court should then, if these fail to provide answers, apply “general principles of law derived by the Court from national legal systems of the world” (unbracketed), with the qualification, in brackets, “where those national laws are not inconsistent with this Statute and with international law and internationally recognized norms and standards”, should be kept to ensure uniform decision-making. Option 2, permitting reference to different national laws, could lead to different outcomes with regard to defendants from different countries in the same case as well as with regard to crimes committed in different countries, contrary to the fundamental principle of equality of accused before the court, as recognized in Article 14 (1) of the ICCPR. See *Part II, IV.C.1.d*. The unbracketed provisions, Article 20 (2), permitting the court to apply its own precedents, and Article 20 (3), requiring that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”, should be retained.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 21. *Nullum crimen sine lege* [Zutphen 15; ILC A]

The fundamental principle of legality (nullum crimen sine lege) should be included in the statute. Article 21 (1) (a), which provides that “a person shall not be criminally responsible under this Statute: (a) in the case of a prosecution with respect to a crime referred to in article 5 . . . , unless the conduct in question constitutes a crime that is defined in this Statute”, incorporates this principle, but it may have to be modified in two respects. Since the elements of the crimes are to be incorporated in a separate instrument drafted by the preparatory commission or the court after the statute is signed, this provision should be amended to indicate that the crime should be defined in the statute or separate instrument. If the international

community subsequently decided that it would be appropriate for the court to assume jurisdiction over cases within the jurisdiction of an *ad hoc* international criminal tribunal established by the Security Council, it might be necessary to amend Article 21 (1) (a), unless the draft provision is revised now to provide for such a possibility. Article 21 (1) (b) could be deleted if, as is likely, treaty crimes are not included within the court's jurisdiction when it is first established. If retained, the concept of applicability of a treaty to the conduct of an individual for purposes of imposing international criminal responsibility will have to be carefully defined since, in contrast to core crimes, most of the proposed treaty crimes - apart from torture - are not widely recognized as crimes of universal jurisdiction. Although the prohibition in Article 21 (1) (2), which is bracketed, of determining whether conduct is criminal by the process of analogy is widely considered part of the principle of legality, this prohibition will have to be interpreted in the light of the reality that crimes under international law do not have the same elaborate framework of criminal law and procedure as crimes under national law. Therefore, of necessity, short of an elaborate international criminal code, the court will have to resort in a limited number of cases, as provided in Article 20 of the consolidated text, to other applicable law than provided in the statute, separate instrument setting out the elements of the crimes and the rules of procedure and evidence. Similarly, even if the appropriate penalties are - as they should be under the related principle of *nulla poena sine lege*- stated in the statute in Article 68, the court will have to look at other applicable law in determining certain issues, such as whether to apply concurrent sentences or consecutive sentences. Paragraph 3 of Article 20, which is unbracketed, stating that "Paragraph 1 shall not affect the character of such conduct as being crimes under international law, apart from this Statute", is a useful complement to Article Y in Part 2.

Article 22. Non-retroactivity [Zutphen 16; ILC A bis]

Article 22 (1), which is unbracketed, appears to be consistent with the principle of non-retroactivity of criminal law as recognized in Article 15 (1) of the ICCPR, but it is more restrictive than necessary, at least with respect to core crimes, since Article 15 (2) of the ICCPR makes clear that "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations[.]" and each of the core crimes involve acts or omissions which are criminal under general principles of law. Article 22 (2), which provides that "[i]f the law as it appeared at the commission of the crime is amended prior to the final judgment in the case, the most lenient law shall be applied[.]" should be retained and the brackets removed.

Article 23. Individual criminal responsibility [Zutphen 17; ILC B.a to d]

The statute should provide for individual criminal responsibility and prohibit any form of collective punishment. Article 23 (1), which provides that "[t]he Court shall have jurisdiction over natural persons pursuant to the present Statute[.]" and Article 23 (2), which states that "[a] person who commits a crime under this Statute is individually responsible and liable for punishment[.]" both of which are unbracketed, implement only the first of these principles. Article 23 (4), which is unbracketed, states that criminal responsibility of individuals under the statute "does not affect the responsibility of States under international law". Although this may well be true with regard to state *criminal* responsibility, a state may well incur *civil* responsibility under international law for the acts of its agents and those acting with its consent or

acquiescence (see discussion below of Article 73). Article 23 (5) and (6), both of which provide for *criminal* responsibility of legal persons (such as corporations or political parties) are inconsistent with the prohibition of collective criminal responsibility and should be deleted. Of course, legal persons should be *civilly* responsible in certain cases for the acts of their personnel.

Article 23 (7), which is heavily bracketed, needs further work. **See Part I, VI.D.** If agreement cannot be reached at the diplomatic conference on principles of accessory liability, then this provision should be placed in a separate instrument. The revised section should, at least with respect to the crime of genocide, include criminal responsibility for conspiracy, direct and public incitement, attempt and complicity, as required by Article III of the Genocide Convention and consistent with the intent of the drafters of that treaty. Article 23 (7), which applies to all crimes within the court's jurisdiction, appears to include options covering all of these concepts. As suggested in a footnote, if the court is to have jurisdiction over a person who aids, abets or assists a criminal after the crime has been committed (for example, by aiding the escape of the accused or concealment of evidence), the statute should expressly say so. Another footnote, which urges that a person be held criminally responsible who "participates in an organization which aims at the realization of such a crime by engaging in an activity that furthers or promotes that realization", and is based upon the now discredited provision in the Nuremberg Charter imposing criminal liability for membership in organizations found to be criminal. It is inconsistent with the fundamental principle of individual criminal responsibility. The mental element (*mens rea*) required should be consistent with Article 29.

Article 24. Irrelevance of official position [Zutphen 18; ILC B.e]

The statute should ensure - in a manner which is consistent both with principles of natural justice and the need to deter grave crimes - that superiors and subordinates, regardless of rank or position, are held responsible for all acts and omissions. A person in a command or superior position, regardless of rank or status, who orders a subordinate to commit genocide, other crimes against humanity or war crimes should be held equally responsible for the crime with the subordinate (see discussion of Article 25 below). A person's official position should be neither a defence nor a mitigating factor. **See Part I, VI.C.3.** The unbracketed part of Article 24 (1) incorporates this principle. However, the inclusion of the bracketed words, "[per se]", permit a person's official capacity to be considered as a mitigating factor, when, if relevant to sentencing, it should be an *aggravating* factor for an official who abused his or her position to commit grave crimes. Article 24 (1) should be adopted without the bracketed words. Article 24 (2), which further reinforces the principle by providing that immunities or special rules attaching to an official cannot prevent the court from exercising its jurisdiction over that person, should be included.

Article 25. Responsibility of [commanders] [superiors] for acts of [forces under their command] [subordinates] [Zutphen 19; ILC C]

The statute should provide that a superior (whether military or civilian) is responsible if he or she orders genocide, other crimes against humanity or war crimes to be committed and that crime is committed or attempted by a subordinate. The statute should also provide that a superior is equally responsible with the subordinate if he or she knew or had reason to know that a subordinate had committed or was about to commit such a crime

and failed to take feasible steps within his or her power to prevent or punish the crime.

The principle of superior responsibility has several elements, including: (1) a duty to exercise authority over subordinates; (2) equality of responsibility with the subordinate; (3) actual knowledge of the unlawful conduct planned or carried out by the subordinate or sufficient information to enable the superior to conclude that such conduct was planned or had occurred; (4) failure to take necessary steps; (5) feasibility of such steps; and (6) prevention or repression of the crime. See *Part I, VI.C.4.*

Article 25 contains many, but not all, of these elements as options and contains a number of unacceptable options. The unacceptable options would limit the principle to military commanders, thus excluding civilian presidents, prime ministers and defence ministers; and would narrow the situations in which a superior should have known about the actions of the subordinates, for example, to situations where there were widespread commission of the offences (thus excluding a single large massacre). Article 25 (b) weakens the strict requirement under Article 86 (2) of Protocol I for superiors to “take all feasible measures within their power”, by simply requiring the superior “to take all necessary and reasonable measures within his or her power”. This standard undermines the requirement of necessity with reasonableness, when humanitarian law expects the superior to do his or her utmost to punish or prevent such crimes. Article 25 (b) should be amended to be consistent with Article 86 (2) of Protocol I. The statute should also make clear that Article 28 (2), concerning omissions, does not override this article.

Article 26. Age of responsibility [Zutphen 20; ILC E]

Although Amnesty International takes no position concerning what is an appropriate age for individual criminal responsibility, the statute should include some provision concerning the age of criminal responsibility. If it proves difficult to reach agreement on a precise age, it might be better to leave it to the court in individual cases to determine whether the person charged has reached sufficient maturity for the imposition of criminal responsibility, possibly along the lines in the compromise proposed in Footnote 4 to Article 68 of the Zutphen text. See *Part I, VI.C.2.*

Article 27. Statute of limitations [Zutphen 21; ILC F]

There should be no statute of limitations for the core crimes of genocide, other crimes against humanity or serious violations of humanitarian law. See *Part I, VI.E.1.* Therefore, Proposal 4, which expressly provides that there should be no statute of limitations for these crimes - thereby sending a clear warning to would-be criminals that they will never be safe from justice - should be adopted. The concern about the possible unfairness of a trial after a long lapse of time can be fully addressed in Article 64 (1) (2) and (2), which provides that the court has a duty to ensure that the rights of the accused are respected and that the trial is fair, and, therefore, Proposal 3 should be deleted. All other proposals, to the extent that they impose a statute of limitations on genocide, other crimes against humanity or war crimes must be deleted.

Article 28. *Actus reus* (act and/or omission) [Zutphen 22; ILC G]

In the light of the wide variety of legal systems from which judges will be appointed, it will be necessary to provide the court with guidance concerning what types of conduct - which should include both an act (actus reus) and an omission - will result in criminal responsibility with respect to crimes where this is not spelled out clearly enough in a treaty defining the crime or customary law. General principles applicable to all crimes should, if possible, be spelled out in the statute or, if this is not possible, in the rules. Paragraph 1, which is unbracketed, and states conduct for which a person may be held criminally responsible can constitute either an act or omission, should be included. Paragraph 2, which defines when an omission may give rise to criminal responsibility under the statute, must not override long-settled principles concerning superior responsibility in Article 25. Some of the bracketed options, such as the restriction on the scope of omissions giving rise to criminal responsibility where there was no “unreasonable risk of danger” to the person and there was “an intention to facilitate a crime”, would undermine the principle of superior responsibility, as well as other principles of criminal responsibility. Sub-Paragraph (a), which is unbracketed and imposes criminal responsibility for an omission when omission is part of the definition of the crime, should be included. The alternative basis for criminal responsibility for omissions in the heavily bracketed Sub-Paragraph (b) should at least include failure to fulfil a pre-existing obligation under international law. Paragraph 3, which is in brackets, stating that a person is only criminally responsible under the statute if the harm caused is caused by attributable to that person’s conduct, could be included as an element of the principle of individual criminal responsibility.

Article 29. Mens rea (mental elements) [Zutphen 23; ILC H]

The mental elements of the crimes should be fully consistent with the mental elements required under international law and not weakened. The court should have jurisdiction over crimes which are committed either intentionally, with knowledge or recklessly. As stated above in the discussion of Article 5, the mental elements of genocide and war crimes recognized in international law should be incorporated in the statute and, where the consolidated text is inconsistent with international law, it must be amended. Article 29 fails to satisfy these requirements and its definitions could lead to some confusion. Paragraph 1 should treat *intent*, which in many national legal systems increasingly means a purpose to engage in certain conduct or achieve a particular result (for example, in the American Law Institute’s Model Penal Code), and *knowledge*, which Paragraph 3 defines as being “aware that a circumstances exists or a consequence will occur”, as *separate* mental elements for clarity. Paragraphs 1 and 2, however, appear to combine the two concepts, as in some other national legal systems, which could lead to considerable confusion in the international court about the mental elements which must be proved to establish guilt, particularly with genocide, which requires a specific intent. Paragraph 1 states that unless otherwise provided, a person is only criminally responsible “if the physical elements are committed with intent *and* knowledge” (emphasis supplied). Paragraph 2 states that a person has intent, in relation to conduct, where the person “means to engage in the act [or omission]” and, in relation to a consequence, the person “means to cause that consequence or is *aware* that it will occur in the ordinary course of events” (emphasis supplied).

A second serious problem is the limited scope of conduct covered which is criminal under international law. As the discussion above in connection with Article 5 of the mental elements of war crimes demonstrates, many of the grave breaches of the Geneva Conventions

and Protocol I can be committed wilfully - that is *with intent* or *recklessly*. Therefore, it is essential to remove the brackets around Paragraph 4, which provides that the court has jurisdiction over crimes which were committed recklessly. See *Part I, VI.B*. However, the current definition in that paragraph, by making the three elements cumulative, would eliminate most cases of reckless war crimes, and should be amended.

Article 30. Mistake of fact or law [Zutphen 24; ILC K]

A mistake of fact should be a ground for excluding criminal responsibility only if it negates a mental element of the crime, is a reasonable mistake and involves an honest error of judgment. The unbracketed language in Paragraph 1 of Option 2, providing that “[a] mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime”, together with the proviso in brackets “that the circumstances he reasonably believed to be true would have been lawful”, would be consistent with this principle. See *Part I, VI.E.6*. Option 1 is not.

A mistake of law should not exclude criminal responsibility where the accused was unaware that the prohibited conduct was unlawful, although it may do so when a reasonable mistake concerned an element of the crime, such a mistaken belief that a court had authority to issue a sentence or that property was abandoned. See *Part I, VI.E.6*. The alternative to Paragraph 2 in the footnote to Option 2, with the qualification that the mistake was reasonable, is consistent with this principle:

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

Neither Paragraph 2 of Option 2 nor Option 1 satisfy this principle.

Article 31. Grounds for excluding criminal responsibility [Zutphen 25; ILC L]

Impermissible defences under international law, such as superior orders, should be excluded.

Mental disease or defect. Sub-Paragraph (a), providing that a person is not criminally responsible if at the time of that person’s conduct he or she “suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law”, appears to be consistent with the purpose of the statute. However, the statute or rules will have to establish a procedure consistent with international law and standards for addressing the situation of a person acquitted on this ground who continues to suffer from that disease or defect.

Intoxication. It would be most consistent with the purpose of the statute if *voluntary* intoxication were excluded as a defence, but included as a possible factor in mitigation if the

person did not have a pre-existing intent or know that the circumstances which led to the crime would arise. As a footnote to Sub-Paragraph (b) states, permitting voluntary intoxication to be a defence in either of these situations “would probably lead to a great number of war crimes and crimes against humanity going unpunished”. Of course, if intoxication is *involuntary* and it destroys the will, then it would mean that the necessary mental element was not present and the person would not be criminally responsible. Sub-Paragraph (b) should be modified to be consistent with these principles.

Self-defence, defence of others and defence of property. The statute should provide that in certain strictly and narrowly defined circumstances that *self defence* and *defence of others* may be a defence to a killing or the infliction of bodily harm in an individual case which might otherwise be a crime under international law, although, given the nature of the crimes of genocide, other crimes against humanity and war crimes, such situations are likely to be rare. *Defence of property*, should be excluded. See **Part I, VI.E.5.** Sub-Paragraph (c) should be reworded to incorporate the following elements: the person did not place himself or herself in the circumstances leading to the threat, the belief that the use of force was necessary was reasonable, that it applies only to threats to that or another person, the threat of force was immediate, the threat of force was unlawful and the force used to ward off the threat was reasonably proportional to the threat.

Duress. Duress - sometimes called compulsion or coercion - cannot be a defence to the core crimes of genocide, other crimes against humanity or war crimes which involve killing or inflicting bodily harm on innocent victims when the mental and physical elements are present, although it is a factor which could be considered in certain circumstances in determining whether mitigation of punishment is appropriate. See Part I, VI.E.3. As the Appeals Chamber of the Yugoslavia and Rwanda Tribunals recently decided in the *Eredemovi* case, for the reasons set forth in the joint separate opinion of Judges McDonald and Vohrah and in the separate and dissenting opinion of Judge Li, “duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings” (Para. 19). As recognized in those separate opinions, however, duress could be considered as a mitigating factor in these situations (Separate opinion of Judges McDonald and Vohrah, para. 82; separate and dissenting opinion of Judge Li, para. 5). Therefore, Sub-Paragraph (d) should be revised to read that a person is not criminally responsible if the person reasonably believes that there is a threat of imminent death or serious bodily harm against that person or another person and the person act reasonably to avoid this threat, provided that the person’s action causes neither death nor a greater harm than the one sought to be avoided; however, if the person recklessly exposed himself or herself to a situation which was likely to lead to the threat, the person shall remain responsible. Other options proposed should be deleted. Sub-Paragraph (d) should also provide that even if not all of these conditions are met, duress may be taken into account in mitigation of punishment pursuant to Article 77 (determination of sentence) or a provision on this subject in the rules.

Necessity. Necessity should not be a defence to the crimes of genocide, other crimes against humanity or war crimes when the physical and mental elements of the crime are present, except in the strictly limited circumstances that it may be taken into account in humanitarian law, although in certain circumstances it may be taken into account in determining whether to mitigate punishment. See Part I, VI.E.4. Therefore,

Sub-Paragraph (e) should provide that a person is not criminally responsible if at the time of the person's conduct the person reasonably believes that there are circumstances beyond that person's control which constitute a danger of imminent death or serious bodily harm to that person and the person acts reasonably to avoid the danger, provided that the person did not cause death and provided that there existed no other way to avoid the danger. The sub-paragraph should also provide that if not all these requirements are met, necessity can be considered in mitigation of punishment.

Paragraph 2 of Article 31, stating that the court may determine the applicability of the grounds for exclusion of criminal responsibility, if retained, should include the grounds for exclusion of criminal responsibility under the statute, since not all of them are listed in Paragraph 1.

Article 32. Superior orders and prescription of law [Zutphen 26; ILC M]

One defence which must be excluded is the defence of superior orders, although the order may be taken into account in mitigation of punishment. Paragraph 1 should be revised to be fully consistent with this principle, established in the Charters of the International Military Tribunals at Nuremberg and Tokyo and incorporated in the Statutes of the Yugoslavia and Rwanda Tribunals. See **Part I, VI.E.2.** The paragraph should make clear that it applies to all orders, whether given by a military or a civilian superior, and the phrase in brackets at the end of the sentence which eviscerates this principle by providing that it applies only to orders which were "known to be unlawful" or which "appeared to be manifestly unlawful", should be deleted. The circumstances when such orders may be taken into account in mitigation should be addressed in Article 77 (determination of sentence). The principle that national legislation or regulations do not excuse international criminal responsibility, mentioned in Paragraph 2, which is in brackets, could be incorporated in this article, but the rest of the paragraph, which contains options excluding this principle with respect to crimes against humanity and war crimes, must be deleted. It would allow states to immunize those responsible for these crimes under international law by national legislation, thus rejecting the legacy of Nuremberg and making the court powerless to deal with the worst crimes in the world.

[Article 33. Possible grounds for excluding criminal responsibility specifically referring to war crimes] [Zutphen 27; ILC N]

There is no need for a separate list of grounds for excluding criminal responsibility for war crimes, as these are to be found in the definitions of these crimes under international law. Moreover, the origin of the concept of military necessity, as defined in the Lieber Code of 1863, was a *restraint* on military operations, not as a *defence* to war crimes.

Article 34. Other grounds for excluding criminal responsibility [Zutphen 28; ILC O]

The only permissible grounds for excluding criminal responsibility in the statute should be expressly listed in the statute to ensure that the court does not create new defences inconsistent with the statute and international law or weaken the prohibitions in the statute and international law in its jurisprudence. If, however, Paragraph 1, which permits the court to consider excluding criminal responsibility on grounds not listed in this part of the statute, is included, then this power must be strictly limited. Paragraph 1 (a) should provide that the ground is recognized in the

general principles of criminal law, and Paragraph 1 (b) should not only provide that the ground “deals with a principle clearly beyond the scope of the grounds for excluding criminal responsibility enumerated in this part and is not otherwise inconsistent with those or any other provisions of the Statute”, but should also provide that the ground is not contrary to international law. If these requirements are not satisfied, then Article 34 should be deleted.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 35. Organs of the Court [Zutphen 29; ILC 5]

This article, which provides that the court consists of the organs of the presidency, an appeals chamber, trial chambers, a pre-trial chamber (or pre-trial chambers), the office of the prosecutor and a registry should be included in the statute, but, to ensure flexibility in the face of fluctuating case loads, should provide for one or more pre-trial chambers, as necessary.

Article 36. Judges serving on a full-time basis [Zutphen 29 bis]

It would be preferable for judges to serve on a full-time basis from the moment they are elected to ensure that they are available to perform their international duties at a moment's notice, without concerns about competing national responsibilities. If judges other than those composing the presidency serve only part-time at the beginning, then there should be a procedure which permits the court to become a full-time court as soon as it is necessary, such as the decision being made by the presidency itself, which would ensure that the decision was taken on non-political grounds with full judicial independence by the institution best placed to determine the necessity for the change. If the states parties are to have a role, then one-third of those states should not be able to prevent the necessary shift to a full-time court by negative votes or simply abstaining.

Article 37. Qualifications and election of judges [Zutphen 30; ILC 6]

Judges should be selected in an open process, after public consultation, who are experienced either in international humanitarian law and human rights or in criminal law

The unbracketed Paragraph 1, stating the total number of judges, subject to Paragraph 2, concerning increases or decreases, is not necessary, but does not appear to pose any problems. However, the bracketed option requiring a certain number of judges from each UN geographic region would introduce an unwelcome rigidity into selection, and should be deleted. Moreover, the concerns about appropriate geographic distribution are fully addressed in Paragraph 8 (c). Paragraph 2, which is largely unbracketed, serves an essential function by permitting the president to propose an increase in the number of judges, to be approved by the assembly of states parties, when such an increase “is considered necessary and appropriate”. This paragraph should also provide, as indicated in the brackets for a decrease when necessary and appropriate, but such decrease should not affect the term of office of any judge then serving. Such increases or decreases should not require a two-thirds majority of all states parties, as this would permit one-third of all states parties to prevent a necessary change by negative votes or simply abstaining.

The unbracketed language of Paragraph 3, concerning qualifications of judges should be retained, although it is deeply to be regretted that the Preparatory Committee decided that

these qualifications should be much less strict than those required of judges of international judicial institutions and expert monitoring bodies, *see Part II, II.C.2*. There is no need, however, to restrict the selection of judges for an *international* criminal court, as suggested in the bracketed sentence, to those “who possess all the qualifications required in their respective States for appointment to the highest judicial offices”, since judges in the pre-trial and trial chambers will need extensive trial experience and ability, which is different from the experience and ability required in appellate courts. At least some of the judges of the pre-trial and trial chambers should have competence in international law, as well as extensive criminal trial experience as a judge, prosecutor or defending counsel. At least some of the appeals chamber judges should have such trial experience, as well as recognized competence in international law, in particular, international criminal law, international humanitarian law and international human rights law. These concerns could be addressed by revising the text of Paragraph b accordingly.

Option 1 in Paragraph 4, which provides for the nomination by states parties of not more than three persons to be judges, should be included in the statute, together with the requirements that the state party appoint a national group for this purpose, and that the nominees be nationals of different states, but the appointment of the national group, as well as the nomination process itself, must be as open as possible and involve as wide a consultation process as possible to ensure the best possible nominees. *See Part II, II.C.2*. Elements of Option 2 in this paragraph should also be included, by providing that the nominations of states parties, after such broad consultation, would be assessed by a nominating committee - preferably of independent experts - appointed by the assembly of states parties, which would make non-binding recommendations to the plenary. Election should be by states parties, who have demonstrated a strong commitment to international justice, rather than by the General Assembly. A secret ballot, as provided in Paragraph 5, could help insulate judicial selection from improper political pressures. Any concern that some states have expressed that a simple majority could lead to selection of unqualified candidates solely because they came from certain geographic regions would, of course, be avoided if the above recommendations were adopted.

Paragraph 6, providing that “[n]o two judges may be nationals of the same State,” should be included, although special consideration might be given to persons possessing more than one nationality. As with other international judicial institutions and expert monitoring bodies, the statute should permit judges to be elected who are not nationals of states parties. This would help ensure that the best talent is selected and the experience of such judges would help encourage those states to become parties. As provided in the unbracketed part of Paragraph 8, in the election of judges, “the representation of the principal legal systems of the world” and “equitable geographical distribution” should be born in mind, but other factors, as indicated in the bracketed provisions, should also be born in mind. These factors include the need to aim for gender balance and the need for expertise on issues related to sexual and gender violence, violence against children and other similar matters. There should be some provision for a maximum age for judges at the time of election, as provided in Paragraph 9, although the particular age chosen is not that important. The terms of office should be staggered, as provided in Paragraph 6, and, to help protect the independence and impartiality of judges, the terms of office should be relatively long and non-renewable, except, possibly, in the case of a judge who previously filled a short-term vacancy. Judges should be able to continue in office in order to complete a case, as provided in Paragraph 11.

Article 38. Judicial vacancies [Zutphen 31; ILC 7]

There should be a provision, as in Article 38, for election of replacement judges in the event of a vacancy to serve out the remainder of a term and it should state whether that replacement judge is eligible for re-election if the replacement term is relatively short.

Article 39. The Presidency [Zutphen 32; ILC 8]

The unbracketed text of Article 39, establishing the presidency (composed of the president and two vice-presidents), which is to be responsible for “the due administration of the Court”, with the exception of the office of the prosecutor, should be retained. The suggested option giving the presidency the responsibility to supervise and direct the registrar and staff of the registry, as in many national courts, is desirable to avoid the problems which plagued the first years of the Rwanda Tribunal.

Article 40. Chambers [Zutphen 33; ILC 9]

Article 40 needs substantial work and matters addressed in other articles should not be duplicated here (or they should be transferred to this article). To ensure that the court is as economical and efficient as possible, the chambers should be as small as possible. An appeals chamber of more than five judges seems excessive in such a small court. As stated above with respect to Article 37 (3), at least some of the appeals chamber judges should have such trial experience, as well as recognized competence in international law, in particular, international criminal law, international humanitarian law and international human rights law. To ensure that judges in a very small, self-contained court remain completely impartial and not subject to influence by colleagues, as well as to avoid the problems entailed by mandatory disqualifications of judges who previously made decisions in cases, Paragraph 3, permitting the president to assign judges to particular chambers, should be modified to limit this to assignment to particular cases within a chamber and judges should be elected to particular chambers and serve only on those chambers throughout their term of office. For the same reasons, Paragraph 4, which is in brackets, should be deleted. In the interests of economy and efficiency, Paragraph 5 should provide for a trial chamber of no more than three judges. As stated above with respect to Article 37 (3), at least some of the judges of the pre-trial and trial chambers should have competence in international law, as well as extensive criminal trial experience as a judge, prosecutor or defending counsel. In the interests of economy and efficiency, Paragraph 6 should provide that the pre-trial chamber may permit a single judge to perform certain minor or routine tasks, as provided in the rules. The system of alternate judges envisaged in Paragraph 7, which is bracketed, is likely to prove more expensive in the long run than the occasional trial or hearing which will have to be recommenced because of the death or incapacity of a judge.

Article 41. Independence of the judges [Zutphen 34; ILC 10]

The statute and rules of the court should ensure that the independence and impartiality of the judiciary is guaranteed, as required by international standards, such as the UN Basic Principles on the Independence of the Judiciary. Article 41, which is unbracketed, is fully consistent with this principle, and should be kept, but it is not alone sufficient to protect judicial independence, as the recommendations elsewhere in this paper demonstrate.

Article 42. Excusing and disqualification of judges [Zutphen 35; ILC 11]

Article 42, concerning the circumstances when judges may be excused or should be disqualified from hearing a particular case, which is almost unbracketed, should be retained. The additional grounds for automatic disqualification of a judge suggested in brackets in Paragraph 2 (national of complainant state, of territorial state or of accused's state) have merit, but, in a small court, might lead to the impossibility of constituting a trial chamber and, therefore, if included, might require a provision for the appointment of an *ad hoc* temporary judge in such a situation. If both the prosecutor and the accused are satisfied with the judges, there seems no reason to permit a state - which is not a party - to request disqualification of a judge, as suggested in Paragraph 3.

Article 43. The Office of the Prosecutor [Zutphen 36; ILC 12]

Paragraph 1, which guarantees the independence of the office of the prosecutor and which is largely unbracketed, should be retained unchanged, but provide for the prosecutor to be able to act on the basis of all three proposed trigger mechanisms (information from any source, states and the Security Council). The unbracketed language of Paragraph 2, concerning the authority of the prosecutor over the management and administration of the office, should be retained unchanged. The suggestion that the prosecutors and deputy prosecutors not only be of different nationalities, but also represent different legal systems, has merit, but further clarification of the term "different legal systems" would be necessary before it could be included. For example, within the civil law family, the French, German, Swiss, Italian, Spanish and Brazilian legal systems are radically different, and within the common law family, there are fundamental differences between the legal systems within the United Kingdom itself, as well as between the those of the United Kingdom, the United States and individual countries in the Commonwealth. To ensure economy, stability and efficiency, avoiding the disruption of starting up and closing down the office, the prosecutor and deputy prosecutors should serve full-time throughout their terms of office. Moreover, past experience demonstrates that they will have a full docket of cases where states have been unable or unwilling to bring to justice those responsible for genocide, other crimes against humanity and war crimes.

It is unfortunate that the qualifications for the prosecutor and deputy prosecutor listed in Paragraph 3 are weaker than those of the judges of the court, as well as of judges of other international judicial institutions and expert monitoring bodies, and the existing requirements in that paragraph should not be weakened any further. In the long run, despite the dedication and excellence of the individual judges who have served as prosecutors for the Rwanda and Yugoslavia Tribunals, over the long run prosecutorial experience is preferable to judicial experience for a permanent institution. Prosecutors should be selected in the same open process with widespread consultation as recommended above in the discussion of Article 37 for judges to help guarantee that the person chosen is impartial, professional, with integrity and independent of political influence. To ensure that the office of the prosecutor can work effectively as a team, the prosecutor ought to be able to appoint his or her deputies, possibly subject to a veto by a majority of states parties, as suggested in the footnote to Paragraph 3. Paragraph 4 should provide that the prosecutor and deputy prosecutors shall serve a long term, seven or nine years, shall not be eligible for re-election, and shall not be over 65 years at the time of election.

The unbracketed language in Paragraph 5 providing that the prosecutor and deputy prosecutors "shall not engage in any activity which is likely to interfere with their prosecutorial functions or to affect confidence in their independence" should be included in the statute. As

stated above, the prosecutor and deputy prosecutors should serve full-time throughout their terms of office and, therefore, the second sentence of this paragraph, which is unbracketed and provides that they “shall not engage in any other occupation of a professional nature”, should be kept. Paragraph 6, which is unbracketed, permitting the presidency to excuse the prosecutor or deputy prosecutor at his or her request, should be kept. Paragraph 7, concerning grounds for disqualification of the prosecutor or deputy, should include the basic principle in the first sentence, still in brackets, that they should not “participate in any matter in which their impartiality might be doubted on any ground”, leaving details to be spelled out in the rules. The unbracketed language in the rest of the paragraph, as well as the additional grounds listed in the brackets, should be included. Questions of disqualification should be decided by all the judges. The first sentence of Paragraph 9, which is still brackets, requiring the appointment of “advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”, together with the last sentence, requiring that the office of the prosecutor “shall include staff with expertise in trauma, including trauma related to crimes of sexual violence”, should be retained. Paragraph 10, concerning the responsibility of the office of the prosecutor to provide protective measures for prosecution witnesses, may not be necessary if the victims and witnesses unit is established in the registry.

Article 44. The Registry [Zutphen 37; ILC 13]

The unbracketed language in this article should be kept. Paragraph 1 should expressly refer to Article 39 (3) (b), spelling out the duty of the presidency for the due administration of the court, including supervision and direction of the registry, not just Article 43, concerning the relationship with the prosecutor. To reinforce the ultimate responsibility for the due administration of the court in the presidency, it might be better for the registrar to be appointed by the judges, and this responsibility could be strengthened by expressly stating, as provided in one of the options in Paragraph 2, that the registrar shall be “under the authority of the President of the Court”. Any of the options set forth in Paragraph 3 appear to be acceptable, but it would have been preferable to state that the registrar should have extensive experience in managing a judicial institution. There should be a victims and witnesses unit established in the court and the registry would appear to be the appropriate place for such a unit, as provided in Paragraph 4, which is still in brackets. The qualifications of staff should include extensive experience in national witness protection and relocation programs, as such programs have proved effective in protecting witnesses and their families from intimidation and harm.

Article 45. Staff [Zutphen 36, 37]

The unbracketed provisions in Article 45, which provide for the appointment and qualifications of the staff of the office of the prosecutor and registry and regulations for the staff of all organs of the court should be retained. The regulations should be circulated for the information of states parties, but there seems to be no need for state party approval. Since the effectiveness, flexibility and speed of response to change of the Rwanda and Yugoslavia Tribunals was greatly strengthened by the ability to accept seconded personnel from states, intergovernmental organizations and non-governmental organizations, Paragraph 4 authorizing such acceptance should be included in the statute.

Article 46. Solemn undertaking [Zutphen 38; ILC 14]

The unbracketed requirement in Article 46 that judges, the prosecutor, deputy prosecutors, registrar and deputy prosecutors should “make a public and solemn undertaking” to exercise their functions “impartially and conscientiously”, thus avoiding potential problems of conscience entailed in the requirement of an oath should be included in the statute unchanged.

Article 47. Removal from office [Zutphen 39; ILC 15]

The provisions for removal from office should be consistent with the UN Basic Principles on the Independence of the Judiciary and the UN Guidelines on the Role of Prosecutors. Paragraph 1, providing that a judge, prosecutor, deputy prosecutor, registrar or deputy prosecutor “who is found to have committed serious misconduct or a serious breach of his or her duties under this Statute” or to be unable to exercise his or her functions, should be included in the statute. However, a serious breach of duties under the rules could also merit removal in certain cases, where it involved violation of the rights of suspects, accused or witnesses or financial corruption. In Paragraph 2, setting out the procedure for decisions on loss of office by secret ballot, the choices most consistent with principles of independence are to require a two-thirds majority of states parties to remove a judge after a recommendation by two-thirds of the judges. A similar supermajority should be required to remove prosecutors and deputy prosecutors and it would appear preferable that the registrar should be removed only by the judges. Paragraph 3, which accords the official facing removal certain due process rights during a hearing on removal, should be strengthened to permit representation by counsel.

Article 48. Disciplinary measures [Zutphen 39 bis]

This article, concerning disciplinary measures when a judge, prosecutor, deputy prosecutor, registrar or deputy registrar “has committed misconduct of a less serious nature than that set out in paragraph 1 [of Article 47]”, probably should be placed in the rules.

Article 49. Privileges and immunities [Zutphen 40; ILC 16]

The statute of the permanent international criminal court should expressly provide that the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the court. Unfortunately, Article 49 fails to protect the court itself, including its property. Although the host state agreement will do this within that state, the court will necessarily have temporary facilities in the territory of other states and these should be expressly protected. See *Part IV, III.F.4.*

The judges, prosecutor and deputy prosecutors and the registrar and deputy registrar should enjoy the privileges and immunities of diplomatic envoys, reinforced by the protection provided by the Convention on the Privileges and Immunities of the United Nations. This protection should apply irrespective of nationality and include the same protection accorded other officials of the court in the state of the officials' nationality. The unbracketed language in Paragraph 1 provides that the judges and the prosecutor “shall enjoy diplomatic privileges and immunities”. The protection in this paragraph should be extended to the deputy prosecutors, the registrar and the deputy registrar and should apply at all times, not just when engaged in the business of the court. This protection must be accorded regardless of

the nationality of the official and should apply in the state of the official's nationality. See *Part IV, III.F.4*.

All staff of the court should enjoy, at a minimum, the functional privileges and immunities of staff of the UN under the Convention on Privileges and Immunities of the United Nations. The unbracketed language of Paragraph 2, providing that the staff of the office of the prosecutor and the registry should “enjoy the privileges, immunities and facilities necessary for the performance of their functions”, should be included in the statute. See *Part IV, III.F.4*. As stated above, the deputy prosecutors, registrar and deputy registrars should enjoy the same immunity as judges and the prosecutor.

The statute should provide that other persons, including victims, their families, witnesses, suspects, accused and counsel, should be accorded such treatment as is necessary for the proper functioning of the court. The unbracketed sentence in Paragraph 3, requiring the “[c]ounsel, experts, witnesses or any other person required at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court[.]” should be included in the statute. See *Part IV, III.F.4*. As the footnote suggests, the express measures of protection in the bracketed sentences are probably included in the general principle set forth in the first sentence and further elaboration could be included in the rules or host state agreement; they could also be included in special agreements with other states.

The court should be able to revoke privileges and waive immunities for its staff, with the consent of the prosecutor or registrar, when it involves one of their staff, but judges, the prosecutor, deputy prosecutor and the registrar and deputy registrars should retain absolute immunity for their official acts. To ensure the independence of the judges, prosecutor, deputy prosecutors, registrar and deputy registrar from political pressure, Paragraph 4 (a) to (c) should be amended to exclude any power to waive their immunities for *official acts* and (d) and (e) amended to exclude waiving the immunities of the deputy prosecutors and deputy registrars for their *official acts*. Waiver of immunities for *acts outside their official duties* should, of course, be permitted. See *Part IV, III.F.4*.

Article 50. Salaries, allowances and expenses [Zutphen 41; ILC 17]

The unbracketed language in Article 50 concerning salaries, allowances and expenses, including the guarantee of no reduction in salaries or allowances during a term of office, should be included in the statute as a safeguard of the court's independence, but the details should be left to the rules or regulations.

Article 51. Working languages [Zutphen 42; ILC 18]

This unbracketed article, which provides that the working languages shall be French and English, as with the Rwanda and Yugoslavia Tribunals, and that other languages may be used at the request of any party should be retained.

Article 52. Rules of Procedure and Evidence [Zutphen 43; ILC 19]

Option 2 in Paragraph 1, which provides in brackets that the rules of evidence and procedure shall be adopted by the assembly of states parties after the entry into force of the statute, is preferable to Option 1, which provides that the rules, including an elaboration of the elements of the offences, are to be annexed to, and an integral part of the statute, and, therefore, adopted by the diplomatic conference. Nevertheless, it would have been preferable if the rules were to be drafted by the court, subject to approval by the states parties, to ensure that they were prepared by judicial experts and that they were speedily adopted. If Option 2 is chosen, and the rules are drafted by the preparatory commission, pursuant to the proposed resolution for adoption by the diplomatic conference, there should be a provision to ensure that if the preparatory commission does not complete its work before the entry into force of the statute that the court itself should complete this task. As a further safeguard to ensure speedy adoption of the rules and the prompt commencement of its operations, the assembly should adopt the rules by a majority, thus avoiding the possibility of one-third of the states delaying adoption of the rules. Any state party, the judges and the prosecutor should be able to propose changes in the rules, which should be adopted by a majority of the states parties. The brackets in Paragraph 2 should, therefore, be deleted. A provision for speedy provisional adoption of amendments to the rules in urgent cases along the lines proposed in Paragraph 3 should be included. The court should always be consulted in the drafting of any amendments to the rules, along the lines of the requirement in Paragraph 2 of Article 53 of consultation with the prosecutor and registrar in the amendment of the regulations. In both cases, the proposed rule changes should be made public so that non-governmental organizations and other independent experts can provide useful expert advice.

Article 53. Regulations of the Court [Zutphen 43 bis]

The unbracketed provisions for adoption by the judges of the regulations necessary for the routine functioning of the court should be included in the statute. The regulations and any amendments should not only be circulated to the states parties for comment, but should also be made public so that non-governmental organizations and other independent experts may provide useful expert advice.

PART 5. INVESTIGATION AND PROSECUTION

Article 54. Investigation of alleged crimes [Zutphen 47; ILC 26]

The unbracketed language in Paragraph 1 of this article stating that the prosecutor shall initiate an investigation when he or she receives information from one of the trigger mechanisms “unless the Prosecutor concludes that there is no reasonable basis for a prosecution under this Statute” preserves the prosecutor’s independence and should be kept. Paragraph 2 (a), requiring notice to suspects before the prosecutor can initiate an investigation, would lead to the destruction or concealment of evidence, intimidation or murder of witnesses and flight, as well as delays; the entire section should be deleted. Paragraph 3, providing for a minimum one month delay in starting an investigation, is similarly flawed and should be deleted. Paragraph 4 (a) (requesting presence of and questioning suspects, victims and witnesses), (b) (collecting documentary and other evidence) and (c) (Option 1) (conducting on-site evidence) give the prosecutor necessary powers, and should be kept. **See Part II, II.B.1.d.** No additional state consent by states parties should be required before the prosecutor can act in their territories and the prosecutor has to be able to act independently of national authorities in many cases to be effective, even

when these authorities are functioning properly, see *Part III, II.B.1*; therefore, the suggested wording in Footnote 1 and Option 2 to Paragraph 4 (c) should be deleted, unless it is made clear that the intent of this provision is to assist the prosecutor if a state with a criminal justice system which functions properly is not providing the prosecutor with assistance in the situations where such assistance is necessary. See *Part III, II.B.2-3*. Paragraph 4 (d), provides in general terms that the prosecutor shall take necessary measures to ensure confidentiality of information

Article 55. Information on national investigations or proceedings [Zutphen 48; ILC 26 bis]

To ensure that the court can be an effective complement to national criminal jurisdictions at all times and respond speedily when they are unable or unwilling to bring those responsible to justice for genocide, other crimes against humanity and war crimes, the statute should require states parties to keep the prosecutor fully informed of any crimes which have occurred over which they have jurisdiction and the steps they are taking to investigate and prosecute those responsible. Article 55 partially implements this essential component of the principle of complementarity, and, if states are serious about establishing an effective court, they will include this article in a strengthened form. The first of the three bracketed phrases at the beginning of Paragraph 1 should be strengthened to provide that states parties should promptly inform the prosecutor of any crimes within the court's jurisdiction in addition to any national investigations or prosecutions of such crimes. The rest of Article 55 should be retained unchanged and the brackets removed around the entire article.

Article 56. Deferral of an investigation by the Prosecutor [Zutphen 49; ILC 26 ter]

To ensure that the court can be an effective complement to national criminal jurisdictions at all times and respond speedily when they are unable or unwilling to bring those responsible to justice for genocide, other crimes against humanity and war crimes, the statute should require states parties to keep the prosecutor fully informed of the steps they are taking to investigate and prosecute those responsible in cases where the prosecutor has deferred an investigation. Article 56 satisfies these requirements and the brackets around this article should be removed.

Article 57. Functions of the Pre-Trial Chamber in relation with investigation [Zutphen 50; ILC 26 quater]

A pre-trial chamber could fulfil a number of useful functions, including ensuring that the rights of suspects and accused are fully respected in national courts before surrender or transfer to the court and after and in the taking of certain evidence. Any such pre-trial chamber must fully respect the independence of the prosecutor. Article 57, prepared by 15 delegations from all major legal systems, is a creative and positive proposal which largely implements these goals and principles. The exact scope of the pre-trial chamber's responsibilities is not as important as is its consistency with these principles. Almost any of the options in the heavily bracketed Paragraph 1 would be acceptable, but if the pre-trial chamber is to take evidence on its own initiative, it should do so only in close consultation with the prosecutor to ensure that its initiative does not disrupt the investigation in any way. The various powers of the pre-trial chamber listed in Paragraph 2 are consistent with the above principles,

but they should be exercised in consultation with the prosecutor. Paragraph 3 only addresses the effect on the admissibility of evidence seized in violation of an order or recommendation of the pre-trial chamber; it or another article should address the consequence of the failure to seize the evidence at all.

Further option for Articles 58 to 61 [Zutphen 51-54; ILC 27 to 30]

The current text of Articles 58 to 61 is unduly complex and many of the delegations which made proposals concerning these articles have withdrawn them and now, as members of a group of 22 states from different legal systems have submitted “a simplified version of these articles” as part of a “move away from national positions towards a single, straightforward procedural approach, acceptable to delegations representing different national legal systems”. Therefore, this paper discusses below only the new articles in this proposal; the old articles should be deleted.

Further option for Article 58. Commencement of prosecution [Zutphen 51; ILC 27]

Paragraph 1, authorizing the pre-trial chamber to issue a warrant for the arrest of a person on application by the prosecutor when there are reasonable grounds to believe that the person committed a crime within the court’s jurisdiction and the arrest is necessary to assure the person’s appearance at trial or avoid obstruction of justice, should be retained. The bracketed provision permitting preventive detention where it is believed that the person will continue to commit crimes within the jurisdiction of the court should be narrowly construed to cases where the person has been captured *in flagrante delicto* (in the course of committing the crime), to avoid abuse of this power. The information required in Paragraph 2 to be included in the prosecutor’s application is reasonable, although the rules will need to address the problem of aliases. Paragraph 3, which requires the pre-trial chamber to examine the application and supporting information and to determine whether there are reasonable grounds to believe that the person has committed that crime and that an arrest is necessary before issuing a warrant should also be kept. Paragraph 4, stating that the court may request the provisional arrest or arrest and surrender of the person under Part 9 (international cooperation and judicial assistance), should also be included, but the term “extradition” is, of course, inaccurate and should not be used in this part of the statute. The proposed Paragraph 5, permitting the prosecutor to request the pre-trial chamber to amend the arrest warrant by modifying or adding to the crimes listed, should also be included. Paragraph 6, permitting the prosecutor to seek, and the pre-trial chamber to issue, a summons to appear as an alternative to an arrest, possibly including restrictions on liberty other than detention when permitted by national law, should be included in the statute. Many of the persons who have been indicted by the Yugoslavia Tribunal have surrendered voluntarily and, in some cases, the pre-trial chamber may determine that restrictions on liberty, such as house arrest, daily reporting or surrender of travel documents may be sufficient to assure the person will appear for trial.

Further option for Article 59. Arrest proceedings in the custodial state [Zutphen 52; ILC 28]

Paragraph 1, requiring the state which received a request for provisional arrest or arrest and surrender to take steps immediately to arrest the suspect in accordance with its laws and the provisions of Part 9 (international cooperation and judicial assistance), should be included in the

statute, but the paragraph should apply both to suspects and to accused. There may be circumstances, as indicated in the footnote to Paragraph 1, when a state might be permitted to place a person under judicial supervision rather than in detention. Nevertheless, the statute should not only provide that the national court should take into account the views of the prosecutor regarding interim release, as provided in Paragraph 3, but should also permit the prosecutor to seek an immediate review in the pre-trial chamber of a national court decision to order an interim release before it becomes effective, and the pre-trial chamber should have the power to determine otherwise, to avoid an abuse of national legal provisions. Similarly, Paragraph 3 should provide that the person arrested should have the right to apply for interim release first in the national court and then in the pre-trial chamber. The brackets around Paragraph 4, which implements the fundamental right of habeas corpus and *amparo*, as recognized in Article 9 (5) of the ICCPR, by permitting the person arrested to apply to the pre-trial chamber for a determination of the lawfulness of the detention and release if it is unlawful, should be removed, but the pre-trial chamber should be required to act on such an application without delay. Paragraph 5, requiring the prompt delivery to the court of a person ordered to be surrendered by the custodial state, should be included, but there should also be a clarification that the custodial state must act without delay.

Further option for Article 60. Initial proceedings before the Court [Zutphen 53; ILC 29]

Paragraph 1, providing that upon the person's initial appearance before the court the pre-trial chamber "shall satisfy itself that the person has been informed of the crimes he or she is alleged to have committed, and of his or her rights under the Statute, including the right to apply for interim release pending trial", should be retained. Paragraph 2, providing for interim release of a person who has appeared for trial, should be retained, but it should be clarified that the burden to show that detention is justified should fall on the prosecutor, as required by Article 9 (3) of the ICCPR, rather than the burden fall on the person who has appeared to show that interim release is warranted. **See Part II, IV.B.2.i.** Paragraph 3, requiring the court to review the ruling on release or detention periodically and upon request of the prosecutor or the accused, should be kept, but to avoid the lengthy pre-trial detention which has occurred in the Yugoslavia and Rwanda Tribunals, the statute should provide, as indicated in the footnote, specific time limits for such periodic reviews. These periods should be as short as possible. However, Paragraph 3 should also apply to suspects who have been provisionally arrested. Paragraph 4, requiring the pre-trial chamber to "assure that a person is not detained for an unreasonable period prior to trial due to unexcusable delay by the Prosecutor", and to consider release if this is the case, should be included, but the statute or the rules should set a time limit for pre-trial detention. There was a proposal in Article 53 (6) (b) of the Zutphen text for time limits, but the period of one year, renewable for a further year, is too long. Paragraph 5, permitting the pre-trial chamber to issue a warrant of arrest to secure the presence of an accused who has been released should be included, but the pre-trial chamber should have the same power with respect to a suspect who has been released.

Further option for Article 61. Confirmation of the charges before trial [Zutphen 54; ILC 30]

Paragraph 1, concerning the hearing before the pre-trial chamber to confirm the charges, should be strengthened to require that this hearing be held promptly after the person's surrender or

voluntary appearance before the court, rather than simply within a reasonable time. The hearing should be in the presence of the accused, unless the person has fled after surrender or a voluntary appearance or the person is disrupting proceedings, and the rest of the paragraph should be amended accordingly. Paragraph 2, which provides that the accused must be provided with a copy of the charges and be informed of the evidence on which the prosecutor intends to rely at the hearing only a “reasonable time” before the hearing, should be amended to be consistent with international law. Article 9 (2) of the ICCPR requires that “[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him” and Article 14 (3) (a) of the ICCPR requires anyone charged with a criminal offence “[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. **See Part II, IV.B.2.a and IV.C.1.h.** The provisions in Paragraph 3 for amendment or withdrawal of charges before the hearing should be included, but the accused should be given notice without delay. Paragraph 4, imposing on the prosecutor the burden of presenting sufficient grounds for each charge, and Paragraph 5, according the accused the right to object to the charges, criticize the evidence and present evidence, should be retained. Paragraphs 6, concerning the pre-trial chamber’s options for decision at the close of the hearing, Paragraph 7, concerning amendment, addition and withdrawal of charges, and Paragraph 8, concerning the expiration of warrants which have not been confirmed, should be included in the statute.

PART 6. THE TRIAL

Article 62. Place of trial [Zutphen 55; ILC 32]

The unbracketed language in Paragraphs 1 and 2, concerning the place of trial (which, presumably includes pre-trial proceedings, where necessary), should be included in the statute. To ensure a speedy and flexible proceedings, the President, rather than the assembly of states parties, should decide when the court may conduct the trial or other proceedings away from the seat of the court. The other language in brackets is not necessary and should be deleted or put into the rules. Paragraphs 3 and 4, which are entirely in brackets, are unduly restrictive and any procedures for conducting trials or hearings in states other than the host state should be left to the discretion of the court, as provided in its rules.

Article 63. Trial in the presence of the accused [Zutphen 56; ILC 37]

There should be no trials in absentia. If such trials are permitted in the statute, however, they should be limited to cases when the accused has deliberately absented himself or herself after the trial has begun, or for as long as an accused is disrupting proceedings. See Part II, IV.C.2. Option 1, which prohibits trials in the absence of the accused in all cases, is the preferred option. If this option is not accepted, Option 2, reflects the fundamental principle that an accused has a right to be tried in his or her presence, except when he or she waives that right by escaping from lawful custody, breaking bail or disrupting proceedings, although as soon as the accused is willing to resume participation in the proceedings, he or she should be permitted to do so. The ILC draft article on the subject, Option 3 and Option 4 should all be rejected for the reasons explained in *Part II, IV.C.2.*

Article 64. Functions and powers of the trial chamber [Zutphen 57; ILC 38]

The trial chamber should have full powers to fulfil its functions and duties, including the duty to ensure that the rights of the accused are respected, with due regard for the protection of victims and witnesses. The unbracketed language in Paragraphs 1 and 2, concerning the duty of the trial chamber to ensure that the rights of the accused are respected, with due regard for the protection of victims and witnesses, should be included in the statute. See **Part II, IV.C.1.a.** If the accused fails to plead, then the trial chamber should enter a plea of not guilty on his behalf to reinforce the presumption of innocence. Paragraphs 3, 4, 5 and 6, which are unbracketed, should be retained. Paragraphs 5 (b *bis*) and 5 *bis* could be included in the statute.

Article 65. Proceedings on an admission of guilt [Zutphen 58; ILC 38 *bis*]

The trial chamber should ensure that admissions of guilt are consistent with the prohibition of compelled testimony and coerced confessions and be fully informed. The unbracketed text in Article 65 appears to implement this principle and should be included in the statute. See **Part II, IV.C.1.n.** The option in Paragraph 3 for remitting a case to another trial chamber after a decision to accept an admission of guilt will help preserve the presumption of innocence and should be included in the statute.

Article 66. Presumption of innocence [Zutphen 59; ILC 40]

The statute should guarantee that everyone is presumed innocent until proved guilty according to law beyond a reasonable doubt. Article 66 fully reflects this fundamental principle of law recognized under international law and standards. See **Part II, IV.C.1.g.**

Article 67. Rights of the accused [Zutphen 60; ILC 41]

The statute and the rules of the court should declare that all suspects and accused are entitled to a fair and prompt public trial before an independent and impartial court affording all the internationally recognized safeguards at all stages of the proceedings - from the moment the suspect is first interrogated with a view to prosecution or detained until exhaustion of all legal remedies - and incorporate these standards expressly or by reference. These safeguards should apply both when the suspect and accused are in the custody of national authorities and in the custody of the court. The unbracketed first part of Paragraph 1, which states that the accused is entitled “to a public hearing, having regard to article 68, and to a fair hearing by an independent and impartial tribunal”, should be incorporated in the statute. The unbracketed wording makes clear that protection measures for the accused, victims and witnesses pursuant to Article 68 are to be balanced against the right to a public hearing, which is a right of the general public as well as of the accused, but are not to be at the expense of the right of the accused to a fair trial. The bracketed phrase, “in addition to any rights afforded to a suspect under this Statute”, may not be necessary if other parts of the statute make clear that the rights of the suspect continue to apply after the suspect is accused. However, the essential guarantee of equality of all persons before the court found in the opening sentence of Article 14 (1) of the ICCPR has been omitted. It should be included here. See **Part I, IV.C.1.d.**

Article 67 should guarantee all the rights recognized in Article 14 of the ICCPR, supplemented by additional guarantees incorporating other international standards where necessary, using gender neutral language and making any drafting changes which are essential to refer to the court, but it should not weaken any of these guarantees in any way. Sub-Paragraph (a) should use the exact wording of Article 14 (3) (a) of the ICCPR: "To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him". The requirement of notice is fully satisfied by the requirement that the notice be provided in a language the accused understands; the substitution of the accused's "own language" could lead to endless debates about which of several languages spoken and understood by the accused was the accused's own language, possibly leading to the dismissal of the charges if the notice was given in the wrong language. It is also inconsistent with Sub-Paragraph (f). The meaning of the "content" of the charge is not entirely clear and may well be included in "the nature and cause of the charge". Sub-Paragraph (b) should be included. The requirements that communication with counsel be free and in confidence are useful clarifications of the scope of the right guaranteed by Article 14 (3) (b) of the ICCPR. Sub-Paragraph (c), guaranteeing the right to be tried without delay and to enjoy a speedy trial should be in the statute, although if the concept of delay is to be qualified, it should be by the option "undue", which has an accepted meaning, unless it is clear that the alternative proposed of "reasonable" is a shorter period than "undue".

The introductory phrase subjecting Sub-Paragraph (d) concerning defence rights to Article 63 (2) (trials *in absentia*) should be deleted. The rest of the sub-paragraph, which is not in brackets and repeats the guarantees in Article 14 (3) (d) of the ICCPR, with a clarification about the circumstances when legal assistance must be provided, should be incorporated in the statute. The unbracketed part of Sub-Paragraph (e) seriously undermines the fundamental guarantees concerning witnesses found in Article 14 (3) (e) to be able "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", by limiting these rights to **prosecution witnesses**, so that the accused would not have such rights with respect to **witnesses called by the court**. This serious restriction on the rights of the accused must be remedied by replacing the current text with the wording of Article 14 (3) (e) of the ICCPR. Sub-Paragraph (f), which is unbracketed, expands the express guarantees concerning interpretation found in Article 14 (3) (f) of the ICCPR to include translation and should be part of the statute. Sub-Paragraph (g), which also is unbracketed, strengthens the guarantees against compelled testimony against oneself and forced confessions found in Article 14 (3) (g) of the ICCPR, and should be retained.

Sub-Paragraph (h), permitting the accused to make an unsworn statement in his or her defence instead of an oath to speak the truth, addresses the concerns of those states which permit or require the accused to do this. This sub-paragraph, which preserves the right of the accused to testify on the same basis as witnesses in the case, a right which is considered a major advance for liberty in many states, is acceptable, but there is no requirement in Article 69 (1) for witnesses to take an oath. They simply have to undertake to tell the truth. Perhaps this sub-paragraph could be included in the rules. Sub-Paragraph (i), concerning state cooperation in collecting evidence pursuant to Part 9 could be moved to that part. Paragraph 2, requiring the disclosure of exculpatory evidence to the accused, should be included. It should include both evidence which shows or tends to show innocence and which mitigates or tends to mitigate guilt. Paragraph 3, restricting the scope of search warrants, is modelled on the constitutional provision

of one state. If included, it will need to take into account the problems posed by evidence seized by national authorities in the context of armed conflict in a manner which necessarily fails to satisfy these requirements and the dangers that evidence would be excluded simply because national authorities, which will carry out most of the compulsory searches required under the statute, did not comply with this provision. The concerns about due process of law in Paragraph 4 are addressed in other articles of the statute, including Article 67 (rights of the accused) and 64 (2) (requiring the trial chamber to ensure that the trial is fair and expeditious) and so may not be necessary. In any event, the court must not have the power to deprive anyone of their life.

Article 68 - Protection of the [accused], victims and witnesses [and their participation in the proceedings] [Zutphen 61; ILC 43]

The court should have a legal aid program or public defender's office with adequate resources to ensure that suspects and accused have an opportunity equal to that of the prosecutor to conduct a defence. The statute fails to provide for such a legal assistance unit, although Article 67 (d) provides for the assignment of legal assistance to the accused in any case where the interests of justice so require, and Article 54 (10) (c) guarantees this right to suspects. The statute should provide for such a unit in the Registry. If it is not included in the statute, it should be included in the rules.

The statute and rules of the court should ensure that victims, witnesses and their families are protected from reprisals and unnecessary anguish, consistently with due process. The statute and rules of the court should take into account the special circumstances of cases involving violence against women, as well as those involving children, without prejudice to the rights of suspects and accused to a fair trial. The first sentence of Paragraph 1, which is unbracketed, requiring the court to “take the necessary measures available to it to protect the accused, victims and witnesses”, should be retained. The second sentence, permitting the court to close the proceedings in *any* circumstances, is inconsistent with the requirement in Article 14 (1) of the ICCPR to conduct public hearings, except in carefully defined circumstances, **see Part II, IV.C.1.f**, and should be restricted accordingly. The court should have the discretion to close the proceedings in the circumstances identified in the final sentence, which is in brackets, when these requirements are met. The first sentence of Paragraph 2, concerning measures to protect victims and witnesses, should be in the statute, and the final sentence should be strengthened to state that these measures must not prejudice the right of the accused to a fair trial. The statute should provide, as stated in Paragraph 3, that the court should take appropriate measures to protect victims and witnesses, but these measures must never prejudice the rights of the accused, and the wording should be amended accordingly. This wording seems to be preferable to the alternative provision in brackets that these measures not be “inconsistent with” the rights of the accused, since some have suggested that this wording would permit a balancing of the rights of the accused and the interests of victims and witnesses which could lead to the adoption of measures which would prejudice the rights of the accused to a fair trial.

Paragraph 4 should provide that the court shall permit the views and concerns the views and concerns of the victim to be presented and considered at appropriate stages of the proceedings where their personal interests are affected in a manner which will not prejudice the right of the accused to a fair trial. Paragraph 5, concerning the victims and witnesses unit, should be included in the statute, either here or in Article 44 (4), but the unit's powers should

include the power to administer protection programs and cooperate with national protection programs, not just to advise the prosecutor and court on protection measures. Paragraph 6, concerning the withholding of evidence from states which could endanger witnesses or their families, could be placed elsewhere in the statute. Paragraph 7 should be included and should state that the rules should give effect not only to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, but to other relevant international standards concerning victims. Paragraph 8 should provide that victims have the right to be represented in the proceedings (not that the legal representatives have the right), but to be able to represent all their interests, including reparations, not just compensation. Paragraph 9, concerning the state applications for protection of state agents and sensitive information could be moved to Article 71 (sensitive national security information).

Article 69. Evidence [Zutphen 62; ILC 44]

If there is to be an article in the statute spelling out certain fundamental rules of evidence, then, as suggested in the footnote to this article, the statute should have a provision stating: “The Court may decide not to admit evidence where its probative value is substantially outweighed by its prejudice to a fair trial of an accused or to a fair evaluation of the testimony of a witness, including any prejudice caused by discriminatory beliefs or bias.” However, since the crimes of genocide, crimes against humanity and war crimes are committed in the context of political, racial, national, ethnic, religious and gender discrimination and hatred, the second consideration will have to be carefully implemented not to exclude evidence necessary to ensure a fair trial for the accused. The unbracketed text of Paragraph 1, concerning the undertaking to be given before testifying, is acceptable. The bracketed exception to this obligation is designed to accommodate concerns of certain states which consider that the accused has the right to testify without giving such an undertaking. Paragraph 2, permitting witnesses to testify by a variety of means, should be included in either the statute or the rules, but only with the proviso that these measures shall not prejudice the rights of the accused. Paragraph 3, providing that “[t]he Court has the authority to call all evidence that it considers necessary for the determination of the truth”, needs to be amended to make clear that evidence, even if relevant, must be excluded in the circumstances spelled out in Paragraph 6, and when it is protected by a privilege, such as the lawyer-client privilege, although these privileges and their scope should be left to the rules. Paragraphs 4 and 5, concerning the court’s power to make evidentiary rulings and to take judicial notice of facts of common knowledge, do not appear to pose any problems. Paragraph 6, which is almost entirely without brackets, should be included in its entirety:

“Evidence obtained by means of a violation of this Statute or internationally recognized human rights [or other relevant rules of international law], and which either casts substantial doubt on its reliability or the admission of which is antithetical to and would seriously damage the integrity of the proceedings, shall not be admissible.”

As the footnote to this paragraph indicates, evidence obtained in violation of the rules could be addressed either in the statute or in the rules. Paragraph 7, which places the burden of proof of a defence on the accused, is contrary to the fundamental principle that the prosecution has the burden to prove the accused guilty beyond a reasonable doubt, as expressly recognized in Article 66. Paragraph 7, which is in brackets, should be deleted.

To the extent that the purpose of Paragraph 8, which provides that the court may not rule on the application of national law when deciding on the relevance or admissibility of

evidence, is the narrow one of ensuring that the court does not become a court of appeal determining whether police complied with national law when obtaining evidence, it may be unnecessary, but it does not pose any problem. To the extent it may also be intended to ensure that national law restrictions cannot determine whether evidence submitted to the court is relevant or admissible, this goal would appear to be achieved by Article 20 on applicable law. However, the court will occasionally need to refer to national law in determining whether evidence is relevant or admissible, for example, in determining ownership of property in cases of pillaging or the chain of military or civilian command. The statute should make clear that Paragraph 8 does not restrict Article 20 in this respect, possibly by adding the bracketed phrase permitting the court to have regard to national law in determining the relevance or admissibility of evidence.

Article 70. Offences or acts against the integrity of the Court [Zutphen 63; ILC 44 bis]

The statute should define the scope of the court's inherent power as a court to punish acts which constitute contempt of court, such as perjury and disobeying a court order. The unbracketed provisions in Paragraph 1 giving the court jurisdiction over (a) false testimony, (b) presentation of false or forged evidence, (e) interference with a witness, (f) preventing an official from performing a duty and (g) retaliation against a court official should be included in the statute. The court should also have jurisdiction over disorderly conduct (c) and (d) disobeying a court order, as provided in Option 1. These offences should be tried, as provided in Paragraph 2, by a different chamber from the one concerned, and the penalties should be spelled out in the statute, as to be provided in Paragraph 3. The note to this article suggests that not all the provisions concerning trials in the statute should apply, but any trials for offences listed in Article 70 must conform to the highest international standards for fair trials.

[Article 71]. Sensitive national security information [Zutphen 64; ILC 44 ter]

The statute must address legitimate national security interests, which should be narrowly defined, in accordance with international law, including the ICCPR. The court must balance these national interests against the international obligation to investigate and prosecute the worst crimes imaginable and it, not states parties, must decide whether the state party must provide that information to the court and what are acceptable measures to safeguard legitimate national interests without prejudice to the right to fair trial. It should safeguard national interests in reaching that determination. Option 2 most closely adheres to these principles and, with certain modifications and clarifications, could be incorporated in the statute. Paragraph 1 should state that Option 2 applies to information which would *seriously* prejudice a state's national security interests. Paragraph 2, requiring the state to seek to resolve the question with the prosecutor or defence by cooperative means, should be in the statute. Paragraph 4, setting forth a number of possible procedures for reviewing the state's claim, modelled on the *Blaski* Appeals Chamber decision should be amended to permit the court to decide whether the proceedings should be *in camera* or *ex parte*, to prevent abuse. The circumstances in which an *ex parte* hearing would ever be permissible would have to be carefully defined in the statute or the rules.

Much of the information sought from states in cases of genocide, crimes against humanity and war crimes will involve military secrets, such as contingency plans, orders to

troops, rules of engagement, amounts and types of weapons, training programs. Paragraph 5 has the important merit of requiring that the decision whether the state is acting in good faith in asserting that disclosure of the information would prejudice national security is to be made by the court. The factors which the court will have to assess under Paragraph 5 in determining whether a state is acting in good faith would appear to permit the court to require the state to provide this sort of military information only where disclosure would not prejudice national security in some way. They would not appear to permit the court to order disclosure where it was essential to the determination of guilt or innocence of the accused and the disclosure - even *in camera* solely to the accused and defence counsel to permit an effective cross-examination - would cause only *minor* and *temporary* prejudice to national security, such as the need to modify certain contingency plans, as opposed to *serious* prejudice to national security, such as the disclosure of the codes for using nuclear weapons or the home addresses of intelligence agents. In contrast, Options 1 and 2 apply only to information whose disclosure would “*seriously* prejudice” national security (emphasis supplied). However, neither of these options would be acceptable. They both leave the ultimate decision on whether the information must be disclosed to the state asserting the claim of national security. Although the court could draw the refusal to provide the information to the attention of the assembly of states parties, it would be then up to the assembly, a political body, not the court, to decide whether the state should disclose the information.

Article 72. Quorum and judgement [Zutphen 65; ILC 45]

Whatever the size of the trial chamber, all judges who participate in the judgment should be present throughout the entire trial. Any other arrangement would be inconsistent with the right to a public and impartial trial guaranteed by Article 14 (1) of the ICCPR. Therefore, Paragraph 1 should provide that no judge may participate in the judgment who was not present throughout the trial. For the same reason, the unbracketed Paragraph 2 limiting the judgment to the evidence presented in court should be included in the statute. Unanimous judgments are the most consistent with the fundamental principle of proof beyond a reasonable doubt according to law. Therefore, neither option in Paragraph 2 providing for less than unanimous verdicts is desirable. Option 2 would not be relevant if the trial chambers are composed of three judges, as recommended in the discussion of Article 40. If less than unanimous verdicts are permitted and the statute permits a chamber to reach a judgment with an even number of judges, then Paragraph 4 would be acceptable. Paragraph 5, requiring the deliberations of the trial chamber to remain secret, is a useful guarantee of judicial independence. If less than unanimous verdicts are permitted, then the statute should allow dissenting opinions, as provided in one of the options in Paragraph 6. The practice of the four *ad hoc* international criminal tribunals have demonstrated the value of such opinions, which will assist the appeals chamber and will in many cases further the development of international law. Paragraph 6 should not only require full and reasoned judgments, but public ones, as required by Article 14 (1) of the ICCPR.

Article 73. Reparations to victims [Zutphen 66; ILC 45 bis]

“Where a complaint is accompanied by a request for damages and interest, the tribunal will have the competence to rule on this claim and to fix the amount of the compensation. The government of the offender will be responsible for implementing the decision.”

Draft convention for the establishment of an international judicial body suitable for the prevention and punishment of violations of the Geneva Convention, by Gustav Moynier, Geneva 1872

The statute should provide that the court may award reparations, including restitution, compensation and rehabilitation, to victims and their families. See Part II, III.C. The unbracketed language in Paragraph 1 providing that the court shall (a mandatory provision is the preferable option) establish principles concerning reparations and determine the scope of reparations (preferably on its own motion as well as on request) should be included in the statute. The right to reparations should extend to all those listed in the footnote and the reference to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power should be included in the statute, together with a reference to other relevant international standards. The unbracketed language in Paragraph 2 (a), providing that the court may make an order against a convicted person for reparations, should be included, and there should be safeguards, as suggested in the footnote, to prevent national courts issuing orders in conflict with the international criminal court’s orders, although this could be covered by Article 85 on state cooperation if this article were to apply to the entire statute, not just to Part 9. The language in brackets on the scope of a compensation award is a useful clarification. The language in brackets on the possibility of a reparations award being paid into the trust fund provided for in Article 72 should be included. Paragraph 2 (b), providing that the court may make an order or a recommend to a state that reparations be made should be included in the statute. As Gustav Moynier, one of the founders and long-time President of the International Committee of the Red Cross, explained more than a century ago when he made the first serious proposal for a permanent international criminal court, it was appropriate that the government of the person who violated the Geneva Convention of 1864 should shoulder the responsibility for payment of the award

“because the Convention could scarcely be violated but by the agents of authority. In addition, one could say that governments are the cause of all the evils of war, and they ought to face the consequences. It would not be fair for victims to be deprived of compensation by the personal insolvency of those responsible. And finally, it is no bad thing that governments have a direct and pecuniary interest in the Convention being faithfully observed by their nationals.” Gustav Moynier, “note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève”, *Bulletin international des Sociétés de secours aux militaires blessés*, Comité international, No. 11, avril 1872, p. 127.

Such an order or recommendation would, like similar orders by national courts in many jurisdictions with different legal systems, involve *civil*, not *criminal* state responsibility. The circumstances when the court may make such an order or recommendation are a useful clarification, but should not be limited to cases when the person was acting “in an official capacity”, but should apply to individuals acting with the consent or acquiescence of the state,

such as death squads. Paragraph 2 (c) providing for recommendations to states in other situations should be retained. Paragraphs 2 (b) and (c) should permit the court to make non-binding recommendations to non-states parties.

Paragraph 3, which is unbracketed, permitting the court to request protective measures pursuant to Article 90 (1) in order to give effect to its orders should be retained, and, with respect to the footnote, the statute should clarify that property and assets must include, as in traditional state-to-state cooperation, non-crime related property and assets. That part of Paragraph 4 which requires the court to take into account convicted persons and victims and other interested persons should be included in the statute. The unbracketed parts of Paragraph 5 concerning enforcement of court orders by victims or others should be included in the statute and enforcement should include judgments and Part 9 of the statute as well as Part 10. States parties should be required to take the necessary measures to assist such enforcement. The unbracketed language in Paragraph 6 providing that nothing in Article 73 should prejudice the rights of victims should be included, but without the restrictive phrase in brackets, which could lead to problems in interpretation and unduly limit the scope of recovery. Paragraph 7, providing for appeals of judgments under Article 73 should be retained without brackets, but interested states should be defined as those against whom an order or recommendation of reparations was made. Paragraph 8 appears to be unnecessary since the court has general powers to make rules and they must be consistent with the statute.

Article 74. Sentencing [Zutphen 67; ILC 46]

Article 74, which is virtually unbracketed, spelling out the procedure for sentencing, including a role for victims in the determination of reparations, should be included in the statute. *See Part II, III.A.1.*

PART 7. PENALTIES

The scope of all penalties in the statute should be consistent with the principle of nulla poena sine lege.

Article 75. Applicable penalties [Zutphen 68; ILC A]

The statute must exclude the death penalty and clearly state the penalties. See Part II, IVD. Paragraph (a) provides a number of possible terms of imprisonment, but the various options do not offer the court any guidance in selecting the appropriate penalties for a particular offence, except that there are options governing the appropriate penalties for minors. If such guidance - apart from the identification of aggravating and mitigating factors in Article 77 - is not provided in the statute, it should be spelled out in the rules. Given the gravity of the crimes of genocide, other crimes against humanity and war crimes, fines alone would not be appropriate penalties, so they should be permitted only if in addition to a sentence of imprisonment, as provided in Paragraph (b). Whether it is appropriate for the court to be determining whether a person convicted should be disqualified from public office at the national level, as provided in Paragraph (c) (i) is an open question. The court should be able to order the forfeiture of the *instrumentalities of crime and proceeds, property and assets obtained by criminal conduct*, without prejudice to bona fide third parties, as provided in Paragraph (c) (ii), should be included in the statute. The court will also need the same powers with respect to *other types of property*

not associated with the crime to enforce a judgment of reparations, as currently provided in Article 90 (1) (l). As indicated above in the discussion of Article 73 and below in the discussion of Article 79, all fines imposed and property forfeited should go to the benefit of victims or their families. Of course, as stated above in the discussion of Article 73, the court should be able to award reparations in the form of restitution, compensation and rehabilitation, whether this is characterized as a civil remedy, a penalty (as in Sub-Paragraph (d)) or both. It goes without saying that Option 1 of Paragraph (e) has no place in the statute of an international criminal court, and, therefore, Option 2 should be adopted.

[Article 76. Penalties applicable to legal persons [Zutphen 69; 47 bis]

In keeping with the principle of individual criminal responsibility, there should be no *criminal* penalties applicable to legal persons, although *civil* remedies, including reparations to victims and their families, dissolution and prohibition of conducting further activities, would be appropriate. Article 69 should be amended accordingly.

Article 77. Determination of the sentence [Zutphen 70; ILC B, C, E]

Paragraph 1, which is unbracketed, providing that the court should, in accordance with the rules, “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person” when imposing sentence, should be included in the statute. Although the footnote correctly states that “[i]t may be impossible to foresee all of the relevant aggravating and mitigating circumstances at this stage”, the rules should spell these out as much as possible to provide greater certainty and consistency in sentencing. The factors listed in the footnote should be included, but one factor which should be considered as an aggravating factor - a high-level leadership position - has been omitted and should be included in the rules. The provision in Paragraph 2 for deduction of time previously spent in detention by order of the court should be included. It may be questioned whether it would be appropriate for a person found guilty of committing a massacre of a thousand people should receive a single sentence, as provided in Option 1 of Paragraph 3, or whether the person should not receive separate sentences for each murder.

Article 78. Applicable national legal standards [Zutphen 71; ILC D]

To be consistent with the principle of equality before the court of all accused guaranteed by Article 14 (1) of the ICCPR, sentencing by an international criminal court should be on the basis of a common international standard applicable on a basis of full equality to all persons convicted by the court. Therefore, Article 78, which would permit each person convicted of genocide *in the same case* to receive *different sentences for exactly the same acts* from the others based on such irrelevant factors as the convicted person’s nationality, the territories where the crimes were committed and the state which had custody of the person at the time of arrest, should be deleted.

Article 79. Fines [and assets] collected by the Court [Zutphen 72; ILC 47 ter]

Any money or other property confiscated from convicted persons should go to victims or their families directly as reparations or, when they cannot be identified, to a general fund for the benefit of all victims. If Article 79 is not amended to provide that fines or other

property collected by the court should go directly to victims in the particular case and their families, then at least it should provide that fines and assets collected by the court shall be transferred in all cases to a trust fund for all victims and their families established by the UN Secretary-General or administered by the court, as provided in Paragraph (a). The other possible recipients listed in this article - the state of the victim's nationality and the registrar - are inappropriate, and these options should be deleted. **See Part IV, II.D.3.**

PART 8. APPEAL AND REVIEW

Article 80. Appeal against judgement or sentence [Zutphen 73; ILC 48]

Paragraph 1 (a), permitting the prosecutor to appeal against a decision, which could include an acquittal, should be amended to exclude any appeal of an acquittal. The current text would permit the prosecutor to continue to appeal successive acquittals until a conviction was obtained. However, the prosecutor should be able to draw the attention of the appeals chamber to any errors of law in a judgment of acquittal, with the proviso that any decision by the appeals chamber that the trial chamber committed an error of law should have no effect on the acquittal, but be limited to future cases. **See Part II, IV.E.** The remainder of the provisions in Paragraph 1 could be retained. Since there should be no trials *in absentia*, **see Part II, IV.C.2**, Paragraph 3, which is entirely in brackets, should be deleted. Even if trials *in absentia* were permitted, the appropriate relief if the convicted person surrenders or is captured is to vacate the judgment and to conduct a trial *de novo*. Since the prosecutor should not be permitted to appeal an acquittal, **see Part II, IV.E**, Paragraph 4 (2), permitting the acquitted person "in exceptional circumstances" to be detained pending the prosecutor's appeal, should be deleted. If a convicted person is detained pending an appeal, even if the judgment is suspended during this period, it would appear consistent with general principles of law to deduct that time spent in detention from the sentence of imprisonment. See Article 77.

Article 81. Appeal against interlocutory decisions [Zutphen 73 bis]

The statute should provide for interlocutory appeals of certain decisions. See Part II, IV.E. Article 81 strikes an proper balance in identifying orders which may be the subject of interlocutory appeals and gives the trial chamber appropriate flexibility in identifying other orders which should be the subject of an interlocutory appeal. Both the unbracketed and bracketed provisions should be included in the statute.

Article 82. Proceedings on appeal [Zutphen 74; ILC 49]

The powers of the appeals chamber on appeal, even if generally co-extensive with those of the trial chamber, as provided in Paragraph 1, should be restricted in certain respects. As stated above in the discussion of Article 80, the prosecutor should not be permitted to appeal an acquittal, except on points of law only, with no effect on the acquittal in that particular case, but only on future cases. **See Part II, IV.E.** If, however, the prosecutor is permitted to do so, then Paragraph 2 should be amended to provide that if the court decides to vacate the acquittal, it may only remand the case to a different trial chamber for a new trial. Paragraph 2, as it stands, would permit the appeals chamber to reverse an acquittal, after a new factual determination, and convert it to a conviction, without the opportunity for further review. Such action would deprive the newly convicted person of the right recognized in Article 14 (5) to have "his conviction and

sentence being reviewed by a higher tribunal according to law". Moreover, this power to change the verdict to the detriment of the accused when the prosecutor alone appeals is in contrast to the prohibition in the same article of amending a decision to the detriment of the accused when only the accused appeals. To the extent that the bracketed final sentence in this paragraph permits the court, in the interests of justice, to consider grounds for excusing criminal responsibility which exist, but were not raised in the trial chamber, then it could be included. The International Military Tribunals at Nuremberg and Tokyo, as well as the Yugoslavia and Rwanda Tribunals, permitted separate and dissenting opinions, and some of these have proved valuable in helping to point the way towards future evolution of international criminal jurisprudence. Therefore, the brackets in Paragraph 4 around the sentence permitting such opinions in the appeals chamber should be removed.

Article 83. Revision of conviction or sentence [Zutphen 75; ILC 50]

The one-step Option 2 for revision, which permits a request for revision to be presented for determination by either the trial chamber which tried the case or another trial chamber, is less cumbersome, more speedy and less costly than the two-step Option 1, and, therefore, seems more consistent with the requirement that the court be an effective complement to national courts. The grounds for revision listed in Paragraph 1 (a) - (e), which is common to both options, are acceptable. Paragraph 2, which also is common to both options and permits the prosecutor to seek revision on the basis of newly discovered evidence, is inconsistent with the principle of *ne bis in idem*, which is expressly recognized in Article 18 as applicable to the court, and should, therefore, be deleted. Paragraph 3 of Option 2 permits the trial chamber to enter a corrected judgment, order a new trial or refer the matter to the appeals chamber and Paragraph 4, now in brackets, permits the decision of the trial chamber disposing of the application pursuant to Paragraph 3 to be appealed by either party to the appeals chamber. Paragraph 4 provides a necessary check on an inappropriate denial by the trial chamber of an application for revision.

[Article 84]. Compensation to a suspect/accused/convicted person [Zutphen 76; ILC 50 bis]

The statute should provide, as recognized by Article 9 (5) of the ICCPR, that anyone who has been the victim of an unlawful arrest or detention has an enforceable right to compensation, and that anyone who has been a miscarriage of justice in the circumstances recognized in Article 14 (6) of that treaty shall be compensated. Paragraphs 1 and 2 implement these rights and should be included in the statute. See **Part II, IV. B.2.h and IV.F.**

PART 9. INTERNATIONAL COOPERATION AND ASSISTANCE

Part 9 is far too long and complicated and a number of its provisions are duplicative of others in this part. As suggested in the footnote to Article 86, "Articles 86, 88, 89 and 90 contain virtually identical provisions, some of which should be harmonized." Some of the detailed provisions should go into the rules.

Article 85. General obligation to cooperate [Zutphen 77; ILC 51]

The requirement in this article that all states shall fully cooperate with the court in its investigations and prosecutions should be included, although this obligation should not be limited to Part 9, but should include the entire statute, including such provisions as Article 73, concerning awards of reparations. In addition, the second sentence, should provide that states parties cooperate without delay. The proposed qualification, “undue”, would weaken this obligation and should be rejected.

Article 86. [Requests for cooperation: general provisions] [Zutphen 78; ILC 52]

Paragraph 1 (a), providing that the court has the authority to make requests to states parties for cooperation and to transmit these requests through the channels designated by the states parties, which is unbracketed, is acceptable, although it would have given the court greater flexibility and speed if it had been expressly authorized to deal directly with any appropriate state official on its own initiative. Paragraph 1 (b), permitting the court to transmit requests through Interpol or any appropriate regional organization is also acceptable. In the interests of speed and minimizing court costs, Paragraph 2 should permit the court to transmit requests to states in one of the working languages of the court, at least when time is pressing and the cost of a translation into the language of the requested state would be excessively high in the circumstances. For example, it would often be necessary to send urgent requests for the arrest of a fugitive accused to more than 185 states and it would be extremely costly if those requests had to be translated into the languages of all of those states. Paragraph 3, requiring the requested state to keep requests and supporting documents confidential, is essential in order to be able to arrest fugitives from justice and to protect witnesses and evidence. The statute should include a provision like that in Paragraph 4 authorizing the court to call upon non-states parties to cooperate on any appropriate basis, since *all* states are under a duty to bring to justice those responsible for genocide, crimes against humanity and war crimes. When a non-state party fails to cooperate with a request under Paragraph 4 (a), it is certainly fitting that the statute should authorize the court to draw this fact to the attention of either the assembly of states parties, the General Assembly or the Security Council, as it deems proper, so that those bodies can take appropriate action to enable the court to exercise its jurisdiction. Paragraph 5, which is unbracketed and authorizes the court to request intergovernmental organizations to cooperate, should be included in the statute. For the same reasons that the court should be able to draw the attention of the assembly of states parties, the General Assembly or the Security Council the failure of a non-state party to honour a court request for cooperation, Paragraph 6 should authorize the court to do the same for states parties, which have undertaken to cooperate with the court.

Article 87. [Surrender] [Transfer] [Extradition] of persons to the Court [Zutphen 79; ILC 53]

The term “extradition” should be deleted wherever it appears in this part, unless it expressly refers to traditional extradition between two states. Instead, a term which covers the sending of a person to the court from a state, such as transfer or surrender, should be used. *See Part III, IV.B.1.* Paragraph 1, which sets out the power of the court to transmit a request for the arrest and surrender or transfer of a person “to any State on the territory of which that person may be found” and to “request the cooperation of that state” in the arrest and surrender or transfer of that person and sets out the obligation of states parties to “comply” with such requests, should be included. State parties should comply without delay; this obligation should not be weakened by the proposed qualification in brackets requiring only compliance without

“undue” delay. Paragraph 2, however, which states that the national law of the state party should govern the procedure for granting or denying a request for surrender or transfer should be deleted or amended to provide that the national law and procedures shall be used to arrest the person and to effect the surrender or transfer only to the extent that the law and procedures are not inconsistent with the statute and that arrest and surrender or transfer is effected without delay. Otherwise, national law could be used to obstruct international justice. Indeed, Option 1 of Paragraph 3, which provides that there should be no grounds for refusal to comply with court requests to arrest or surrender or transfer a person to the court, is the only option which is consistent with the statute.

None of the grounds listed in Option 2 for states parties to refuse a request for surrender or transfer are legitimate. **See Part III, IV.B.2.** There should be no *à la carte* state consent regime in the statute; all core crimes should be crimes of inherent (automatic) jurisdiction. Therefore, Paragraph 3 (a) should be deleted. Since the core crimes are crimes of universal jurisdiction permitting *any state* to try *any person* suspected of these crimes, *regardless of nationality*, Paragraph 3 (b) authorizing a state to refuse to surrender or transfer one of its nationals suspected of these crimes must be deleted. Since Articles 18 and 19 authorize the court to try persons who have been tried in national courts when such proceedings are designed to shield the person, Paragraph 3 (c) permitting a state to refuse to surrender or transfer a person on the ground that national proceedings have taken place should be deleted. The court’s review of the application for an arrest warrant and its findings that there are sufficient grounds to issue such a warrant will necessarily satisfy the evidentiary requirements for almost all states anyway, so Paragraph 3 (d) permitting a state to refuse a request when the information submitted does not satisfy its own evidentiary requirements is not necessary, and it should be deleted. Since the court, whose very rationale is to bring to justice in fair trials those who are responsible for violating peremptory norms, and since it could have no power under international law to violate peremptory norms, there is no reason to permit states to refuse to comply with a court order on the ground that compliance with a court order would breach one of these norms, as suggested in Paragraph 3 (e).

Even if any of these grounds were legitimate, the court itself would have to determine whether those circumstances existed, not the state party. The additional ground suggested in the footnote to this option, that the penalty for the offence would be prohibited by the law of the requested state, would have been relevant had the statute included the death penalty, but it is inconceivable that an international criminal court established within the framework of the UN would include that penalty. Similarly, a compromise proposal identified in the footnote to Article 75 on applicable penalties would address the concerns of certain states which prohibit life imprisonment or lengthy prison terms by including in Article 100, concerning pardon, parole and commutation of sentences, “a mandatory mechanism by which the prisoner’s sentence would be re-examined by the Court after a certain period of time in order to determine whether he or she should be released”. Since states parties should not be free unilaterally to deny requests for surrender or transfer, Paragraph 4, which is in brackets, requiring them to inform the court promptly of their reasons for doing so, should be deleted.

Paragraph 5, permitting states parties to delay compliance with a court request to surrender or transfer pending a court decision on an application to set aside the request, should be deleted or amended to require that the state party comply with the request pending a court determination. This would ensure that the person concerned was promptly arrested and

surrendered or transferred to the court's custody, thus protecting witnesses from intimidation or injury and evidence from destruction and preventing flight. The provision that the state delaying compliance would have to "take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application" would not provide sufficient protection, and, since the number of cases in which the court will have erroneously determined that it had jurisdiction and that a case was admissible are likely to be few, it would be better to ensure the prompt surrender or transfer of the person sought to avoid possibly lengthy delays in the international investigation pending a decision on the challenge.

Neither of the three options in Paragraph 6 concerning competing requests to a state party to surrender or transfer a person sought both by the court and a state seeking that person's extradition for a core crime is entirely satisfactory. A state party should always give priority to a request by the court for surrender or transfer over a request for extradition by another state, whether a state party or a non-state party. As explained in **Part I, II.B**, a transfer of a person to the court "would satisfy the requested state's obligation under [try or extradite] treaties to bring the suspect to justice - the very object and purpose of the *aut dedere aut judicare* requirement in the Geneva Conventions, Additional Protocol I and the Convention against Torture". The best solution for Paragraph 6 would be to combine the best elements of Option 3 and Option 2. Option 3 requires that a state party shall accord priority to requests by the court over a request by *any* state - whether a state party or not - when the court has determined that the requesting state is unable or unwilling to bring the person sought to justice. This option should make clear that the burden is on the requesting state to establish that it is able and willing to bring the person sought to justice and there should be a provision requiring that the requesting state promptly carry out a genuine criminal investigation and, if the evidence warrants, a prosecution. If the requesting state does not promptly do so, then it should surrender or transfer the person to the court for investigation or prosecution. Failure to do so will undermine any future attempts by the requesting state to extradite persons who are the subject of a court request.

Option 2, which provides that a state party must comply with a request by the court in preference to an extradition request from a *state party*, is not acceptable without amendment because it permits a state party to decline to comply with a request by the court when the requesting state is a *non-state party*. However, one positive element in this option is that it simply requires the court in making the request to take "into consideration the proceedings in that State which gave rise to its extradition request", rather than make a formal determination that the requesting state was unable or unwilling to bring the person to justice. Paragraph (a) of Option 1 contains unacceptable options. One would simply require that the requested state party give priority "as far as possible" to a request from the court over requests for extradition from other states parties; another would extend this indefinite obligation to include non-states parties. Paragraph (b) provides that the requested state party has the discretion, based upon a number of factors, to decide to extradite the person sought by the court to a non-state party.

Paragraph 7, which is entirely in brackets, introduces an additional series of unacceptable hurdles to the effective complementarity of the court by permitting a person to challenge requests for surrender or transfer based on traditional grounds for challenging state-to-state extradition: lack of jurisdiction by the court, *non bis in idem* or insufficient evidence to arrest someone under the requested state's own national law. This would permit *national* courts - some of which would be unable or unwilling to bring the persons sought to justice in their

own courts - to second guess determinations by the court that it had jurisdiction, that surrender or transfer would be consistent with the principle of *ne bis in idem* as set forth in Articles 18 and 19 and that there was sufficient evidence to issue a warrant pursuant to Article 58 (further option). Paragraph 7 should be deleted in its entirety. Determining whether the court has jurisdiction is a matter solely for the court itself under Article 14, the principle of *ne bis in idem* is incorporated in Articles 18 and 19, which the court is under a duty to resolve itself under Article 15 and the court makes its own determinations whether there is sufficient evidence to issue arrest warrants under Article 58 (further option). Paragraph 8, permitting any requested state to postpone surrender or transfer of a person to the *international* court solely because it is conducting *national* proceedings against a person for a different offence or because the person is serving a sentence (which could be house arrest or even provisional release) is a recipe for endless delay or paralysis by an uncooperative state. Given the nature of the core crimes of genocide, other crimes against humanity and war crimes, the request by the *international* court, if it has determined that the requirements of complementarity set forth in Article 15 are satisfied, must take precedence over the *national* proceedings. The state interest in ensuring that the person is brought to justice for crimes under national law will be served by the return of that person to the national authorities after an acquittal or completion of the sentence.

All states have an obligation under international law to bring to justice those responsible for genocide, other crimes against humanity and war crimes in their own courts, to extradite them to a state able and willing to do so in a fair trial which is not designed to shield them from criminal responsibility or, if a state party to the statute, to surrender or transfer them in any case where the court requests them to do so. **See Part I, II.B.** Paragraph 9, which is entirely in brackets, however, leaves the choice solely to the states parties, not the court. Since all states parties should consent to the court's inherent (automatic) jurisdiction over these core crimes by the act of ratifying or acceding to the statute, without any further consent, Paragraph 9 should be revised in accordance with the above principle or reserved solely for non-core crimes.

Paragraph 10 provides for transmission to the court of evidence requested in a case and return of that evidence to the state after the trial. It should be included in the statute, but the proposed restriction in brackets limiting the transfer of evidence to the court "[t]o the extent permitted under the law of the requested State" would undermine the effectiveness of the court as a complement to national jurisdictions by permitting *national* legislation to bar the transmission of evidence to an *international* court and it should be deleted. The bracketed proposals requiring the state to supply the evidence even if the person is not surrendered or transferred and protecting the rights of third parties in the property should be included. As the note at the end of this paragraph indicates, it might be more appropriate to move this provision to Article 90 concerning other forms of cooperation or to the rules.

Paragraph 11, requiring states parties to authorize transportation through their territory and to detain anyone making an unscheduled landing on the territory pending receipt of a request for further transit, should be included in the statute. However, the paragraph should clarify that the phrase "under its national procedural law" must not be inconsistent with the statute and that the transit should be as prompt as possible to avoid possible prolonged bureaucratic delays. Since the duty to bring to justice those responsible for genocide, other crimes against humanity and war crimes is an international duty applicable to all states, and since states parties agree to cooperate with the court in doing so, it is appropriate that all states parties bear some of the costs

of surrender and transfer. The suggested allocation in the final brackets of Paragraph 12 of costs, based on where the cost incurred arose, appears to be a fair allocation of responsibility which could be spelled out further in the rules. In some exceptional cases, however, where a national criminal justice system has collapsed or the state party simply does not have sufficient resources to pay for all of the costs associated with conducting a thorough search in its territory or related to providing security and free legal assistance once the person sought has been detained, there should be some provision in the rules for the court itself to assume a greater share of the costs.

Article 88. Contents of request for [surrender] [transfer] [extradition] [Zutphen 80; ILC 53 bis]

This article is excessively detailed and, as indicated in a footnote, portions could go into the rules. Moreover, as the note at the end of the article states, since some of the provisions are similar to the text in Articles 89 (3) concerning provisional arrest and Article 90 (8) (b) concerning other forms of cooperation, these provisions could be combined in a single article. In terms of the requirements of Paragraph 1 listing the requirements of the contents of a request for surrender or transfer in the case of a pre-indictment arrest and in the case of a post-indictment request, however, they do not seem to be unduly onerous for the court, with two exceptions. Paragraph 1 (b) (v) and 1 (c) (ii), both of which are in brackets, would require that the court supply “such documents, statements, or other types of information regarding the commission of the offence and the person’s role therein which may be required by the laws of the requested state”, thus permitting a *national* court from a state which participated in the drafting of the statute, which sets out the requirements for issuing an arrest warrant in Article 58 (further option), to determine what evidence is sufficient for an *international* arrest warrant. This is unacceptable. States have an opportunity at the diplomatic conference to agree on a greater evidentiary showing for the issuance of an arrest warrant than specified in Article 58; the court should not have to meet up to 185 different evidentiary standards, any of which could change. There are no similar requirements proposed for Article 89, concerning provisional arrest. These provisions, as well as the related Paragraphs 2 and 3 should be deleted in their entirety. Paragraph 4, permitting the court in accordance with Article 68, concerning protection of the accused, victims and witnesses, to withhold certain information, from the requested state concerning victims or witnesses and their families when necessary to protect their safety, is an essential provision and the brackets around it should be removed.

Article 89. Provisional arrest [Zutphen 81; ILC 54]

The court should have the power in urgent cases, as specified in Paragraph 1, to request the provisional arrest of a person pending presentation of the request for surrender or transfer and supporting documents pursuant to Article 88. The information required to be provided in the request under Paragraph 2 seems to be reasonable. As the note to Paragraph 3 indicates, it duplicates the text of Paragraph 4 of Article 88, and these paragraphs could be combined into a single article. Paragraph 4, requiring the release of a person provisionally arrested after a specified period if the request for surrender or transfer has not been received, unless the person consents to surrender or transfer before the end of this period, should be included in the statute, but the period should be as short as possible so that provisional arrest is not abused. Paragraph 5, which permits the subsequent rearrest and surrender or transfer of a released person if the request is received after release, should be included in the statute.

Article 90 - Other forms of cooperation [and judicial and legal [mutual] assistance] [Zutphen 82; ILC 55]

The unbracketed text of Paragraph 1, providing that “States Parties shall, in accordance with the provisions of this Part, comply with requests for assistance by the Court”, should be included unchanged. **See Part III, II.B.** The bracketed provision, which would restrict such compliance to requests which are in accordance with “their *national* [procedural] law”, would undermine this fundamental obligation. States should, of course, be free to use their national procedures in complying with a request by the *international* court, but only to the extent that these procedures are consistent with the statute and do not result in delay. The entire unbracketed list of specific types of cooperation should be retained, including (a) identification and location of persons or items; (b) taking of evidence; (c) questioning suspects or accused; (d) service of documents; (e) facilitating appearance; (f) execution of searches and seizures; (g) provision of records and documents; (h) protection of persons and evidence; (i) identification, tracing, freezing and seizure of property; and (j) any other types of assistance. Similarly, it is essential to require states parties to assist the court (k) in conducting on-site investigations and inspections and (l) in conducting court proceedings on its territory, and the brackets should be removed around these two sub-paragraphs. The proposed restriction in Sub-Paragraph (j) to assistance “not prohibited by the law of the requested State” should be deleted as this would give the requested state a veto on court investigations or prosecutions.

Option 1 in Paragraph 2, which expressly provides that “[a] State Party shall not deny a request for assistance from the Court”, should be included in the statute. Option 2 in this paragraph, which permits a state party to deny a request for international assistance in whole or in part on the basis of a long list of grounds permitted in traditional state-to-state mutual assistance requests should be deleted in its entirety. **See Part III, II.A.2.** Since the court should have inherent (automatic) jurisdiction over all core crimes the moment a state ratifies or accedes to the statute, without any further requirement of state consent, Sub-paragraph (a) is unacceptable if it refers to core crimes. Sub-paragraph (b) would permit a state party to deny a request for *international* assistance based on its own *national* law, and, therefore, is also unacceptable. Sub-paragraph (c), which permits a state party to refuse to provide *international* assistance to the court whenever it decided that “execution of the request would seriously prejudice its *national* security, *ordre public* or other essential interests” (emphasis added), and also must be rejected. **See Part III, II.A.2.c.** Sub-Paragraph (d), which is inconsistent with each of the three options proposed in Article 71 for the provision of sensitive national security information, would permit a state in its own discretion to refuse to comply with a request by the court whenever “the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence]”. Therefore, it should be deleted. Sub-paragraph (e), which would permit a state party to deny a request which “would interfere with an ongoing investigation or prosecution in the requested State or in another State”, is inconsistent with the principle of complementarity as defined in Article 15, and must be rejected. For the same reasons that a request by the court for an arrest and surrender or transfer must have priority over competing obligations under an extradition treaty, requests by the court for international assistance must have priority over competing obligations under mutual assistance treaties; therefore, Sub-paragraph (f) providing the opposite should be deleted. Paragraphs 3, 4 and 5, which govern the procedure for denials of requests for assistance, should also be rejected for the reasons stated above.

Paragraph 6 (a), which requires the court to ensure the confidentiality of information provided pursuant to a request, except as required for the investigation and proceedings described in the request, is too restrictive as such information may prove essential for other investigations or proceedings. It should be amended to take this need into account. Sub-paragraphs (b) and (c), permitting states to supply information to the prosecutor on a confidential basis to be used solely for the purpose of generating new evidence, unless the state subsequently agrees that they may be disclosed, must not be used by states to insulate persons from prosecution by precluding the prosecutor from using the information as evidence or to perpetuate an injustice by preventing the prosecutor from disclosing exculpatory or mitigating evidence or potentially exculpatory or mitigating evidence to the accused. Given the difficult problems these sub-paragraphs pose, it might be better to include them, as suggested in the footnote, in the rules, which would make it easier to adjust them in the light of experience.

Paragraph 7, governing assistance by the court to states, should make it clear in sub-paragraph (a) that such assistance by the court to states must be entirely discretionary. International assistance to the court is not the same as mutual assistance between two states. **See Part I, II.A.1.** When the court has determined, pursuant to Article 14 that it should exercise its inherent (automatic) concurrent jurisdiction and under Article 15 that a case is admissible, then its request on behalf of the entire international community for international assistance must take priority over national interests. Paragraph 8, governing the form and content of requests for international assistance does not appear to pose many problems, although these detailed requirements could go into the rules. In exceptional cases, for example, when an investigator is in the field and sees information or evidence which is about to be destroyed, but the investigator does not have a pen or paper or access to a fax machine, an oral or phone request to preserve the evidence should be respected by the state official, pending a formal request. Sub-paragraph (a) (ii) should be amended to take into account such urgent cases. Sub-paragraph (b), which is similar to Articles 89 (3) and 88 (4), could be combined with those articles into a single article.

Article 91. Execution of requests under article 90 [Zutphen 83; ILC 56]

Paragraph 1 is unacceptable. It requires that “[r]equests for assistance shall be executed in accordance with the law of the requested State”, without any requirement that the law of the requested state be consistent with the state party’s obligations under the statute and that the request be implemented without delay. It would permit any state to deny requests for assistance based solely on its own national substantive and procedural requirements in extradition cases. Paragraph 2, which provides that states respond urgently to urgent court requests, is acceptable. Paragraph 3, concerning the language of responses, should provide that at least some of the response be in one of the working languages of the court to facilitate prompt and efficient processing.

Paragraph 4 is a crucial paragraph. It should provide that the prosecutor may carry out investigations on the territory of any state party after giving notice; the prosecutor should not be hostage to state consent to conduct investigations on the territory of states parties. **See Part III, II.B.1.** The current wording of Paragraph 4, which is in brackets, is unacceptable, as it requires the prosecutor to obtain the consent of the requested state in *all* cases. The proposal that the prosecutor or the court may only assist the authorities of the requested state in the execution of a request for assistance if requested to do so, also unduly restricts the ability of the

prosecutor to conduct an effective investigation. Paragraph 5, requiring the state, upon request, to inform the court of the time and place of the execution of a request for assistance, should be included so that the prosecutor can be present, but the court should be able to make a single request applicable to an entire investigation.

The allocation of ordinary costs for the execution of requests in the territory of a requested state between the court and the requested state provided in Paragraph 6 (a) and (b) appears to be reasonable, although these detailed provisions could go into the rules. Paragraph 7, which is entirely in brackets, provides that “[w]itnesses or experts may not be compelled to testify at the seat of the Court.” This provision is unacceptable and would be unacceptable in most national courts. As Judge Louise Arbour, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, stated in her address to the Preparatory Committee on 8 December 1997,

“the permanent Court, not witnesses, should have the discretionary power to determine whether the witness should be allowed to testify at a location other than the seat of the Court. The logistical, financial and other difficulties associated with the use of satellite video link and depositions are considerable, in addition to the difficulties caused for the Prosecutor’s organization of the presentation of evidence”.

In exceptional cases, the court should have the power to permit a witness to testify at a different location, but witnesses and experts cannot dictate to an international criminal court which is trying cases of genocide, other crimes against humanity and war crimes where and under what circumstances they will testify. Of course, the court must make every effort which does not prejudice the rights of the accused to protect the safety and health of witnesses and minimize the trauma of testifying. Sub-paragraph (b) should be modified to apply only to those exceptional cases where the court itself has made a determination in the interests of justice that a witness can testify at a location other than the seat of the court and has decided where that should be. It should also include the requirement that such arrangements must be “in compliance with international law standards”.

Sub-paragraph (c), concerning means of communication to take evidence from witnesses away from the seat of the court, should be modified to make clear that the preservation of the anonymity of witnesses is limited to the non-disclosure to the press, public and others, but does not extend to the accused, who will need to know the identity of his or her accuser, once that witness is placed under secure protection, a sufficient time before trial in order to conduct an effective defence. Sub-paragraph (d), prohibiting the detention or restraint on witnesses and experts who appear before the court for acts or omissions prior to the departure of that person from the requested state, may need to be modified in the case of witnesses or experts who may have committed crimes within the jurisdiction of the court. The wording of Paragraph 8, concerning the disclosure of confidential information will have to be considered in the light of the final wording of Article 71.

Article 92. Rule of speciality [Zutphen 84; ILC 57]

This article, which incorporates a rule of speciality found only in traditional state-to-state extradition and mutual legal assistance requests, has no relevance to surrenders or transfers by

a state to an international criminal court, see *Part III, IV.B.2.f*, and it should be deleted in its entirety.

PART 10. ENFORCEMENT

“It is . . . important for the court’s decisions, either interlocutory or final, to be complied with by States. If States are permitted to ignore its decisions, the very object of the establishment of the court will be defeated and public confidence in the integrity of the court lost. The statute therefore must provide for a procedure to secure compliance when there is a failure to do so.”

Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/1998/39, 12 February 1998, para. 30

Article 93. General obligation regarding recognition [and enforcement] of judgements [Zutphen 85; ILC 58]

There should be a provision requiring all states parties to give prompt and full effect to the judgments and decisions of the court in accordance with the statute. The exact wording of the provision is not as important as the substance of the provision, which should require that the state party give full effect to the relevant judgment or decision. For example, if a state has undertaken to imprison a person convicted by the court for a term of years, then it must do so. If the court has issued a decision ordering a state to freeze assets believed to belong to a suspect or accused, then the state authorities must promptly do everything in their power to freeze the assets. If a judgment of conviction has determined that the convicted person must restore property in the territory of a state party or within its jurisdiction which that person seized from the victim, then the state party must promptly ensure that the property is restored to the victim. None of the proposed wordings in brackets for the first paragraph of Article 93 appear to satisfy these requirements entirely. The scope of “undertake to recognize” is not clear. The commitment to “enforce directly on their territory” excludes occupied territory and other areas under their jurisdiction, such as ships, military bases and areas of operation by peace-keeping forces. The failure of the the forces serving in the multinational Implementation Force (IFOR) and its successor, the multinational Stabilization Force (SFOR), to fulfil their obligations to arrest the dozens of persons indicted by the Yugoslavia Tribunal in areas where they have operated “at will” since the Dayton Agreement, demonstrates that much stronger language is essential and that it must require states parties to give *prompt* and *full* effect. These obligations should not be limited, as provided in one of the options, to being in accordance with Part 10, since some of these obligations, such as reparations to victims, as is made clear in the second paragraph, apply to other parts of the statute. The second paragraph, providing that the judgments of the court are to be binding on every state party with respect to criminal liability of the convicted person and principles concerning reparations to victims, should be included in the statute and should be consistent with Article 73 on this subject.

Article 94. Role of States in enforcement [and supervision] of sentences of imprisonment

Since the punishment of genocide, other crimes against humanity and war crimes is an international responsibility, Option 1, providing that “[a] sentence of imprisonment shall be served in a State designated by the [Court] [Presidency]”, would be appropriate, provided the allocation of convicted persons to states parties was done on an equitable basis. Unless some binding agreement were reached with a non-state party which permitted the court to require the immediate surrender or transfer of a convicted person back to the court if the conditions of imprisonment were inconsistent with the statute or international law or standards, sentences should only be served in the territory of a state party. If Option 1 is rejected, however, in favour of Option 2, it will need to be amended in certain important respects. Paragraph (a), providing that the sentence shall be served in a state designated by the court or the presidency from a list of states which have indicated to the court their willingness to accept sentenced persons, is acceptable. Paragraph (b), which permits a state to make its consent to acceptance of prisoners conditional, is not acceptable; all sentences should be served under approximately the same terms and conditions.

Paragraph 2 (a) of this article, requiring that the designation by the court of a state to accept a convicted person be governed either by equitable distribution or burden sharing to be elaborated, perhaps in the rules, is acceptable. Some provision, as suggested in the bracketed sentence, prohibiting the designation of the state in which the crimes occurred or the state of the victim’s nationality, subject to certain exceptions, should be included in the rules for reasons of security and safety, but it is possible that there could be a variety of circumstances when those states might be appropriate, particularly a long interval after the crimes occurred and the existence of a new government committed to the rule of law. However, these exceptional circumstances would better be left to be decided in the rules. There is no reason to oppose permitting the convicted person to be heard concerning the decision by the court or presidency concerning the designation of the place of imprisonment, as provided in Sub-paragraph (b), so long as that decision remains that of the court or presidency. The court should take into account the extent to which a state complies with international standards governing the treatment of prisoners, as provided in Sub-paragraph (c), but the court will have to ensure that once a convicted person is transferred to a state that the state complies with international standards, as provided in the bracketed part of Article 96 (1). Paragraph 3, providing that if no state of imprisonment is designated, the convicted person shall serve the sentence in a facility provided by the host state of the court is acceptable, provided that in that case the international community should assist in the payment of the costs of an international responsibility. This is an essential provision in the light of the limited number of states which have expressed a willingness to accept persons convicted by the Rwanda and Yugoslavia Tribunals.

Article 95. Enforcement of the sentence

The unbracketed part of Paragraph 1, providing that “the sentence of imprisonment shall be binding on the States Parties, which may in no case modify it”, should be included in the statute. The bracketed phrase, permitting states to accept convicted persons on their own conditions, is not acceptable, and should be deleted. Paragraph 2, which is unbracketed, and provides that the court alone shall decide any application for review of the judgment or sentence and that the state of imprisonment shall not impede such applications, should be included in the statute.

Article 96. Supervision and administration of sentence

Paragraph 1, requiring the court or the president to supervise the enforcement of sentences in states, should be included, with the bracketed words, requiring the sentence to be “consistent with internationally recognized standards governing the treatment of prisoners”. Option 1 in Paragraph 2, specifying that “[t]he conditions of detention shall be governed by the law of the State of enforcement and consistent with internationally recognized standards governing treatment of prisoners”, should be included in the statute, along with the provisions concerning modification of terms of imprisonment by the court or presidency. Option 2 is less satisfactory as it introduces a difficult national standard to monitor in addition to the international standards and does not give the court or the presidency the authority to require changes in conditions of imprisonment. Paragraph 3, requiring that “[c]ommunications between persons sentenced and the Court shall be unimpeded”, should be included, together with the guarantee of confidentiality.

Article 97. Transfer of the person upon completion of sentence

Paragraph 1, providing that unless the host state agrees to let the convicted person stay upon completing the sentence, the person will be released into the custody of the state of that person’s nationality or any other state which has agreed to receive that person, should be amended to guarantee that released persons are not sent to states where they are at risk of grave human rights violations. The allocation of costs in Paragraph 2 for transfers of prisoners to serve their sentence in a state to the court, unless the state agrees otherwise, seems reasonable. Paragraph 3, permitting the state of imprisonment to extradite a prisoner on completion of the sentence to another state for the purposes of trial or the enforcement of a sentence, should be subject to the same guarantee that the released prisoner not be extradited to a state where the person would be at risk of grave human rights violations.

Article 98. Limitation of prosecution/punishment for other offences [Zutphen 87; ILC 59 bis]

Appropriate criteria will have to be developed in the rules to guide the court in deciding whether to approve a prosecution or punishment by a state of imprisonment of a convicted person for an offence committed prior to the delivery by the court or the extradition by the state of imprisonment to a third state for prosecution or punishment for such an offence. For example, the court should not approve the prosecution or punishment where this would result in a risk of grave human rights violations.

Article 99. Enforcement of fines and forfeiture measures [Zutphen 88; ILC 59 ter]

The provisions in this article for recovering fines and enforcing forfeiture of property serve a necessary purpose, but their final form will depend on whether fines are permitted and provisions concerning reparations in Article 73.

Article 100. Pardon, parole and commutation of sentences [early release] [Zutphen 89; ILC 60]

The statute and rules of the court should ensure that imprisonment, pardons and commutations of sentences are an international responsibility. See Part II, V. Option 1, which permits a convicted person to apply to the court or presidency for a pardon or commutation of sentence if a person in the same circumstances in the state of enforcement is

eligible to do so, is not acceptable as it would result in persons convicted by the court of the same crimes serving the same sentences to become eligible for pardon or commutation at different times and in different circumstances, solely because of the accident of where they happened to serve their sentence. This would be inconsistent with the fundamental principle of equality of persons before the court recognized in Article 14 (1) of the ICCPR. **See Part II, IV.C.1.d.**

Option 2, which provides that the court or presidency alone has the the right to determine eligibility for commutation, parole or pardon, ensures that a uniform international standard will be maintained. This international responsibility could be reinforced by the proposal for “a mandatory mechanism by which the prisoner’s sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released”, as suggested in the footnote to this article. If it is determined that it is not appropriate for the court or presidency, as judicial institutions, to determine eligibility for a pardon or commutation of sentence, a function normally performed by the executive, sometimes advised by a clemency committee, then it would be better to assign this task to the UN Secretary-General, perhaps advised by a committee on pardons and commutations, as a neutral figure, than to a political body such as the assembly of states parties, which could lead to unseemly political pressures for early release. Clear criteria for eligibility for parole, if this is to be permitted, should be spelled out in the statute or in the rules, as provided in Paragraph 2. These criteria could include those proposed in brackets in Paragraph (1) (b).

[Article 101]. Escape [Zutphen 90; 60 bis]

The provision for delivering an escaped prisoner who is recaptured to the state where he or she was serving the sentence or to another place to be determined by the court, does not appear to pose any problems.

PART 11 - ASSEMBLY OF STATES PARTIES

Article 102. Assembly of States Parties

The statute or the rules of the assembly should provide the same degree of access for intergovernmental organizations and non-governmental organizations as the General Assembly has required at the diplomatic conference. The court should be able to participate in the assembly as well as in the bureau. The unbracketed parts of Paragraph 1 establishing the assembly of states parties should be included in the statute. States parties which sign the treaty could be observers, as this could encourage them to cooperate with the international criminal court, to provide voluntary contributions to a trust fund for the court and, eventually, to ratify the statute. The role of observer states will have to be carefully defined in the rules to ensure that observers cannot obstruct proceedings. The statute should state that intergovernmental organizations and non-governmental organizations which participated in the diplomatic conference, and others invited by the assembly, should be observers on the same basis as they participated in the Preparatory Committee and the diplomatic conference. **See Part IV, IV.A.**

The assembly of states parties should have certain limited powers, including the election and removal of judges, the prosecutor and deputy prosecutors and approval of

statutory amendments or court rules proposed by the court or a state party. These powers should be subject to appropriate safeguards to ensure the court's independence. Some of the powers listed in Paragraph 2 are appropriate; others are too broad and could endanger the independence of the court itself. Although the power of the court to consider and adopt recommendations of the preparatory commission in Sub-Paragraph (a) is essential, if the preparatory commission fails to complete all of its tasks before the entry into force of the statute, such as drafting the rules, it should be given to the court itself to complete them without delay, subject to approval by the assembly. The court will have an incentive to complete the draft of the rules so that it can start work as soon as possible. If left to the assembly, a political body, there is a danger that it could simply become an extended session of the diplomatic conference.

The statute should make clear that Article 41 (1), which states that “[i]n performing their functions, the judges shall be independent”, Article 43 (1), which provides that “the Office of the Prosecutor shall act independently as a separate organ of the Court”, and Article 43 (2), stating that “the Prosecutor shall have full authority over the management and administration of the Office of the Prosecutor”, will limit the scope of management oversight in Sub-Paragraph (b). Sub-Paragraph (c) leaves unclear what happens to reports of the court. The statute should provide for public reports by the court to the General Assembly and the assembly and least once a year, and more frequently when necessary, as well as frequent public bulletins similar to those published by the Yugoslavia and Rwanda Tribunals. Sub-Paragraph (d) should make clear that the budget should be prepared by the court for approval by the assembly in consultation with the entire court, not just the registrar. As explained below, the UN should finance the court and, therefore, after approval by the assembly, it should be transmitted to the General Assembly for final approval.

Sub-Paragraph (e) should state that any changes in the number of judges must be in accordance with the provisions in Article 37 (2). Sub-Paragraph (f) should provide that the assembly may consider any recommendation by the court, as well as the bureau, concerning non-cooperation by states parties and non-states parties. As the footnote to Article 86 (6) indicates, the court should be able to refer cases of non-compliance to the General Assembly or Security Council without going to the annual meeting of states parties. The unbracketed part of Sub-Paragraph (g) on other functions of the assembly does not appear to pose any problems, but the suggestion that the assembly consider applications for pardons should be rejected. As stated above with respect to Article 100, if this power is not given to the court, then it should be given to the Secretary-General, as a non-political official, rather than to a political body like the assembly, where applications for pardon could lead to improper political bargaining over releases. The proposal in the footnote that the assembly should have a role in dispute resolution should be rejected, unless this is limited to determining on the appropriate measures to enforce a court judgment resolving judicially a dispute by two states parties concerning the application or interpretation of the statute. Paragraph 3, spelling out the role of the bureau appears to be too rigid and detailed; this could be left to the rules. However, representatives of each of the organs of the court should be observers in the assembly as a whole, not just the bureau.

The rules of procedure for the assembly of states parties should permit speedy convening when necessary. They should require prompt public reports to the General Assembly of their sessions. Paragraph 4, concerning convening special meetings, would give the assembly sufficient flexibility if these meetings could be convened by either the bureau or

a certain number of states. The majority required in Paragraph 5 for making decisions should not be too high.

No state party which the court has found to have failed to comply with a court request or order should be permitted to participate in the meeting of states parties until it complies. Financing of the court, as explained below, should be by the UN, but if states parties play any role, the Paragraph 6 concerning arrears should be strengthened to have an automatic suspension *any time* the registrar certifies that the state party has not paid its assessed contributions in full and on time; a two-year delay could cripple the court. Paragraph 6 should also provide for an automatic suspension any time the assembly receives a report from the Presidency stating that a state party has failed to comply fully and promptly with a court order or request; Article 102 fails to do this. The rules of the assembly adopted pursuant to Paragraph 7 will necessarily have to be consistent with the statute and the rules of the court.

PART 11 - FINANCING OF THE COURT

Article 103. Payment of expenses of the Court

This unbracketed article, which simply states the basic principle that expenses of the court as assessed by the states parties shall be dispensed in accordance with the statute and rules, appears to pose no problems.

Article 104. Funds of the Court

The primary method of financing the permanent international criminal court should through the regular UN budget, although other methods of financing could be used to supplement this method, provided that they do not undermine the independence, impartiality and effectiveness of the court. Option 2, which provides that the expenses of the court should be borne by the UN, should be included in the statute. If Option 3, which provides that the court should be financed initially by the UN and then by the states parties, were to be adopted, then there should be clear and objective criteria for determining when the states parties would be able to assume this burden without adverse impact on the effectiveness of the court, and the statute should provide for the UN to resume responsibility for funding international justice if financing by states parties proves to be ineffective. Option 1, which provides that the court should at all times be financed by the states parties should be rejected. **See Part IV, II.A; II.D.1.**

Some of the funding of the permanent international criminal court could come from the UN peace-keeping budget, provided, however, that it does not undermine the independence, impartiality and effectiveness of the court. This possibility is only referred to in passing in a footnote to this article. **See Part IV, II.B.**

Article 105. Voluntary contributions

The permanent international criminal court should be able to accept voluntary financial contributions, as well as contributions of staff and equipment from states, intergovernmental organizations, non-governmental organizations, individuals and other

sources, with appropriate safeguards to ensure that these contributions do not undermine the independence, impartiality and effectiveness of the court. Article C, which is unbracketed, incorporates this principle and should be included in the statute. However, the rules should state that these funds are placed in a trust fund overseen by independent trustees or some other appropriate safeguard instituted. See *Part IV, II.C.*

Article 106. Assessment of contributions

Whatever method of assessment is adopted should be spelled out in the statute, subject to adjustment based on objective economic criteria, by the assembly of states parties.

Article 107. Annual audit

The requirement in this article for an annual audit by an independent auditor is a useful provision, but the rules should authorize more frequent audits, where necessary. The court should also ensure that audit reports, as well as financial reports, are included in the public reports to the assembly of states parties and the General Assembly.

PART 13. FINAL CLAUSES

Article 108. Settlement of disputes [Zutphen 91; SDT A]

The statute should provide that any disputes between states parties concerning the interpretation or application of the statute should be resolved by the permanent international criminal court. Option 1, providing that any dispute concerning the interpretation or application of the statute is to be settled by the court, implements this principle and should be included in the statute. See *Part IV, III.D.1.* The role of the assembly of the states parties should be limited to enforcement of court orders and requests, and should not include any negotiations concerning the scope or content of those orders and requests, which would undermine the judicial authority of the court. The court's power to settle such disputes should not be limited to the vague category of "judicial functions of the court", as provided in Option 3. Options 2 and 4 also should be deleted.

Article 109. Reservations [Zutphen 92; SDT B]

No reservations should be permitted. Option 1, which expressly provides that "[n]o reservations may be made to this Statute", should be included. All other options permitting reservations should be rejected in their entirety. See *Part IV, III.B.*

Article 110. Amendments [Zutphen 93 [SDT C]

The statute should permit each of the organs of the court, as well as states parties, intergovernmental organizations and non-governmental organizations, to propose amendments to the statute. There should be a speedy method for making minor amendments which do not fundamentally alter state obligations, add new crimes or change the fundamental nature of the permanent international criminal court. Other amendments should require a super-majority of ratifications by states parties before

entering into force. Under each method, amendments should be binding on all states parties. The requirement in Paragraph 1 that a certain number of years elapse before a state party may recommend amendments should be deleted to permit any amendments, including technical amendments which prove necessary, to be made. However, the proposal in brackets that the UN Secretary-General should circulate the proposed amendments ensures a close link with the UN and should be retained, but the proposed amendments should be made public and circulated to interested intergovernmental and non-governmental organizations for comment. Paragraph 2 should provide for consideration by the assembly of states parties. Option 2 in Paragraph 3, requiring a supermajority vote by the assembly of states parties, is preferable to Option 1, requiring a consensus, which would permit any one state party to veto an amendment. The supermajority should not exceed the normal requirements in intergovernmental organizations of two-thirds of all states parties.

The bracketed proposal in Paragraph 4 that the UN Secretary-General circulate proposed amendments adopted by the assembly of states parties to all states helps ensure a close link to all states, but the Secretary-General should make the proposed amendments public and circulate them to interested intergovernmental and non-governmental organizations for comment. The required majority of instruments of ratification or acceptance for approval should not exceed the normal requirement of two-thirds of all states parties. Since states will have ample time between adoption of an amendment by the assembly of states parties and entry into force to decide whether to withdraw, the same one-year notice for withdrawals in other cases should be required. There seems to be no need for a lengthy period of one year before an amendment enters into force after the required number of acceptances, as provided in Paragraph 5, since only 30 days (13 seems to be an error) is proposed for entry into force in Article 111 for additions to the list of crimes. **See Part IV, III.E.** It is regrettable that the speedy and simplified amendment procedure envisaged in Article 94 of the Zutphen text has been deleted. In the light of this deletion, it will be essential to include a greater number of statutory provisions in the rules, to ensure that the court is able to adapt rapidly to change.

Article 111. Review of the Statute [Zutphen 95; SDT E]

Option 2 of this article, which provides in Paragraph 1 for an automatic review of the list of crimes in Article 5 after a certain number of years and for a review of the statute at any time after a decision by the assembly of states parties, is preferable to the more limited Option 1. Five years seems a reasonable time to wait to assess whether additional crimes should be added to the list. The number of states required to convene a special meeting of the assembly of states parties should not exceed two-thirds of all states parties. **See Part IV, III.E.**

Article 112. Signature, ratification, acceptance, approval or accession [Zutphen 96; SDT F]

The statute should provide that states parties should translate the statute, in cooperation with the court, into the languages spoken in their territories as a matter of priority and should assist the court in translating the statute into the other major non-UN languages as soon as possible. The decision not to include this requirement is regrettable; if states parties are really serious about ensuring that the court is an effective deterrent to the worst crimes in the world, then they will translate the statute and rules into their languages as soon as possible. The final act should encourage all states to undertake such translations as a matter of priority

and ask the Secretary-General to provide technical assistance on request to states to do so. See *Part IV, III.D.2.*

[Article 113. Early activation of principles and rules of the Statute] [new]

This important article, which requires all states which have signed the statute to refrain from acts that would defeat its object and purpose pending its entry into force and that with respect to the repression of crimes of international concern, that “States should pay due regard to the relevant principles and provisions contained in the Statute, including in the performance of their responsibilities in competent organs of the United Nations, with a view to accelerating the achievement of the shared goal of establishing the Court”, should be included in the statute. It will reinforce existing obligations under international law, but also ensure that any *ad hoc* international criminal tribunals, such as the one proposed for Cambodia, and any regional international criminal courts which are created before the statute enters into force will be consistent with the principles in the statute.

Article 114. Entry into force [Zutphen 97; SDT G]

The statute should provide that a low number of ratifications is required for the statute to enter into force and that it should enter into force immediately when the last instrument of ratification required is deposited. The entry into force of the statute should not be delayed until completion of the rules, as suggested by one option in brackets in Paragraph 1. The court, of necessity, will not be able to begin to hear cases until the rules are adopted. To avoid delay, there should be a requirement that if the preparatory commission, which is to be entrusted in the resolution annexed to the final act with drafting rules, does not complete its work before the statute enters into force that the court itself, which will have an incentive to draft the rules without any further delay, should complete this work and submit the rules to the assembly of states parties for approval.

Article 115. Withdrawal [Zutphen 98; SDT H]

If withdrawals are to be permitted, the statute should contain a provision permitting withdrawal only after an initial period of several years, upon a notice of at least one year, provided that such withdrawal may not take effect with respect to any crimes within the jurisdiction of the international criminal court which were committed before the date the notice was given and that the withdrawing state remains bound to cooperate with the court concerning investigations or proceedings of any such crimes, at any time after the date of the notice, no matter when begun. Paragraph 1, permitting withdrawal on written notice to the UN Secretary-General, effective one year later, is largely consistent with this principle, but it would have been better to permit withdrawal only after an initial period of several years to give the court a more stable foundation. Paragraph 2, which provides that a state “shall not be discharged by reason of its withdrawal from the financial obligations which accrued while it was a Party to this Statute” and that it must cooperate with the court concerning investigations and proceedings commenced before the effective date of withdrawal, is not fully consistent with this principle. The bracketed paragraph would ensure that the court would be a more effective complement to national jurisdictions by providing that a state is not discharged from *any* obligations arising from the statute before the effective date, not just *financial* obligations. If

this is interpreted as a continuing duty to cooperate with the court concerning investigations started after the effective date of withdrawal, but involving crimes committed before that date, then this option is satisfactory. It would be better, however, for this to be expressly stated to avoid an incentive for certain states to denounce the statute when they fear that a concealed massacre is about to be discovered or that an investigation is likely to be opened concerning crimes which are known. See *Part IV*, III.C.

Article 116. Authentic texts [Zutphen 99; SDT I]

This standard article poses no problems.

SUPPLEMENTARY DOCUMENTS

A. Final Act

The final act of the diplomatic conference should be as comprehensive as possible and include as annexes all reports and working papers and relevant recommendations and proposals of non-governmental organizations. To be consistent with this principle, the Committee of the Whole should incorporate in its reports all proposals submitted to the conference or they should be otherwise included in the records of the conference to ensure that Paragraph 23 fully reflects the deliberations of the conference. See *Part IV*, III.D.2. Paragraph 26 fails to mention the leading role that non-governmental organizations have played in the drafting of the statute since Gustav Moynier, one of the founders of the International Committee of the Red Cross, first proposed the establishment of a permanent international criminal court in 1872. It is to be hoped that the diplomatic conference will acknowledge their crucial role over the past century and a quarter.

B. Establishment of a Preparatory Commission

The resolution annexed to the final act should include a provision guaranteeing that non-governmental organizations and intergovernmental organizations, including the two ad hoc tribunals, which have contributed so much to the process so far, can continue to participate in the process in the same way they have been able to participate in the Preparatory Committee and they are guaranteed at the diplomatic conference. In addition, the resolution should invite intergovernmental organizations (including the two ad hoc tribunals), non-governmental organizations and independent experts to submit suggestions concerning preliminary matters and draft texts to the preliminary commission as soon as it is established. The draft resolution fails to implement this principle, although a note suggests that the preparatory commission may decide to make use of the expertise and experience of the two tribunals by inviting representatives to participate in its work. The resolution should be amended to implement this principle.. See *Part IV*, III.F.2.

The preparatory commission should have the flexibility to meet in the host state or other locations, such as at the seat of the two ad hoc international criminal tribunals. It should frequent interim public reports on its work to the General Assembly. Neither of these important recommendations were incorporated in the draft resolution, and it is to be hoped

that the preparatory commission will be issue frequent interim reports on its work to ensure that its proceedings are as open as possible. See *Part IV, III.F.5.*

All instruments drafted by the preparatory commission should be provisional only, subject to revision by the court. The preparatory commission should consult intergovernmental organizations, including the two international tribunals, non-governmental organizations and independent experts as an integral part of its work program. The draft resolution provides that the instruments prepared by the preparatory commission are draft texts, but does not expressly provide that the court can play any role in the revision of the drafts, either before they are sent to the assembly of states parties or at a meeting of the assembly of states parties. It also fails to state that the preparatory commission should consult non-governmental organizations. These serious defects should be corrected. See *Part IV, III.F.5.*

THE DIPLOMATIC CONFERENCE

The rules of the diplomatic conference should guarantee the same level of participation for non-governmental organizations as required by the General Assembly. Although the rules appear to be consistent with the requirements which the General Assembly set for participation by non-governmental organizations in GA Res. 52/160, 15 December 1997, it will be important to ensure that the spirit of those rules, as well as the letter, is fully respected. The practice of conducting much of the work of the sixth session of the Preparatory Committee in informal meetings is deeply troubling and led to a much weaker text, since the delegates were unable to receive timely expert advice from non-governmental organizations. See *Part IV, IV.A.*

The rules of the diplomatic conference should have a mechanism to ensure prompt decision-making, by voting where necessary, to ensure that a small number of states cannot obstruct proposals which receive widespread support. It is a matter of dismay that, as a result of opposition by only half a dozen delegations expressed in informal, closed meetings, the Preparatory Committee was unable to adopt a rule for decision-making. It will be essential for the diplomatic conference to adopt rules for decision-making as soon as possible during the first days of the conference which permit procedural decisions to be reached by *a majority of states present and voting* and *matters of substance* to be reached by *no more than two-thirds of states present and voting*. If the position of the half a dozen delegations - which contend that *all decisions* be adopted by *all states registered for the conference* - were adopted, then the number required for any decision would probably be higher than the total number of delegations in the room on a day-to-day basis, thus permitting a small number of states to block decisions simply by abstentions or absences. See *Part IV, IV.B.*

The diplomatic conference should ask the General Assembly to request state ratification of the statute as soon as possible and to provide technical assistance to states to facilitate ratification and enactment of implementing legislation. The draft resolution fails to request the General Assembly to include this normal provision in any resolution on the court. See *Part IV, III.A, p. 23.*