UniCEUB – Centro Universitário de Brasília
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Curso de Relações Internacionais

Alexandre Rojas Belli Castanha

"APLICAÇÃO DO ESTATUTO DE ROMA: O Problema Da Jurisdição Do Tribunal Penal Internacional À Luz Da Teoria Normativa Das Relações Internacionais"

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Monografia apresentada como requisito parcial para a conclusão do curso de bacharelado em Relações Internacionais do Centro Universitário de Brasília – UniCEUB.

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Professor Orientador: Marco Antonio de Meneses Silva

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Brasília – DF
Novembro de 2003

DEDICATÓRIA

Aos meu pais,

que sempre estiveram ao meu lado seja qual fosse a empreitada assumida e que me ensinaram que

O amor sempre vence!

AGRADECIMENTOS

"Não posso deixar de agradecer o apoio que recebi da minha família e amigos, sempre presentes nas horas de tensão.

Aos professores em geral, por terem me ajudado a trilhar um caminho que hoje chega em sua primeira porta para o verdadeiro conhecimento.

É por mim devido aqui também um agradecimento especial aos professores Arthur Trindade Maranhão Costa, Renato Zerbini Ribeiro Leão, Ronald Lacerda e Tarciso Dal Maso Jardim, inspiradores da minha escolha do tema aqui trabalhado e, **at last but not at least** *ao Professor Marco Antônio Meneses Silva, meu orientador e fiel companheiro de discussões filosóficas sem fim, o qual além de tudo encontrou disposição e paciência para, reconheço, cumprir esta árdua tarefa."*

RESUMO

O presente trabalho tem como objetivo analisar os dispositivos constantes do Estatuto de Roma relativos ao processo de estabelecimento da jurisdição do Tribunal Penal Internacional (Tribunal ou TPI), criado a partir do mesmo.

Um histórico resumido acerca do surgimento e estabelecimento do Tribunal também é fornecido nesse trabalho, como forma de esclarecimento em relação à natureza e origem de seu arcabouço normativo.

Neste sentido, através de um ensaio comentado incrivelmente detalhado, serão abordadas as questões polêmicas em relação ao correto cumprimento dos artigos integrantes da Parte II do referido Estatuto, o qual versa a respeito da Jurisdição, Admissibilidade e Lei Aplicável para cada caso levado ao conhecimento do Tribunal.

Partindo dos diversos conceitos abrangidos pela teoria normativa (sempre através de uma perspectiva crítica), sobretudo da oposição entre as correntes universalista e comunitarista, analisa a validade e o impacto da instituição de uma jurisdição de caráter relativamente universal para o TPI, examinando suas causas e possíveis consequëncias para as relações internacionais.

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SUMÁRIO

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I. INTRODUÇÃO

O Ocidente[1] tem muito que aprender no que diz respeito às questões sutis do entendimento intercultural entre regiões e povos. Apenas algumas das reações sofridas ou desferidas por tais nações ao perceber que os agrupamentos mais importantes de Estados na esfera de relacionamento mundial não mais, pura e simplesmente, refletem os três blocos da Guerra Fria (países comunistas, capitalista e não-alinhados), já demontram que este desequilíbrio não é mais somente uma questão de aparência. Os eventos ocorridos em 11 de Setembro de 2001 nos Estados Unidos (o atentado terrorista que causou a queda das torres gêmeas do World Trade Center de Nova Yorque e também a destruição de uma das alas do Pentágono, em Washington) e a insistência norte-coreana em manter inalterado o cronograma de desenvolvimento de armas nucleares apresentam-se aqui como dois exemplos evidentes de tal afirmação.

As sociedades não-ocidentais, especialmente na Ásia Oriental, estão desenvolvendo sua riqueza econômica e criando bases para um poder militar e uma influência política internacional cada vez maior. À medida que sua autoconfiança aumenta, estes povos afirmam com muito mais intensidade seus próprios valores culturais e repudiam aqueles que outrora lhes foram impostos pelo Ocidente.

Todavia, ao analisarmos os acontecimentos dos últimos 5 anos, poderíamos incorrer na tentação de concordar com a ilusão de que alguns sinais alentadores, dentre os quais a instituição do Tribunal Penal Internacional - através do Estatuto de Roma[2], demonstravam uma crescente maturidade em relação aos problemas referentes à coexistência pacífica de formas de vida culturalmente distintas.

Certamente a Guerra contra o Iraque ou, como muitos já convencionaram, a II Guerra do Golfo, foi sob este ângulo e no melhor dos casos, um fruto híbrido. Não foi conduzida pelo comando da ONU; as nações que fizeram a guerra nem ao menos estavam

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[1] Definido para esse trabalho através da assertiva de Samuel P. Huntington, em seu livro *O Choque de Civilizações e a Recomposição da Ordem Mundial*: “as civilizações que compartilham afinidades desde a derrocada do sistema internacional baseado na antagonia capitalismo versus comunismo”.

[2] A íntegra do Estatuto de Roma consta como anexo a este trabalho.

obrigadas a prestar contas à ONU. Mesmo assim, atualmente, a Força Aliada (liderada pelos Estados Unidos e Grã-Bretanha) que se sagrou vencedora, insiste em que o processo de reconstrução daquele país deve obrigatoriamente ser monitorado por um representante daquela organização mundial. Tal fato, porém, já é mais do que nada.

Assim, atualmente parece extremamente natural que o Direito Internacional passe a ser visto como um conjunto de normas inócuas, apenas invocadas por conveniência por quem detenha o poder político, militar e econômico para invocá-las quando deseja e rejeitá-las ou negá-las (implicitamente ou até mesmo explicitamente) quando lhes seja conveniente. O Direito Internacional desintegra-se em manipulações. Faticamente se exige seu cumprimento compulsório pelos países politicamente mais fracos, enquanto os países mais fortes as cumprem ou não (dependendo de sua conveniência).

Entretanto, "quando se tem em mente que a implementação das regras do [Direito Internacional Público] precisa ser conseguida através da cooperação organizada da comunidade internacional e não através de um governo mundial (pois o próprio Kant, em seu escrito sobre 'a paz perpétua', rejeitou um governo mundial, propondo em seu lugar uma "Federação de Estados Livres"), utópico no mau sentido, então é possível interpretar o final [dessa guerra]"[3], como uma chance única para clarear a nossa visão sobre a verdadeira função de diversos órgãos multilaterais desse Direito, inclusive do recém-nascido Tribunal Penal Internacional. A possibilidade em questão seria a de reconfigurar a atuação desses órgãos seguindo linhas culturais e civilizacionais, baseada na suposta existência de "um mundo novo, onde a política local é a política da etnia e a política mundial é a política das civilizações"[4].

Portanto, conforme proposto anteriormente, qual a justificativa existente para que a norma mantenha sua força de convicção e atuação? Será que ainda temos motivos para crer que "a pretensão universalista embutida nos direitos humanos pode realmente se concretizar ou será que ela simplesmente esconde um instrumento de dominação de uma cultura sobre as outras?"[5]. Pois exatamente com o intuito de fornecer algumas respostas para essas perguntas é que iniciamos esse trabalho, conscientes de que "a antiga rivalidade entre superpotências

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[3] O período original refere-se ao 'direito dos povos' e 'ao final de uma ordem mundial bipolar'. In: HABERMAS, Jürgen. **Passado como Futuro.** Tradutor, Flávio Beno Siebeneichler; Entrevistador, Michael Haller. (Rio de Janeiro: Tempo Brasileiro, 1993). Coleção Biblioteca Tempo Universitário, número 94; Série Estudos alemães. Cap. 1, p. 24. Obs.: Tradução do autor.

[4] HUNTINGTON, Samuel P. **O Choque de Civilizações e a Recomposição da Ordem Mundial.** Tradução de M.H.C. Côrtes. (Rio de Janeiro: Objetiva, 1996). Cap 1, p. 21.

[5] HABERMAS (1993), p. 31.

está gradualmente cedendo espaço para um crescente choque entre civilizações”[6]. Analisar o sentido de manter e aceitar a jurisdição de um Tribunal Internacional que - ao menos sob a ótica normativa – já aparenta nascer sob uma égide etnocêntrica ocidental ultrapassada, é o que tentaremos fazer nesse trabalho.

Nesse sentido, em seu primeiro capítulo, esse trabalho pretende elucidar o caminho percorrido pela humanidade para atingir o estabelecimento do que hoje convencionamos denominar Tribunal Penal Internacional (TPI). Objetiva também descrever a importância da elevação do grau de compromisso mundial com respeito aos direitos humanos, a justiça internacional e a lei humanitária.

O objetivo principal do capítulo seguinte é aprofundar a análise de cada um dos artigos que compõem a PARTE II do Estatuto de Roma (JURISDIÇÃO, ADMISSIBILIDADE E LEI APLICÁVEL). Quando ele (o estatuto) se refere a crimes de genocídio, crimes contra a humanidade, crimes de guerra e crimes de agressão internacional, uma visão estritamente Ocidental impera. Não acredito que por trás das interpretações metafísicas e religiosas dessas normas possa existir um consenso profundo.

Ainda nessa seção apontamos para outro imenso “buraco” existente no referido Estatuto: ele não estabelece qual a definição e conseqüente abrangência dos crimes de agressão internacional que o TPI poderá vir a julgar. Apesar de os crimes supracitados já se apresentarem devidamente enquadrados no estatuto, não há artigo algum regulamentando o que deve ser entendido como crime de agressão internacional. Isso abre precedentes para novas interpretações de atuação jurisdicional do Tribunal, pois conceitos como a autodeterminação dos povos, soberania e nacionalismo, estariam também em julgamento.

Assim, as relações entre o ordenamento jurídico internacional e os seus Estados-Partes apresentam-se de forma diferenciada, devido às interpretações políticas e teóricas que cada um deles faz concernente ao mesmo arcabouço normativo. O desafio da jurisdição universal sobre todos os crimes contra a humanidade é ainda um assunto controverso. Foram feitas muitas aproximações teóricas para esta questão e, desde que os pontos desenvolvidos no capítulo III se referem somente à Parte II do estatuto de Roma, nosso

[6] HUNTINGTON (1996), p. 21.

trabalho no capítulo subseqüente se concentrou na correta determinação de sua validade a partir de uma perspectiva normativa teórica.

Para tanto, nos utilizamos inicialmente de uma distinção entre os conceitos tradicional e crítico de teoria, objetivando chamar a atenção do leitor em relação ao foco que atualmente incide sobre o estudo das relações internacionais. Como afrima Frost, atualmente estamos muito preocupados "em explicar o que aconteceu no passado, o que acontece no presente e o que é provável de acontecer no futuro" e assim, deixamos de lado o fato de que nas relações internacionais "muito pouca atenção é dada para questões sobre o que deve ser feito"[7].

Ao final, dentro de uma ótica normativa e, voltando-se para as suas correntes universalista e comunitarista, concluímos a pesquisa expondo nosso ponto de vista a respeito das tendências do mundo atual em relação ao trabalho do recém-nascido Tribunal Penal Internacional.

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[7] FROST, Mervyn. **Ethics in International Relations: A Constitutive Theory.** (Cambridge: Cambridge University Press, 1996). Cap 1, p. 12. Obs.: Tradução do autor.

II. O TRIBUNAL PENAL INTERNACIONAL

No final do século XIX e primeiras décadas do século XX, acordos internacionais sobre as leis de guerra fizeram crescer a esperança de que, quando irrompessem conflitos, haveria certos padrões de conduta que seriam respeitados por todas as partes e que seriam reduzidos o horror e o impacto devastador da guerra nos indivíduos, comunidades e nações envolvidas.[8] Apesar dessa codificação de leis para regular a guerra, o século XX ainda se apresenta como o século mais devastador da história. As guerras foram mais freqüentes e ficaram mais brutais, enquanto a maioria dos crimes horrendos perpetrados contra pessoas inocentes foi cometida impunemente. Faltaram os meios para garantir os padrões legais, um compromisso de Estados e organizações para assegurar que esses padrões fossem satisfeitos, e uma indicação clara que nenhuma nação e nenhum indivíduo podem estar acima das leis.[9]

Nesse sentido, este capítulo pretende elucidar o caminho percorrido pela humanidade para atingir o estabelecimento do que hoje convencionamos denominar Tribunal Penal Internacional (TPI). Tenciona também descrever a importância da elevação do grau de compromisso mundial com respeito aos direitos humanos, a justiça internacional e a lei humanitária.

É geralmente aceito que o primeiro Tribunal Penal Internacional *ad hoc* tomou assento em 1474 para julgar Peter Von Hagenbach por crimes cometidos durante o cerco à cidade alemã de Breisach. A idéia de um Tribunal Penal Internacional foi então retomada no século XIX por Gustave Moynier para julgar violações da Convenção de Genebra de 1864. Os Tribunais de Nuremberg e Tóquio funcionaram efetivamente como tal depois da Segunda Guerra Mundial e condenaram dezenas de pessoas, lançando assim, os alicerces para a instituição de uma justiça criminal internacional. Finalmente, em 1989, Trinidad e Tobago propuseram às Nações Unidas a criação de um Tribunal Penal Internacional permanente, inicialmente sob o argumento de tratar somente de processos relativos ao tráfico de drogas.[10]

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[8] Refiro-me ao Internacionalismo Liberal do século XIX e ao Idealismo do início do século XX, duas correntes do pensamento liberal nas Relações Internacionais.

[9] Em seu livro *Global Governance, Development, and Human Security: The Challenge of Poverty and Inequality*, a autora Caroline Thomas contesta com dados a noção de que o século XX foi o século das guerras. Pelo levantamento dela, morreu muito mais gente de fome e de doenças correlatas a essa.

[10] Disponível em: http://www.icc-cpi.int/php/show.php?id=basicdocuments. Acesso em 10/10/2003.

Naturalmente não podemos deixar de mencionar aqui os Tribunais de Ruanda e da Iugoslávia[11], os quais já operam por cerca de dez anos e têm evidenciado a utilidade e a necessidade da existência de uma justiça criminal internacional. Assim, pode-se afirmar que eles sedimentaram o caminho para a criação de um Tribunal permanente.

Portanto, utilizando-se de um rascunho de estatuto preparado e então adotado pela Comissão de Direito Internacional em julho de 1994[12], as Nações Unidas começaram, no ano subseqüente as negociações acerca do Estatuto do Tribunal Penal Internacional. Em 10 de fevereiro de 1995, foi formada uma Coalizão de ONG's (Organizações Não Governamentais) para um Tribunal Penal Internacional (COTPI) e estabelecido um comitê de direção informal. Naquela ocasião, o Movimento Federalista Mundial/Instituto para Política Global e seu Diretor Executivo, William R. Pace, foram convocados para servir como secretaria e promover as reuniões para essa nova rede de ONG's.[13] Durante o mesmo ano, por iniciativa da Assembléia Geral das Nações Unidas, um comitê *ad hoc* reuniu-se duas vezes em Nova Iorque na Sede da ONU para debater o rascunho de estatuto oferecido pela Comissão de Direito Internacional. Ao final daquele mesmo ano a Assembléia Geral das Nações Unidas decidiu então criar um Comitê Preparatório, para aprontar uma proposta de Estatuto a ser submetida a uma conferência diplomática.

Então, de 1996 a 1998, seis sessões do Comitê Preparatório da ONU foram realizadas em Nova Iorque para trabalhar na proposta de estatuto que visava estabelecer um Tribunal Penal Internacional permanente. Além de prover dados relevantes para estas discussões, as ONG's que assistiram a essas reuniões defenderam – amparadas pela COTPI - a realização de uma conferência diplomática para finalizar o Tratado.[14]

A Conferência de Plenipotenciários das Nações Unidas para Estabelecimento de um Tribunal Penal Internacional ocorreu de 15 de junho a 17 de julho de 1998 em Roma, Itália. Mais de 130 governos participaram da conferência, muitos com delegações consideráveis. A COTPI também estava presente: monitorando as negociações, atualizando informações diariamente para divulgação em âmbito mundial, facilitando a participação e

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[11] Para maiores informações acesse os sites oficiais do Tribunal Penal Internacional para Ruanda: http://www.ictr.org/default.htm, e do Tribunal Penal Internacional para a ex-Iugoslávia: http://www.un.org/icty/index.html .

[12] Disponível em: http://www.iccnow.org/romearchive/papers/1PrepCmt/1PrepCmtViewsonICCWFM.doc. Acesso em 23/10/2003.

[13] Disponível em: http://www.iccnow.org/introduction/ciccbackground.html. Acesso em 16/09/2003.

[14] Disponível em: http://www.iccnow.org/romearchive.html, acesso em 16/09/2003.

também a realização de diversas atividades paralelas de mais de 200 ONGs que haviam comparecido. As ONGs ofereceram sugestões significativas durante o processo de formatação do Tratado, contribuindo em alguns de seus aspectos mais importantes como, por exemplo, na estipulação do alcance de medidas relacionadas aos crimes de violência sexual e na criação e definição do papel do Promotor Independente.[15]

Ao término das cinco semanas de intensas e, freqüentemente, emocionais deliberações, em 17 de julho 1998, 120 nações votaram a favor da adoção do Estatuto de Roma do TPI. Somente 7 nações votaram contra o tratado, incluindo E.U.A., Israel e China, e outras 21 se abstiveram. O Estatuto foi então imediatamente aberto para assinaturas e ratificações. Todos nós sabemos que sua versão final e aprovada contém falhas, e alguns grupos acreditam fortemente que há sérias deficiências. De qualquer maneira, ele ainda inclui inacreditáveis treze partes e é particularmente detalhado.[16]

O Tribunal Penal Internacional objetiva transformar os padrões internacionais de conduta de forma a torná-los mais específicos, fornecer um mecanismo importante para implementação destes padrões e assegurar que os perpetradores de atos criminosos sejam trazidos à justiça perante o TPI quando os Tribunais Nacionais estiverem impossibilitados ou relutantes em assim o fazer. Igualmente importante poderia ser o impacto sobre as leis nacionais das nações ratificantes para assegurar que estes crimes possam ser julgados dentro das suas próprias fronteiras. O TPI também representa uma das oportunidades mais significativas que o mundo já teve no sentido de prevenir e/ou drasticamente reduzir as mortes e a devastação causadas por conflitos.[17] Assim poderá fazê-lo através dos diversos mecanismos que possui para iniciar investigações e processos em uma fase precoce, contribuindo, conseqüentemente, para o estancamento antecipado da violência e para resoluções mais ágeis de conflitos. O estabelecimento do TPI também deve ser entendido em um contexto mais amplo, em termos de sua habilidade para afetar alguns dos mais graves problemas atuais: o recrutamento e uso de crianças como soldados, a incidência generalizada de crimes de violência sexual, a perpetração de crimes motivada por racismo, a proliferação e uso generalizado de armas leves e muitos outros.

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[15] Idem.
[16] Ibidem.
[17] Lembramos que, de acordo com seu Estatuto, o TPI não pretende enfrentar outras causas de mortalidade.

Desde que o Estatuto de Roma do Tribunal Penal Internacional entrou em vigor, em 1 de julho de 2002, muito progresso foi alcançado no estabelecimento físico do Tribunal em Haia, na sua nação anfitriã - a Holanda.[18]

Em julho de 2002, a Comissão Preparatória supervisionou o estabelecimento de uma equipe de instauração, incluindo oito peritos de todo o Mundo, a qual começaria a construir a infra-estrutura necessária para apoiar o trabalho diário do TPI. Esta infra-estrutura, variando desde medidas de segurança física, construção de salas para o TPI até computadores e redes de comunicações e monitoração, é essencial para assegurar que este tribunal será uma instituição verdadeiramente eficiente e efetiva.

A Assembléia de Estados-Partes se reuniu pela primeira vez em setembro de 2002 e adotou, entre outras coisas, o seu primeiro orçamento e os procedimentos de eleição e nomeação para os juizes e o Promotor do TPI. A Assembléia também designou o primeiro funcionário deste tribunal: o Diretor da Divisão de Serviço Gerais, Bruno Cathala (da França), que ocupou o seu posto em 15 de outubro de 2002. O mandato da equipe de instauração terminou em 31 de outubro daquele mesmo ano mas muitos dos seus peritos foram convidados a continuar o trabalho com a Divisão supracitada. O cargo ocupado por seu Diretor existiu somente durante o período de tempo antes da eleição formal de um Oficial de Secretaria, o que aconteceu durante a sessão plenária de 16-27 de junho de 2003.[19]

Em fevereiro de 2003, a Assembléia de Estados-Partes reuniu-se em uma primeira sessão sumária para eleger os dezoito juízes do Tribunal. Naquela ocasião foram eleitos sete mulheres e onze homens de todas as regiões do mundo para compor a primeira magistratura do TPI. Estes, por sua vez, prestaram juramento em uma cerimônia organizada pelo governo da Holanda em 11 de março de 2003, em Haia. Neste mesmo evento os juízes elegeram a Presidência conforme prevê o Estatuto de Roma: escolheram Philippe Kirsch, do Canadá, como Presidente; Akua Kuenyehia, de Gana, como o primeiro Vice-Presidente e Elizabeth Odio Benito, da Costa Rica, como a segunda Vice-Presidente.[20]

A Assembléia de Estados-Partes elegeu o Promotor durante sua segunda sessão sumária, que aconteceu de 21 a 23 de abril de 2003. Os Estados-Partes procederam com base

[18] Disponível em: http://www.iccnow.org/buildingthecourt.html. Acesso em: 12/08/2003
[19] Idem.
[20] Ibidem.

em uma reunião anterior, ocorrida em março, onde eles tinham concordado informalmente e por consenso, em eleger o Sr. Luis Moreno Ocampo, da Argentina, como Promotor.[21]

Finalmente, como últimas notícias nesse sentido, durante a segunda reunião (ocorrida em 9 de setembro de 2003) desta mesma sessão, foi também eleito o Sr. Serge Brammertz (da Bélgica) para o cargo de Promotor-Adjunto do Tribunal Penal Internacional. Em uma decisão adicional, a Assembléia fixou o seu mandato em seis anos, conforme sugerido pelo Promotor, a iniciar-se oficialmente em 3 de novembro de 2003.[22]

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[21] Ibidem. Acesso em: 27/09/2003.
[22] Disponível em: http://iccnow.org/pressroom/ciccmediastatements/2003/11.06.03-DPSwearingIn.pdf. Acesso em: 12/11/2003.

III. A JURISDIÇÃO DO TRIBUNAL PENAL INTERNACIONAL E SEUS PRINCIPAIS PROBLEMAS

O objetivo principal desta seção é aprofundar a análise de cada um dos artigos que compõem a PARTE II do Estatuto de Roma (JURISDIÇÃO, ADMISSIBILIDADE E LEI APLICÁVEL). Considerando que o estatuto visa assegurar aos suspeitos e acusados o direito a um julgamento justo em conformidade com os mais altos padrões internacionais em todas as fases dos processos, se o TPI deve ser efetivo, particularmente nas situações nas quais estes crimes acontecem, então a justiça não somente deve ser feita, mas denotar ter sido feita.

Portanto, o Tribunal Penal Internacional deve ser totalmente íntegro no cumprimento dos mais altos padrões internacionais existentes para proporcionar um julgamento justo[23]. Estes padrões incluem aqueles que se encontram nos Artigos 9, 10 e 11 da Declaração Universal dos Direitos Humanos[24]; Artigos 9, 14 e 15 da Convenção Internacional de Direitos Civis e Políticos[25]; Regras de Padrão Mínimo da ONU para o Tratamento de Prisioneiros[26]; Conjunto de Princípios da ONU para a Proteção de Todas as Pessoas sob Qualquer Forma de Detenção ou Encarceramento[27]; Artigos 7 e 15 da Convenção da ONU contra Tortura e Outros Tratamentos Cruéis, Desumanos, Degradantes ou Punitivos[28]; Diretrizes Básicas da ONU sobre a Independência do Judiciário[29]; Princípios Básicos da ONU sobre a Função de Advogados[30]; e as Diretrizes da ONU para o papel dos Promotores[31].

Mantendo essa linha de pensamento chegamos a uma proposição simples: o estatuto não deve estabelecer a jurisdição do Tribunal – sobre o genocídio, outros crimes contra a humanidade e crimes de guerra – de forma mais limitada que a jurisdição universal.

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[23] O conceito de justiça ainda será objeto de discussão no decorrer desse trabalho.
[24] Disponível em: http://www.unhchr.ch/udhr/lang/por.htm. Acesso em: 22/10/2003.
[25] Disponível em: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. Acesso em: 22/10/2003.
[26] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). p. 273-289.
[27] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). p. 291-299.
[28] Disponível em: http://www.unhchr.ch/html/menu3/b/h_cat39.htm. Acesso em 22/10/2003.
[29] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). p. 409-412.
[30] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). p. 413-417.
[31] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). p. 418-422.

Não seria recomendável que o TPI tivesse que obter consentimento prévio do Estado que detém a custódia do suspeito ou acusado (Estado Custódio), do Estado em cujo território o crime aconteceu (Estado Territorial), do Estado de nacionalidade do suspeito ou acusado, do Estado de nacionalidade da vítima, do Estado que requisita a extradição do suspeito ou acusado ou qualquer outro Estado interessado, toda vez que estivesse empreendendo esforços para dar início às investigações de um destes crimes[32].

Uma vez que uma jurisdição inerente (automática) é concorrente com aquela dos Estados, o Tribunal só exercitaria sua jurisdição quando os Estados estivessem impossibilitados ou pouco dispostos a fazê-lo. De qualquer maneira, sob as leis internacionais, cada um destes três crimes – genocídio, outros crimes contra a humanidade e violações sérias de direito humanitário – já é reconhecido como crime de jurisdição universal. Isso significa que qualquer Estado pode exercitar jurisdição sobre uma pessoa suspeita de ter cometido um destes crimes e fazer justiça sobre qualquer um responsável por tais crimes, não importando onde o crime foi cometido. Se o TPI deve ser um complemento efetivo para os tribunais nacionais, e não um tribunal mais fraco, então tem que ter a mesma jurisdição universal sobre esses crimes como qualquer um dos Estados-Partes. Nenhum corpo diplomático ou político, incluindo o Conselho de Segurança ou Estados, deveria ter o poder para parar ou mesmo retardar uma investigação ou processo sob qualquer circunstância. Não há nenhuma base legítima sob o direito internacional ou moralidade para obstruir a justiça interrompendo ou retardando investigações de crimes de genocídio, outros crimes contra humanidade ou violações sérias à lei humanitária internacional[33].

Realmente, todos os Estados deveriam ter obrigação de reprimir estes crimes - a justiça jamais deveria ser um instrumento de barganha em negociações de paz. Então, nenhuma anistia nacional ou perdão que evite a justiça e o aparecimento da verdade poderiam impedir o Tribunal Penal Internacional de julgar os responsáveis por esses crimes sob a égide do direito internacional. Quaisquer atrasos em uma investigação poderiam permitir o enfraquecimento da memória de testemunhas, a destruição de evidências e a intimidação de testemunhas e vítimas. Esse ponto de vista foi bem afirmado por Louise Arbour, Promotora

[32] Essa questão será mais bem apresentada e discutida em nossos comentários a respeito dos artigos 12, 17 e 19 do Estatuto, encontrados nas páginas subseqüentes.

[33] Na teoria normativa, há base para problematizar a noção de legitimidade irrestrita para a jurisdição universal (padrões morais não são universais, ou seriam?). Essa proposição ainda será objeto de discussão no decorrer desse trabalho.

dos Tribunais Penais Internacionais para a Iugoslávia e Ruanda (Tribunais da Iugoslávia e de Ruanda) desde dezembro de 1997, quando ela fez a seguinte declaração ao Comitê Preparatório para a instituição do TPI:

> "(O Tribunal) deveria ser forte e bem equipado para operar como o mecanismo autorizado pelo qual um indivíduo pode ser privado da liberdade. Se for uma instituição fraca e impotente, não só irá carecer de legitimidade, mas trairá os próprios ideais de direitos humanos que terão inspirado sua criação. Neste caso, não obstante o número de ratificações, o Tribunal poderá ser considerado um desenvolvimento retrógrado e não só não dispensará justiça legítima, mas poderá exacerbar a sensação de injustiça legitimada dos ultrajados. Em resumo, eu não estou convencida que um Tribunal permanente fraco é melhor que nenhum Tribunal".[34]

Portanto, todos os Estados-Partes, incluindo seus tribunais e funcionários, têm que dispensar plena cooperação, sem demoras, ao TPI em todas as fases dos procedimentos. Como os dois Tribunais *ad hoc* da Iugoslávia e de Ruanda, o TPI será amplamente dependente de cooperação estatal, quer envolva medidas voluntárias como visitas a locais e entrevistas com testemunhas, ou processo compulsório para inspecionar instalações, compelir testemunhos e produção de documentos ou prender e transferir as pessoas[35].

Então é devida ao TPI, por parte daqueles Estados que o reconhecem e ratificam, a mesma cooperação e complacência que as suas autoridades executivas dispõem aos seus tribunais nacionais. Para assegurar que o TPI não seja uma iniciativa frustrada antes mesmo que possa dar início às suas atividades, deve também ser fornecida plena cooperação no período anterior ao Tribunal determinar se tem jurisdição e se deveria exercitá-la. Os Estados não podem recusar-se a obedecer a ordens ou solicitações do Tribunal para fornecimento de informações ou para transferir as pessoas para o TPI sob nenhuma das tradicionais bases de recusa reconhecidas e vigentes na cooperação internacional interestatal. O TPI deve ter o poder para determinar quando um Estado obedeceu completamente suas ordens e pedidos e, também, para afirmar quando um Estado ou indivíduo podem ser dispensados de obedecer a ordens ou pedidos do Tribunal.

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[34] AMNESTY INTERNATIONAL. **The International Criminal Court: Making The Right Choices - Part V: Recommendations to the Diplomatic Conference**, disponível em: http://www.iccnow.org/romearchive/papers/RomeTreaty/AIMakingRightChoicesPart5.pdf. Acesso em 19/09/2003.

[35] Para maiores esclarecimentos a respeito das obrigações cooperativas dos Estados-Partes e as respectivas sanções impostas pelo seu descumprimento vide Anexo I, artigos 12, 86, 87 e 99. Adicionalmente, confira os comentários em relação ao artigo 12 do Estatuto de Roma, constantes desse trabalho.

Não é permitida nenhuma reserva em relação ao Estatuto, uma vez que em seu próprio texto essa possibilidade qualifica-se como expressamente proibida. Permitir reservas frustraria o objetivo e os propósitos primordiais do Estatuto – levar a justiça àqueles responsáveis pelos piores crimes no mundo – ao admitir que Estados-Partes redefinissem crimes, adicionassem defesas inconsistentes com as leis internacionais ou se esquivassem de obrigações para cooperar com o TPI. Também conduziria a um sistema inexeqüível no qual cada Estado se comprometeria com um conjunto diferente de obrigações, em vez de compromissos internacionais comuns.

Assim, o Tribunal sempre deve ter extremo cuidado ao tentar manter este frágil equilíbrio existente entre o princípio da autodeterminação dos povos e sua própria jurisdição.

O Estatuto ainda encerra muitas dúvidas e uma vez que sua versão final aprovada não define satisfatoriamente a abrangência do crime de genocídio, de outros crimes contra humanidade ou de crimes de guerra e, às vezes, impõe patamares de julgamento muito altos (não encontrados nas normas do direito internacional antes da instituição do Tribunal), um ensaio comentado[36] de cada artigo pertencente à Parte II do Estatuto de Roma é provido a seguir:

Artigo 5 - Crimes dentro da jurisdição do Tribunal[37]

Nenhum comentário específico.

Artigo 6 - Genocídio

O Estatuto incorpora sem qualquer mudança a definição de genocídio da Convenção de Genocídio[38] (em seu artigo 2). Estaria incorreto exigir que os acusados pretendam destruir uma parte significativa de um grupo inteiro ou até mesmo uma parte significativa de um grupo em uma região geográfica particular ou cidade; é suficiente para impor responsabilidade criminal por genocídio que os acusados tenham visado destruir uma grande quantidade de um grupo em uma comunidade particular. Claro que não há nenhuma

[36] Esse ensaio foi baseado no documento da Anistia Internacional intitulado *The International Criminal Court: Making The Right Choices - Part V: Recommendations to the Diplomatic Conference*, disponível em: http://www.iccnow.org/romearchive/papers/RomeTreaty/AIMakingRightChoicesPart5.pdf. Acesso em 19/09/2003.
[37] Apenas relembrando, caso seja necessária a consulta ao texto original de cada artigo, o Estatuto de Roma em sua íntegra consta como Anexo à esse trabalho.
[38] Disponível em: http://www.unhchr.ch/html/menu3/b/p_genoci.htm. Acesso em: 08/10/2003.

exigência de que o acusado possa destruir grande parte de um grupo da comunidade, basta que essa seja a intenção. É importante lembrar aqui que o termo "ethnical" (étnico), que configura um neologismo na língua inglesa, é inserido no texto para ampliar a proteção da Convenção de Genocídio para um grupo lingüístico e/ou para um grupo onde a raça não seja a "característica dominante, que poderia ser definida pelo conjunto de suas tradições e sua herança cultural". Assim, certamente serão incluídos os grupos tribais. Muitos dos atos que constituem genocídio sob a Convenção - se cometidos contra indivíduos que são membros de grupos sociais ou políticos - constituiriam crimes contra a humanidade se cometidos em uma base sistemática ou generalizada. Na realidade, a perseguição de membros de grupos políticos já está qualificada como um crime contra a humanidade.

Artigo 7 - Crimes contra a humanidade

A definição deveria deixar claro que, assim como o genocídio, os outros crimes contra a humanidade são independentes de crimes cometidos contra as leis internacionais e, portanto, podem ser cometidos tanto em tempo de paz como também durante conflitos armados. Uma vez que esses crimes podem ser cometidos por autores não-estatais, como grupos de oposição armados ou até mesmo por indivíduos particulares, não há exigência que eles sejam realizados como parte de uma política ou um plano estatal. O requisito de intenção deve ser o mesmo em todos os níveis na hierarquia do Estado ou outros grupos para assegurar que todos aqueles responsáveis por estes graves crimes sejam conduzidos à justiça.

Assim, a Anistia Internacional[39] preferiu o termo "*large scale*" (larga escala), usado pela Comissão de Direito Internacional em seu rascunho do Código de Crimes Contra a Paz e Segurança da Humanidade[40], ao invés de "*widespread*" (generalizado). A Comissão de Direito Internacional em seu comentário sobre esse Código definiu "larga escala" para significar que "os atos são dirigidos contra uma multiplicidade de vítimas. Esta exigência exclui um ato desumano isolado cometido por um criminoso que age por iniciativa própria e dirigido contra uma única vítima." Explicou ainda que este termo substituiu "*mass scale*" (em massa) na primeira leitura do rascunho desse Código de Crimes em 1991 porque "larga escala" era "suficientemente abrangente para cobrir várias situações que envolvem uma

[39] Idem 14.
[40] Disponível em: *The ILC adopts the draft Code of Crimes against the Peace and Security of Mankind*. Martin C. Ortega. Max Plank Yearbook of United Nations Law (Vol 1) Library of UN Office at Geneva: UNOG Main Library, 1997). pp. 283-326

multiplicidade de vítimas, por exemplo, como resultado do efeito cumulativo de uma série de atos desumanos ou o efeito singular de um ato desumano de magnitude extraordinária."

É essencial definir corretamente as palavras "systematic" (sistemático) e "widespread" (generalizado), que são usadas no texto consolidado. A Comissão de Direito Internacional explicou que "maneira sistemática" significa "em conformidade com um plano ou política preconcebidos. A implementação desse plano ou política poderia resultar na perpetração repetida ou contínua de atos desumanos. A motivação dessa condição é excluir um ato fortuito que não foi cometido como parte de um plano ou política mais abrangentes." Assim, "crimes sistemáticos" incluiriam o caso de uma unidade militar ou policial que obedece a uma decisão do comandante para matar cada pessoa em uma cidade ou aldeia ou cada pessoa de um grupo particular naquela cidade ou aldeia. Uma sugestão de um Estado para definir "sistemático" como um conceito que envolve um ataque contra uma população civil que constitui ou é parte de uma política, plano combinado (apoiados pela imposição desse e outros ataques) ou de uma prática repetida durante um certo tempo, como defendido por um outro Estado, seria demasiado restritiva. Crimes "generalizados" incluiriam assassinatos cometidos em várias partes de uma região geográfica particular, mas não necessariamente ao longo de uma província inteira ou distrito.

A definição de jurisdição tem que cobrir Estado e atores não-estatais, inclusive membros de grupos de oposição armados e indivíduos que agem sob direção de funcionários estatais ou membros de grupos políticos (ou com o seu consentimento ou aquiescência), para assegurar que o Tribunal terá jurisdição sobre crimes generalizados contra a humanidade sendo cometidos ao redor do mundo por atores não-estatais.

Essa definição deve ser a mesma para todos os níveis da hierarquia no Estado, organização ou grupo para assegurar que quaisquer atores que tenham cometido os atos desumanos, e também os que tenham planejado e ordenado os crimes, estejam sujeitos à responsabilidade criminal internacional.

(a) Homicídio. A definição de homicídio no estatuto (ou no instrumento separado sobre elementos constitutivos de crimes que o artigo 9 menciona como 'previsto para estar o mais cedo possível finalizado') também deveria cobrir execuções extrajudiciais, que são "mortes ilícitas e deliberadas levadas a cabo por ordem de um governo ou com sua

cumplicidade ou aquiescência"[41]. Execuções extrajudiciais podem ser diferenciadas de outras mortes. Uma execução extrajudicial é um assassínio deliberado, e não acidental. É ilícito. Viola leis nacionais, como aquelas que proíbem o assassinato, ou padrões internacionais que proíbem a privação arbitrária da vida, como a Convenção Internacional de Direitos Civis e Políticos[42], o Código de Conduta da ONU para os Encarregados de Execução da Lei[43] e os Princípios Básicos da ONU para o Uso da Força e Armas de Fogo[44]. A referência a padrões internacionais é essencial quando a lei nacional não alcança o nível de tais normas ou, como no caso dos Nazistas Alemães, a lei nacional autoriza tais mortes. A ilegalidade das execuções extrajudiciais as distingue de homicídios ocorridos em autodefesa pessoal, de mortes que resultam do uso racional da força na execução da lei e de mortes em conflitos armados que não sejam proibidas sob o direito internacional, além dos casos em que é imposto - em conformidade com padrões processuais internacionais e consistentes - o uso da penalidade de morte. Execuções extrajudiciais podem ser diferenciadas de assassinamentos que violam uma política oficial legal porque são levados a cabo por ordem de um governo ou com sua cumplicidade ou aquiescência. Assim, uma execução extrajudicial é, com efeito, um assassinato cometido ou tolerado pelo Estado.

Homicídios que também constituem crimes contra a humanidade incluem execuções deliberadas e arbitrárias cometidas por grupos políticos armados em base generalizada ou sistemática. Tais mortes são deliberadas, não acidentais. São arbitrárias porque não são lastreadas por qualquer padrão legal internacionalmente reconhecido. Infringem padrões fundamentais de conduta humanitária - como refletido na cláusula Martens[45] - como leis criminais nacionais que proíbem homicídios, a lei humanitária

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[41] In: *Extrajudicial, summary or arbitrary executions* Apud Draft report of the Commission : Commission on Human Rights, 59th session. - E/CN.4/2003/L.11/Add.5. (Library of UN Office at Geneva: UNOG UN Reference Coll., 24 Apr. 2003). pp. 8-12.

[42] Idem 3.

[43] In: Human rights: a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6 (Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). pp. 346-350.

[44] In: Human rights : a compilation of international instruments. Volume 1, 1st part, Universal instruments. - ST/HR/1/Rev.6(Vol.I/Part1). (Library of UN Office at Geneva: UNOG UN Reference Coll., 2002). pp. 351-355.

[45] *"Até que um código mais completo das leis de guerra seja emitido, as partes contratantes concordam em declarar que, nos casos não incluídos nos regulamentos já adotados até o momento por elas, populações e beligerantes permanecem sob a proteção e império dos princípios de direito internacional, haja visto que eles são o resultado dos costumes estabelecidos entre as nações civilizadas, das leis humanitárias e das necessidades e exigências da consciência pública."* Essa cláusula aparece pela primeira vez em um instrumento oficial de defesa da lei humanitária como a nona cláusula preambulatória da Convenção (II) com respeito às Leis e Costumes da Guerra Terrestre (1899). Disponível em:

internacional e os padrões internacionais de direitos humanos. Seu caráter arbitrário os difere de morticínios em autodefesa, ou defesa de outros em relação a uma ameaça imediata, e de mortes em conflito armado que podem acontecer como conseqüência de um ataque ou defesa de um objetivo militar - como morticínios ocorridos no percurso entre choques de forças adversárias violentas, matanças em fogo cruzado ou ataques em geral contra militares e pessoal de segurança. São cometidos sob autoridade de um grupo político armado e conforme sua política, em algum nível, devem deliberadamente eliminar indivíduos específicos, ou agrupamentos ou categorias de indivíduos, ou inclusive permitir aqueles sob sua autoridade de também cometer tais abusos. Morticínios deliberados e arbitrários podem ser diferenciados de assassinatos por razões privadas que se mostram - por exemplo, através de medidas preventivas e ação disciplinar - terem sido atos de indivíduos em violação de ordens superiores.

(b) Extermínio.

> "Extermínio é um crime que por sua própria natureza é cometido contra um grupo de indivíduos. Adicionalmente, o ato de extermínio envolve um elemento de destruição em massa, que não é requerido para um assassinato. Sob esse raciocínio, extermínio é relacionado de perto ao crime de genocídio, no aspecto em que ambos os crimes são dirigidos contra um número grande de vítimas. Porém, o crime de extermínio aplica-se a situações que diferem daquelas cobertas pelo crime de genocídio. Extermínio caracteriza situações nas quais um grupo de indivíduos que não compartilham nenhuma característica comum é assassinado. Também se aplica a situações nas quais são mortos alguns membros de um grupo enquanto outros são poupados".[46]

O Parágrafo 2 (b) do Artigo 7 (Crimes contra a humanidade) no texto consolidado, que prevê que o extermínio inclui de forma premeditada e intencional, "a imposição de condições de vida calculadas para provocar a destruição de parte de uma população" parece somente ser uma ilustração de um tipo de extermínio, em lugar de uma definição; além disso, o termo intencional é muito restritivo já que excluiria atos negligentes que são suficientes para constituir uma violação séria quando cometidos durante um conflito armado internacional. A definição que precisa ser incluída no estatuto ou em um instrumento separado deveria ser consistente com aquela da Comissão de Direito Internacional e assim,

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http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/81ef87b37f70d8fac125641e003513a1?OpenDocument

[46] Idem 36.

conseqüentemente, o elemento mental requerido deveria ser igual ao requerido para uma violação grave.

(d) Deportação. Em complemento às proibições de forçar as pessoas a abandonar o seu próprio país, o estatuto deve criminalizar a realocação forçada sistemática ou generalizada de indivíduos dentro das fronteiras do seu próprio país, quando isso é feito por motivo de raça, religião, idioma, origem étnica ou social, ou opinião política. Se a proibição é limitada à deportação por uma fronteira internacional, poderia deixar de cobrir situações onde, em um conflito "interno", um ou mais grupos separatistas em um Estado forcem membros de um grupo étnico particular para fora da área do Estado que eles entendam como seu próprio lugar. A proibição em tais situações deveria cobrir medidas formais e informais de realocação forçada.

Uma terceira violação do direito de liberdade de movimento que deveria ser coberta pelo estatuto é o *refoulement* (retorno forçado) das pessoas para países onde suas vidas, segurança ou liberdade estão em risco. Quando uma política desse gênero é praticada de forma sistemática ou generalizada, deveria ser um crime contra a humanidade. A transferência de uma pessoa protegida pela Quarta Convenção de Genebra "para um país onde essa pessoa possa ter razão para temer perseguição por suas opiniões políticas ou convicções religiosas" é proibida pelo Artigo 45 daquela Convenção e é definida como uma violação séria em seu Artigo 147.

(f) Tortura. A definição de tortura no estatuto (ou em um instrumento separado definindo os elementos constitutivos dos crimes) deveria ser baseada (mas não limitada a ela) na definição de tortura da Convenção contra Tortura e Outros Tratamentos Cruéis, Desumanos ou Degradantes ou Castigo (Convenção contra Tortura)[47]:

> "Para os propósitos dessa Convenção, o termo 'tortura' significa qualquer ato pelo qual dor severa ou sofrimento, físico ou mental, é infligido intencionalmente a uma pessoa visando obter informação ou confissão desta ou de uma terceira pessoa, punir por ato que essa ou uma terceira pessoa tenha cometido ou seja suspeita de ter cometido, intimidá-la ou coagi-la ou a uma terceira pessoa, ou ainda, por qualquer razão baseada em discriminação de qualquer tipo, quando tal dor ou sofrimento é infligido ou instigado ou com o consentimento ou aquiescência de funcionário público

[47]Idem 6.

> ou outra pessoa que age oficialmente. Não inclui dor ou sofrimento específica ou incidentalmente proveniente de sanções legais".[48]

A definição deveria ter incluído tortura cometida de forma sistemática ou generalizada por grupos políticos armados. Demandar que a vítima esteja sob custódia ou sob controle físico do acusado ou privada de liberdade pode ser muito restritivo e, desde que o conceito de "sanções" legais da Convenção Contra Tortura significa "em conformidade com o direito internacional", essa frase simplesmente reforçaria uma garantia já existente.

(h) Perseguição por motivos políticos, raciais, nacionais ou outros. É reconhecida há muito tempo como um crime contra a humanidade, independente de outros crimes, como assassinatos, extermínios e "desaparecimentos". O crime de perseguição é um crime contra indivíduos com concepções proibidas - políticas, raciais ou religiosas -, não contra um "grupo ou coletividade que possa ser identificado". Portanto, esta linguagem deveria ser corrigida adequadamente. A definição proposta no Parágrafo 2 (g) de que por perseguição "entende-se a privação intencional e grave de direitos fundamentais em violação do direito internacional" deveria ser clarificada em um instrumento separado nos elementos constitutivos dos crimes.

Não há nenhuma razão para se impor um significado para o crime de perseguição baseado em especificidades, como sugerido; isso simplesmente ampliaria o já vasto princípio que existe na Convenção de Genocídio em relação a outros crimes contra a humanidade, com todos os problemas que já acarreta.

(i) Desaparecimento forçado de pessoas. Embora "desaparecimento" se enquadre adequadamente dentro da categoria "outros atos desumanos" que são reconhecidos como crimes contra a humanidade, merece ser definido expressamente como tal, para enviar um sinal claro a quem comete esse crime, da determinação da comunidade internacional para os conduzir à justiça onde quer que se encontrem. A definição do crime de desaparecimento forçado de pessoas no estatuto (ou no instrumento separado que define os elementos dos crimes) deveria ser consistente com a definição aprovada pela Assembléia Geral da ONU no Preâmbulo de sua Declaração na Proteção de Todas as Pessoas de Desaparecimento Forçado, que se refere a desaparecimentos forçados de pessoas ocorrendo em muitos países.

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[48] Idem 6. (Artigo 1 – Tradução do autor).

A definição proposta no Parágrafo 2 (i) do Artigo 7 (Crimes contra humanidade), embora semelhante à definição na Declaração da ONU, difere em pelo menos um aspecto importante, omite a assertiva “de alguma outra forma privados de sua liberdade”, que é destinada a assegurar que nenhum método de “desaparecimento” (existente ou não) escape da responsabilidade criminal internacional.

(k) Outros atos desumanos. A categoria de “outros atos desumanos”, cometidos em uma base sistemática ou generalizada, garante que novas formas de crime contra a humanidade que forem desenvolvidas não escaparão da responsabilidade criminal internacional.

O uso da expressão “de caráter semelhante” assegura que a definição seja consistente com o princípio *nullum crimen sine lege* (artigo 22), sem contudo restringir indevidamente o seu âmbito. A proposta segundo a qual os outros atos desumanos também causam grande sofrimento ou dano sério para o corpo ou a saúde mental ou física poderia ser um modo de garantir consistência com este princípio fundamental. Porém, esse padrão particular poderia ter excluído certos crimes bem reconhecidos contra a humanidade, como a prisão arbitrária.

A Comissão de Direito Internacional sugeriu vários critérios para determinar outros atos desumanos que deveriam ser considerados crimes contra a humanidade. O Artigo 18 (k) do projeto de Código de Crimes abarca “outros atos desumanos que danificam severamente a integridade física ou mental, saúde ou dignidade humana, como mutilação e graves danos corporais”. A Comissão de Direito Internacional estabeleceu que somente atos “similares em gravidade” para com outros crimes contra a humanidade seriam incluídos. O Secretário-Geral, em sua análise do Julgamento de Nuremberg, em seu relatório de 1993 para o Conselho de Segurança sobre o proposto Tribunal da Iugoslávia sugeriu que privar parte da população civil dos meios de subsistência poderia ser outro ato desumano. Embora a aproximação da Comissão de Direito Internacional tenha mérito, especial cuidado terá que ser tomado para definir esse critério, para assegurar que contemple todos os atos que deveriam estar sujeitos a responsabilidade criminal internacional e para que de alguma maneira seja completamente consistente com o princípio de nullum crimen sine lege.

Artigo 8 - Crimes de Guerra

Seu texto consolidado ocasionalmente inclui mais elementos mentais restringentes nos crimes listados do que exigido pela lei humanitária. Por exemplo, várias opções usam o termo restritivo intencionalmente, em lugar do termo mais inclusivo, propositalmente, que abrange ambos os conceitos de intenção e descuido mas exclui negligência ordinária. O comentário do Comitê Internacional da Cruz Vermelha (CICV) para o Artigo 85 do Protocolo I (para. 3474) às Convenções de Genebra define *propositalmente* como segue:

> "Os acusados devem ter agido conscientemente e com intenção, i.e. com a sua mente no ato e suas conseqüências, e desejando-as ('intenção criminal' ou 'malícia planejada'); isso abrange os conceitos de 'intento ilegal' ou 'negligência', isto é, a atitude de um agente que, sem estar certo de um resultado particular, aceita a possibilidade de que aconteça. Por outro lado, negligência ordinária ou falta de previsão não são cobertas, i.e., quando um homem age sem ter a sua mente no ato ou suas conseqüências (embora não tomando as precauções necessárias, particularmente não buscando informação precisa, constitui negligência culposa, punível pelo menos com sanções disciplinares)."[49]

O texto inclui muitas violações cobertas pelas Convenções de Genebra[50], mas várias opções limitam seriamente o âmbito da jurisdição do Tribunal sobre violações particulares:

Parágrafo 2 (b) (i) - Ataques a civis. A jurisdição do Tribunal deveria incluir as violações da proibição de ataques a civis em conflitos armados internacionais já constantes da lei humanitária, as quais são definidas como violações sérias ao Protocolo I à Convenção de Genebra[51], no Artigo 85 (3) (a) daquele instrumento que estabelece: "os seguintes atos serão considerados como sérias violações deste Protocolo, quando cometidos propositalmente, em violação das providências pertinentes deste Protocolo e causando morte ou dano sério para o corpo ou a saúde: (a) fazer a população civil ou indivíduos civis objeto de ataque [.]"

Parágrafo 2 (b) (xxii) - Violência Sexual. O significado em inglês da frase "also constituting a grave breach of the Geneva Conventions" (que constitua também um desrespeito grave das Convenções de Genebra) parece que neste caso aplica-se para a lista de

[49] Idem 36.
[50] Disponíveis em: http://www.unhchr.ch/html/intlinst.htm. Acesso em: 01/10/2003.
[51] Disponível em: http://www.unhchr.ch/html/menu3/b/93.htm. Acesso em: 03/11/2003.

atos especificados na primeira oração presente nesse inciso e também para “qualquer outra forma de violência sexual” - a segunda oração desse mesmo período. Se o propósito dessa frase era assegurar que as pessoas também pudessem ser acusadas das violações sérias estabelecidas em (a), então essa intenção deveria ficar clara, talvez em uma oração separada. Se o propósito só era restringir o âmbito da jurisdição do Tribunal, em relação a “qualquer outra forma de violência sexual”, para atos que também constituiriam uma violação séria das Convenções de Genebra, então a linguagem está muito restritiva, uma vez que exclui certas classes de pessoas protegidas pelo Protocolo I. Desde que o conceito de “qualquer outra forma de violência sexual”, como refletido na Declaração sobre a Eliminação de Violência contra Mulheres da ONU, é potencialmente muito mais abrangente que o conceito de violações sérias sob as Convenções de Genebra ou sobre o seu Protocolo I, os elementos constitutivos desses crimes terão que ser explicados cuidadosamente no instrumento separado adotado depois da conferência diplomática.

Parágrafo 2 (b) (xxvi) - Utilizar crianças em hostilidades. Os princípios essenciais contidos no direito internacional, enquanto expressos em linguagem apropriada para opor responsabilidade criminal individual e responsabilidade estatal, ficam claros aqui:

Os verbos 'utilizar' e 'participar' foram adotados para contemplar não só a participação direta em combate como também a participação ativa em atividades militares ligadas aos combates, como patrulhamento, espionagem, sabotagem e o uso de crianças como chamarizes, mensageiros ou em postos de fiscalização militares. Não contempla atividades claramente sem conexão com as hostilidades como entregas de comida em uma base aérea ou o uso de crianças como funcionários que auxiliem nas tarefas domésticas necessárias na residência de um oficial militar casado. Porém, o uso de crianças em uma função direta de apoio, como agir como entregadores de materiais à linha de frente, ou em atividades da própria linha de frente, está incluído na terminologia.

Parágrafo 2 (c) O caso de um conflito armado de caráter não- internacional. Não há nenhum limite exigido perante o campo de aplicação do Artigo 3 comum às quatro Convenções de Genebra e, portanto, não deveria haver nenhum no estatuto. Incorpora alguns dos princípios fundamentais aplicáveis a qualquer tempo, como reconhecido na cláusula Martens há mais de um século atrás e que está agora incorporada em cada uma das quatro Convenções de Genebra (Estabelecendo que denúncias não devem de forma alguma

prejudicar as obrigações para com as quais as partes envolvidas no conflito deverão permanecer compelidas a cumprir, em virtude dos princípios da lei das nações - já que eles são resultantes dos costumes estabelecidos entre povos civilizados, das leis humanitárias e dos ditames do senso moral comum/consciência popular).[52]

Como o comentário do Comitê Internacional da Cruz Vermelha em relação ao Artigo 3 admitiu que era preciso rejeitar a visão que ele "não era aplicável em casos onde conflitos armados irrompem em um país", mas, não preenche várias condições que diferenciem "um conflito armado genuíno de um mero ato de banditismo ou uma insurreição desorganizada e de curta duração", conclui-se que "o Artigo deve ser aplicado tão amplamente quanto possível". O Comentário do CICV explicou que o Artigo 3 "simplesmente demanda respeito por certas regras que já foram reconhecidas como essenciais em todos os países civilizados e decretadas na lei interna dos Estados em questão, muito antes que a Convenção fosse assinada. Que Governo ousaria reivindicar perante o mundo, em caso de perturbações civis que pudessem ser descritas justamente como meros atos de banditismo (com o Artigo 3 não sendo aplicável) que tivesse o direito de deixar os feridos sem cuidados, de infligir tortura e mutilações e de fazer prisioneiros reféns?".[53]

Além do mais, o texto consolidado do Estatuto estipula que esse irá se "aplicar para conflitos armados de caráter não internacional e, portanto, não irá reger as situações de tensões e perturbações internas, tais como revoltas, atos isolados e esporádicos de violência ou outros atos de natureza similar".

Mas o Tribunal deveria ter jurisdição sobre todas as violações ao referido Artigo 3, não só `a "violações graves" do mesmo, como previsto no estatuto. Isso seria consistente com a jurisdição do Tribunal de Ruanda (sob o Artigo 4 de seu estatuto) e do Tribunal da Iugoslávia (sob o Artigo 3 de seu estatuto, como reconhecido na decisão de 1995 da Câmara de Apelações em Tadi). A jurisdição do Tribunal já é limitada a crimes sérios de preocupação da comunidade internacional como um todo e, de acordo com o Artigo 17 (1) (d) do Estatuto,

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[52] COMITÊ INTERNACIONAL DA CRUZ VERMELHA. Delegação no Brasil. **Normas Fundamentais das Convenções de Genebra e seus Protocolos Adicionais.** (Genebra, 1983). Cap. V, pp. 51-52.

[53] AMNESTY INTERNATIONAL. **The International Criminal Court: Making The Right Choices - Part V: Recommendations to the Diplomatic Conference**, disponível em: http://www.iccnow.org/romearchive/papers/RomeTreaty/AIMakingRightChoicesPart5.pdf. Acesso em 19/09/2003.

casos que não sejam de "suficiente seriedade" não serão considerados admissíveis. Não deveria haver nenhuma dupla barreira de gravidade a ser superada.

Também deveriam ser incluídas proibições adicionais, se o tribunal pretende ter a mesma jurisdição em conflitos armados não-internacionais e internacionais:

Fome forçada de civis como um método de guerra: O parágrafo que dá ao tribunal jurisdição sobre o uso intencional de fome de civis como um método de guerra, usando a linguagem do Artigo 8 (b) (xxv), aplicável a conflito armado internacional, também deveria ser incluído nesta parte do estatuto.

Ataques que causam perda incidental de vida ou ferimentos a civis: O parágrafo que dá ao Tribunal jurisdição sobre ataques possíveis de causar perda incidental de vida ou danos a civis ou danificar objetos civis já está escrito e utilizado no Artigo 8 (b) (iv), aplicável a conflitos armados internacionais.

Escravidão e o Comércio de Escravos: Escravização[54] e Escravatura[55] são crimes contra a humanidade, mas se os crimes contra a humanidade são limitados àqueles dirigidos contra uma população civil, então a escravização de combatentes capturados durante um conflito armado não-internacional não estaria dentro da jurisdição do Tribunal. O Artigo 4 (2) (f) do Protocolo II proíbe a "escravidão e comércio de escravos em todas suas formas".[56]

Artigo 9 – Elementos constitutivos dos crimes

Nenhum comentário..

Artigo 10

Nenhum comentário.

Artigo 11 – Jurisdição (ou competência) ratione temporis

Nenhum comentário.

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[54] *"Ato de escravizar-se"*. In: FERREIRA, Aurélio Buarque de Holanda. **Novo Dicionário da Língua Portuguesa.** 2. ed. (Rio de Janeiro: Nova Fronteira, 1986). p. 691.
[55] *"1. Tráfico de Escravos (…)"* Apud (FERREIRA, 1986).
[56] Disponível em: http://www.unhchr.ch/html/menu3/b/94.htm. Acesso em: 09/11/2003.

Artigo 12 – Condições prévias ao exercício da jurisdição

Como já citado e determinado no princípio desse capítulo, não há nenhuma razão pela qual o TPI- estabelecido com base em um tratado assinado por um número expressivo de Estados - não deveria estar na mesma posição para exercitar a jurisdição universal sobre genocídio, crimes contra a humanidade e crimes de guerra da mesma maneira que as próprias Partes Contratantes. Ratificando o Estatuto do TPI, os Estados-Partes concordam de uma maneira oficial e formal que o TPI também pode exercitar jurisdição criminal com relação a esses crimes. Isso apenas significa que assim como os Estados-Partes o TPI também deveria ser competente para processar pessoas que tenham cometido um desses crimes, não obstante o Estado em cujo território tenha tido lugar a conduta em causa (Estado Territorial), o Estado que detém a custódia do suspeito ou acusado (Estado Custódio), ou qualquer outro Estado tenha ou não aceitado a jurisdição do Tribunal.

Porém, o parágrafo 2 (a) desse artigo poderia dar a entender que o Tribunal não terá jurisdição se/quando uma pessoa suspeita de cometer genocídio (por exemplo, ordenando a matança de 10,000 membros de um grupo religioso no território de um Estado-Parte) viajar para um outro Estado-Parte - onde seria então detida em custódia antes da denúncia do crime cometido - mas, logo a seguir ou até mesmo depois de consagrada a denúncia (entretanto, ainda antes do Tribunal ter verificado se o caso seria admissível sob os auspícios do artigo 17 do Estatuto), viajar novamente, agora para uma localização desconhecida ou para um Estado não signatário do Tratado. Porém, naquela ocasião o Estado que detinha a custódia do suspeito ou acusado poderia ter exercitado sua jurisdição universal - se realmente estivesse disposto ou se dispusesse das condições mínimas para fazê-lo.

Também está caracterizada uma regressão na justiça internacional quando o Parágrafo 3 requer o consentimento adicional do Estado Territorial (do qual funcionários poderiam muito bem estar implicados na realização dos crimes) antes do Tribunal poder exercitar sua jurisdição. Como exemplo, vamos assumir que um general suspeito de violações sérias às Convenções de Genebra - por ordenar a morte de 50,000 prisioneiros de guerra no território de um Estado-Parte – tenha fugido para um pequenino Estado-Parte vizinho. Esse último poderia deter o general em custódia, em conformidade com sua jurisdição universal sobre graves violações às Convenções de Genebra. Porém, os líderes do Estado Custódio poderiam perceber então que aquele país não tem recursos suficientes para garantir a

segurança do general, das vítimas e das testemunhas e também para pagar pela defesa jurídica do general. Da mesma forma, eles poderiam decidir não julgar o general por causa da esmagadora pressão militar, política ou econômica cominada pelo Estado Territorial vizinho. De acordo com o texto do Parágrafo 3, nessas circunstâncias o TPI não poderia exercitar a mesma jurisdição universal sobre o general conferida ao pequeno, subdesenvolvido e ameaçado Estado Custódio. Portanto, se permanecer como está, esse dispositivo impedirá o Tribunal de ser um complemento efetivo às jurisdições criminais nacionais.

Artigo 13 – Exercício da Jurisdição

Nenhum comentário.

Artigo 14 – Denúncia por um Estado-Parte

Um estado deve ser capaz de denunciar uma situação - embora ela não precise estar circunscrita àquelas que envolvam ameaças ou violações à paz e segurança internacionais - para o Tribunal. Enquanto o Promotor tiver poder para iniciar investigações e processos baseados em informações de outras fontes (excetuadas as indicações fornecidas pelo Conselho de Segurança ou reclamações de Estados signatários), sempre sujeitas a escrutínio judicial apropriado, então os Estados não deveriam ter poder para efetuar denúncias de casos individuais.

Mas esse parágrafo tem que deixar claro que o Estado não pode limitar a denúncia para que ela inclua somente os crimes cometidos por um só lado do conflito em uma situação - como na proposta para um Tribunal Penal Internacional ad hoc para Cambodja - ou restringir a nacionalidade daqueles indivíduos que poderão ser investigados e processados, como estabelecido no Estatuto do Tribunal de Ruanda[57]. O Promotor deve ser livre para investigar todas as pessoas que possam ser responsáveis por crimes consagrados na jurisdição do Tribunal. Na verdade o risco de que os Estados possam isentar as pessoas de responsabilidade criminal internacional através de denúncias seletivas demonstra a necessidade de o Promotor poder abrir investigações de moto próprio, sujeito a escrutínio judicial adequado. O Parágrafo 2 - relativo à informação que deveria constar nas denúncias estatais – é certamente uma provisão útil, desde que não se torne a base para declarar a falta de competência do Tribunal ou a inadmissibilidade dos casos por ele investigados quando da

[57] Disponível em: http://www.ictr.org/ENGLISH/basicdocs/statute.html. Acesso em 18/11/2003.

submissão de uma denúncia que não inclua todas as informações necessárias somente porque um Estado que poderia tê-las apurado com maior rapidez não se mostrou disposto a agir neste sentido.

Artigo 15 – O Promotor

"Para o Tribunal proposto ter credibilidade internacional e legitimidade, será essencial para um Promotor internacional independentemente iniciar acusações de suspeitos pelo cometimento de crimes dentro da jurisdição do Tribunal. Se tais acusações permanecessem sob a decisão de um corpo político, como no Conselho de Segurança, seria certamente colocada em questão a imparcialidade da justiça internacional". [58]

Artigo 16 – Transferência do inquérito e do processo criminal

Nenhum comentário.

Artigo 17 – Questões relativas à admissibilidade

Os Estados têm o dever primário de conduzir à justiça aqueles responsáveis por crimes graves sob o direito internacional, contudo, o Tribunal deve poder agir como um complemento efetivo aos Estados quando eles estão impossibilitados ou pouco dispostos a desempenhar esse dever. O próprio Tribunal deve ter o poder para determinar se irá exercer sua jurisdição concorrente em tais casos. Assim, o acordo sobre o texto do Artigo 17 foi uma das grandes realizações do Comitê Preparatório. Apesar da retratação no começo desse artigo que o texto "representa um possível modo para lançar o assunto de complementaridade e não prejudica as visões de qualquer delegação", representou o acordo de um número esmagador de delegados e nenhuma delegação tentou rejeitar esse compromisso publicamente. Qualquer tentativa de um governo para debilitar o Artigo 17 poderia ter colocado em risco o que já se encontrava acordado no resto do texto consolidado e, conseqüentemente, provocar o fracasso da conferência diplomática.

Como o Ex-Relator Especial da ONU para Tortura declarou em um recente relatório[59], ele estava "atento a sugestões segundo as quais a concessão de anistias nacionais

[58] NAÇÕES UNIDAS. Comissão de Direitos Humanos. Relatório. RODLEY, Nigel S. (Ex-Relator Especial sobre Tortura), Doc. da ONU E/CN.4/1998/38, 24 de dezembro de 1997, para. 228. Obs.: Submetido em conformidade com a Resolução 1997/38, para. 226, da Comissão de Direitos Humanos.
[59] Idem.

poderia ser introduzida como uma barreira à jurisdição do Tribunal." Ele considera qualquer movimento nesse sentido subversivo "não só do Estatuto em pauta, mas também da legalidade internacional em geral. Pois tal iniciativa minaria gravemente o propósito do Tribunal, ao permitir aos Estados legislar seus cidadãos fora da jurisdição do TPI. Também prejudicaria sensivelmente a legalidade internacional, porque é axiomático que os Estados não podem invocar a própria lei para esquivar-se de suas obrigações presentes no direito internacional. Desde que o direito internacional exige dos Estados que penalizem os tipos de crime contemplados no Estatuto do Tribunal em geral - e a tortura em particular - levando os seus autores à justiça, as anistias em questão são por isso mesmo violações das obrigações concernentes aos Estados de conduzir tais violadores à justiça. Qualquer proposta de movimento nesse sentido significaria virar as coisas de cabeça para baixo e permitir à lei nacional ditar a obrigação legal internacional."[60]

Artigo 18 - Decisões Preliminares sobre admissibilidade

Apesar da demonstrada necessidade de pronta investigação e processo de crimes, se o Promotor transferisse a investigação ao Estado, lhe seria proibido pelos Parágrafos 2 e 3 revisar essa determinação por um período de seis meses depois daquela transferência ainda que chegue ao seu conhecimento que o Estado está impossibilitado ou pouco disposto a investigar ou processar. Assim, a exigência do Parágrafo 5 que determina que os Estados-Partes devem responder "sem atrasos injustificados" aos pedidos para manter o Promotor informado a respeito da situação dos inquéritos conduzidos pelo próprio Estado mostra-se, por si só, como sendo de valor limitado.

O Parágrafo 7 daria aos Estados uma terceira chance de escapar à jurisdição do TPI, ainda podendo contestar a admissibilidade de um processo em conformidade com o Artigo 19, apesar da intenção daquele artigo em limitar os Estados a uma contestação antes da decisão final sobre o julgamento. Permitir repetidas contestações dos Estados à admissibilidade de casos apenas prejudicaria a autoridade do Tribunal e poderia reduzir a velocidade de seus trabalhos, contrariando o princípio fundamental de que justiça demorada é justiça negada. Em relação aos procedimentos longos, complicados e injustos, parece ser de pouca valia o que até agora se encontra fixado no Artigo 18 para ajudar no propósito de tornar o Tribunal um complemento efetivo às jurisdições nacionais. A habilidade do Estado para

[60] Idem.

assegurar a revisão judicial apropriada sobre as decisões do Promotor de quando o Tribunal exercitaria a sua jurisdição e de quais casos seriam admissíveis está protegida adequadamente através do Artigo 15, que exige revisão judicial preliminar da decisão do Promotor em iniciar um inquérito, e do Artigo 19, o qual permite uma contestação pré-julgamento da jurisdição e admissibilidade de um caso por parte do Estado e outras contestações provenientes do acusado.

Artigo 19 – Impugnação da jurisdição do Tribunal ou da admissibilidade de um caso

Os suspeitos que tenham sido presos através da expedição de um mandado de prisão preventiva e também os acusados deveriam poder contestar a jurisdição do Tribunal ou a admissibilidade de um caso em qualquer fase dos procedimentos. Os Estados poderiam fazer tal contestação apenas uma vez depois da captura do suspeito ou acusado e antes do julgamento.

O parágrafo 2, entretanto, o qual permite ao Tribunal determinar a admissibilidade de um caso por iniciativa própria - através do Artigo 15 - em qualquer fase dos procedimentos, pode gerar problemas. Uma vez que tenha sido determinado que o caso é admissível e os procedimentos estão em andamento, o TPI não deveria ficar sob a pressão de manobras dos Estados reivindicando, tardiamente, o seu direito de administrar esses procedimentos. Este problema não parece ter sido equacionado adequadamente no Parágrafo 3 deste mesmo artigo e clama por uma nova rodada de discussões.

Artigo 20 - Ne bis in idem

Há pelo menos dois problemas com o teor dessa definição, os quais são também encontrados no Artigo 17 (2) (a) e (c):

O Artigo 20 (3) (a), ao exigir um “propósito” para proteger uma pessoa contra uma responsabilidade criminal, não cobre os procedimentos em que um Promotor - agindo de boa fé - estiver impossibilitado de obter uma condenação porque o Tribunal, na prática, careceria de poderes para obter evidências ou para compelir uma testemunha a prover informações, por exemplo, por causa de condições inseguras no país.

O Artigo 20 (3) (b), ao prever que os processos possam ser “conduzidos de forma que, em um caso concreto, se revelem incompatíveis com a intenção de submeter a pessoa à ação da justiça”, pode – a não ser que a palavra “intenção” seja lida de forma a incluir aqueles fora dos processos – ser falho em equacionar a situação onde o julgamento não pôde ser administrado independentemente ou imparcialmente por causa de ameaças externas contra o Promotor, os juízes, advogados, as vítimas e testemunhas. Além disso, há o perigo de que as condições “independentemente” e “imparcialmente” sejam entendidas tão estritamente que excluam casos onde a independência dos promotores e juizes não é ameaçada e eles hajam imparcialmente, mas os procedimentos fiquem longe dos padrões internacionais para um julgamento justo.

Artigo 21 – Lei aplicável

Nenhum comentário.

Então, reconhecendo a importância desses comentários e levando em conta que alguns dos problemas sobre a jurisdição do Tribunal parecem ter aumentado, nós podemos apenas concluir que os principais assuntos não resolvidos no Estatuto poderão afetar diretamente a independência e a efetividade do Tribunal em um futuro próximo.

O desafio da jurisdição universal sobre todos os crimes contra a humanidade é ainda um assunto controverso. Foram feitas muitas aproximações teóricas para esta questão e, desde que os pontos desenvolvidos neste capítulo se referem somente à Parte II do estatuto de Roma, nosso trabalho no próximo capítulo será a correta determinação de sua validade a partir de uma perspectiva normativa teórica.

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IV. O CASO DA JURISDIÇÃO UNIVERSAL A LUZ DA TEORIA NORMATIVA

Estejamos ou não conscientes desse fato, todos nós temos nossas opiniões a respeito do conhecido e do desconhecido – e elas não valem grande coisa. Entretanto, o impacto causado por essas opiniões sobre nossas ações é, muitas vezes, devastador. Isso porque consideramos a opinião como uma tese que provém de nossos instintos e conhecimentos empíricos. Assim, através desse argumento contestamos aqui o conteúdo diverso das opiniões – como também o estatuto de uma experiência que acredita que opinar é **saber** e que é suficiente **estar certo** para pretender **ser verdadeiro**.

Contudo, diante do mistério do real a alma não pode (e nem conseguiria), por decreto, tornar-se ingênua: sob a luz de seus preconceitos intrínsecos e do senso moral comum, ela dá origem a opiniões que qualificam o conhecimento ou o objeto em questão por sua utilidade, impedindo a si mesma de conhecê-los verdadeiramente.[61]

Mas, se qualquer opinião decorre de uma determinada posição no tempo e no espaço (especialmente de tempo e espaço sociais e políticos), não conseguimos emitir uma opinião sobre questões que não compreendemos, sobre perguntas que não sabemos formular com clareza e, conseqüentemente, há sempre a possibilidade de que a visão de mundo que cada um de nós ostenta esteja definida de acordo com nossas características sociais: classe econômica, nacionalidade, religião, etc.

Daí deriva a primeira conclusão que necessitamos para iniciar nosso raciocínio: é preciso saber formular problemas. Se não há pergunta, não pode haver uma teoria para respondê-la. E, digam o que disserem, para qualquer tipo de investigação científica ou pesquisa os problemas não se formulam de modo espontâneo: “No princípio de qualquer investigação está a ontologia. Não podemos definir um problema de política global sem pressupor uma certa estrutura básica, consistindo nos tipos significativos das entidades envolvidas e na forma das relações significativas entre elas”.[62]

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[61] Minha abordagem acerca do conceito de opinião é influenciada por G. Bachelard, *A Formação do Espírito Científico* (Rio de Janeiro: Fondo Cultural, 1998).

[62] COX, Robert W. “Rumo a uma conceituação pós-hegemônica da ordem mundial: reflexões sobre a relevância de Ibn Kaldun”. In: Rosenau, James N. e Czempiel, Ernst-Otto. Governança sem Governo. Tradução de Sérgio Bath. (Brasília: Ed. UnB, 2000) Cap. 5, pp. 183-184.

Logo, fica claro que a edificação de qualquer teoria terá como seu ponto de partida ontológico o senso moral comum - que ajuda a formar uma opinião inicial sobre o problema (mas não o compreende totalmente) - e a sua respectiva crítica imanente: “A teoria segue a realidade, mas também a precede e a modela”.[63]

Assim, considerar a existência de alguma teoria em si não faria sentido pois, seguindo esse raciocínio, toda teoria apresenta um ponto de vista delimitado no espaço e no tempo. Nada é evidente ou gratuito. Tudo é construído: “Teoria é sempre para alguém e para algum propósito”. [64]

Então, em concomitância com as supracitadas assertivas de Cox, seria plausível concluir que uma teoria pode servir a dois propósitos distintos: em primeiro lugar, poderá servir de orientação para auxiliar na resolução de problemas provenientes do panorama particular que caracterizou seu ponto de partida; em segundo lugar, poderá ser uma teoria mais reflexiva com relação ao próprio processo de teorização em si – através do autoreconhecimento da perspectiva específica de sua formulação e das relações dessa perspectiva com as demais. Em outras palavras, enquanto existem algumas teorias que visam modificar o senso comum, há outras que desejam transcender ou mesmo substituir esse senso comum por uma convicção que - por menor ou maior período de tempo – pode parecer a certas pessoas como mais ou menos “maluca”.

Essas diferentes visões nos proporcionam duas concepções distintas de teoria: a tradicional e a crítica.

“Concepções tradicionais de teoria supõem o teórico distante do objeto de análise. Por analogia com as ciências naturais, elas sustentam que objeto e sujeito devem estar estritamente separados a fim de que quaisquer teorias possam ser formadas adequadamente”.[65] As teorias de resolução de problemas ou teorias tradicionais encaram as relações sociais e de poder – e as instituições sobre as quais essas relações estão organizadas – como molduras dadas para a ação. A teoria tradicional busca lidar com as fontes de problemas e perturbações a fim de fazer com que tais relações e instituições possam funcionar de

[63] Idem, p.184.
[64] COX, Robert W. “Social Forces, States and World Orders: Beyond International Relations Theory” In: KEOHANE, Robert O. **Neo-realism and its Critics.** (New York: Columbia University Press, 1986) Cap. 8, p. 207. Obs.: Tradução do autor.
[65] DEVETAK, Richard. “Critical Theory” In: BURCHILL, Scott (Ed.), et al. **Theories Of International Relations.** (London: Macmillan, 1996) Cap. 6, p.147. Obs.: Tradução do autor.

maneira satisfatória. Assim, como essas relações e instituições não são questionadas, os problemas que surgem podem ser tratados em cada área específica na qual se originam. A força dessa teoria reside em sua habilidade de estabelecer os limites de uma determinada área problemática e reduzir um problema particular a um determinado número de variáveis, sendo assim passível de uma análise precisa. Logo, graças à suposição *coeteris paribus* sobre a qual a teoria tradicional está baseada, seria possível o desenvolvimento de leis ou regularidades que apresentam validade universal. Também não podemos deixar de ressaltar o caráter 'a-histórico' de tal teoria, pois trabalha com um presente contínuo.

"Esta [afirmativa] contrasta com as concepções críticas, que enxergam a teoria como irredutivelmente relacionada à vida social e política".[66] A teoria crítica (que é crítica por se colocar fora da ordem de mundo preponderante e perguntar como essa ordem se originou) não admite as relações sociais e de poder como fixas, ao contrário, questiona seu surgimento e se elas se encontram em um processo de superação/transformação. Tal teoria apresenta como principal objetivo tratar o complexo sociedade-Estado como um todo, sem dividí-lo em partes separadas. Além disso, diferentemente da teoria de resolução de problemas, pode ser considerada uma teoria histórica, pois se ocupa da análise não somente do passado mas também dos processos contínuos de mudança.

"A Teoria, como todo [tipo de] conhecimento, é necessariamente condicionada por influências sociais, culturais e ideológicas, e uma das principais tarefas da teoria crítica é revelar o efeito deste condicionamento. (...) Adotando esta atitude autoreflexiva a teoria crítica toma como seu ponto de partida a conexão entre conhecimento e valores".[67] Nesse sentido, a hipótese de que a realidade é fixa não é uma mera conveniência metodológica, mas sim um viés ideológico, uma vez que serve aos interesses particulares (sejam eles de classe ou nacionais) daqueles que estão satisfeitos dentro de uma determinada ordem. Isso significa que a teoria tradicional é conservadora, uma vez que busca resolver os problemas que se originam nas diversas partes do complexo social com o objetivo amplo de manter o bom funcionamento deste. Essa busca pelo reconhecimento de uma suposta isenção de valores esconde o desejo do teórico tradicional de seguir o caminho traçado pelas ciências naturais e seus pesquisadores, mas, ao implicitamente aceitar a ordem existente como algo dado (não problematizável), já se afasta dessa possibilidade por revelar-se impregnada de valor.

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[66] Idem.
[67] Ibidem, pp. 150-151.

Destarte, de forma coerente com a própria definição de teoria crítica, desenvolvemos até aqui um raciocínio normativo histórico-reflexivo em relação ao conceito de teoria, através do qual alcançamos também uma segunda conclusão: empreendemos o esforço de realizar esse trabalho no sentido de caracterizá-lo não como uma tentativa de unicamente apontar os problemas concernentes a jurisdição universal proposta pelo Estatuto de Roma – aqui tencionamos criticar no intuito de não somente descrever ou aprimorar mas transformar.

Embora o nosso objeto de estudo propriamente dito (a jurisdição do TPI) represente apenas um dos diversos aspectos constituintes da ordem[68] ou, mais especificamente, do ordenamento jurídico que emerge como conseqüência primordial da criação do TPI, será necessária a introdução de um elemento extra ao conceito de ordem: "diferentes ordens promovem objetivos e valores distintos (....). Bull dá então mais um passo a frente, sustentando que três valores específicos transcendem todas as diferenças entre ordens – a segurança contra a violência, o princípio do *pacta sunt servanda*[69] e a estabilidade relativa de posses (ou da propriedade)". [70] Sendo assim, uma análise das possíveis relações entre esses valores e a jurisdição do TPI se faz necessária. Isso porque a valoração crítica do direito positivo não diz o que é o direito (ontologia jurídica), nem como é de fato o direito positivo localizado no tempo e no espaço (ciência jurídica) e sim como deve ser o direito posto: como parte da Ética Jurídica que realiza a análise crítica dos valores como liberdade, paz, igualdade, etc.

A estabilidade relativa de posses, assim como a segurança contra a violência, caracterizam-se como duas premissas que se encontram na base do modo de produção capitalista e, conseqüentemente, influenciam muito mais diretamente a esfera político-econômica. Quanto ao correto cumprimento da cláusula *pacta sunt servanda*, poderá haver divergências em relação à jurisprudência universal do tribunal, conforme já descrito no capítulo anterior em nossos comentários em relação ao artigo 12 (condições prévias ao exercício da jurisdição).

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[68] "Ordem é todo modelo ou regularidade de interação que encontremos em qualquer situação social." In: BULL, Hedley. " The Anarchical Society. A study of order in world politics" (New York: Columbia University Press, 1977), Cap. 1 Apud COX (2000), p. 189.

[69] Convenção de Viena Sobre o Direito dos Tratados (Artigo 26): "Pacta Sunt Servanda – Todo tratado em vigor obriga as partes e deve ser cumprido de boa-fé", disponível como anexo em: PACÍFICO, Andrea. **Os Tratados Internacionais e o Direito Constitucional Brasileiro.** (Brasília: Ed. Brasília Jurídica, 2002), p. 71. Obs.: grifo em itálico do autor.

[70] COX (2000), p. 189.

Portanto, citando Norberto Bobbio, descobrimos que "o problema filosófico [da jurisdição universal do TPI] não pode ser dissociado do estudo dos problemas históricos, sociais, econômicos, psicológicos, inerentes à sua realização: o problema dos fins não pode ser dissociado do problema dos meios".[71] Na teoria crítica, o sentido da história apenas pode ser derivado da realidade concreta: os direitos (e aqui incluímos o direito à jurisdição automática imputado ao TPI) "nascem quando devem ou podem nascer. Nascem quando o aumento do poder do homem sobre o homem ou cria novas ameaças à liberdade do indivíduo, ou permite novos remédios para as suas indigências: ameaças que são enfrentadas através de demandas de limitações de poder; remédios que são providenciados através da exigência de que o mesmo poder intervenha de modo protetor".[72] Daí decorrem os principais questionamentos que permeiam as nossas mentes desde o princípio desse trabalho: será esta realmente a época adequada para o estabelecimento de um TPI nos termos do Estatuto de Roma? Por quê? A quem verdadeiramente interessa a instituição do TPI e seus mecanismos? Quais são os reais e derradeiros propósitos incutidos na decisão de aceitar ou não a jurisdição universal do TPI?

Esses ainda não são questionamentos conclusivos e, conseqüentemente, apenas incitam o aparecimento de outras questões. Assim, será necessário o desenvolvimento de um raciocínio que deve primeiro passar pelo reconhecimento e definição dos problemas conceituais envolvidos na imputação da jurisdição do TPI. A definição do conceito de justiça (ou direito) certamente representa uma premissa central na elaboração de qualquer argumento neste sentido.

A filosofia política kantiana estipula a liberdade como sendo o único direito inato, ou seja, o único valor que é transmitido pela natureza independentemente de qualquer ato jurídico. Para Kant a liberdade, "na medida em que a sua realidade é demonstrada por uma lei apodíctica da razão prática, constitui a pedra angular de todo o edifício de um sistema da razão pura" e, portanto, incitaria reflexões acerca da possibilidade da moralidade na razão teórica "de que o conhecimento moral tem uma índole toda especial. Trata-se de um saber,

[71] O período original refere-se ao 'problema filosófico dos direitos do homem'. In: BOBBIO, Norberto. **A Era dos Direitos.** Tradução de Carlos Nelson Coutinho. (Rio de Janeiro: Ed. Campus, 1992), p.24.
[72] Idem, p. 6. Obs.: Grifo em negrito do autor.

que é conhecimento, mas totalmente diverso do saber teórico, porque a necessidade que se implica o dever moral é absoluta e sem condições". [73]

Como resultado dessas afirmações de Kant é possível concluir que o homem reúne as condições de possibilidade para se desvencilhar de um autocontrole tutorial sobre si mesmo e avançar rumo à anarquia. Contudo, isso não implica que o indivíduo irá se desvencilhar: neste sentido constatamos a tensão entre idéia e realidade que regula o progresso da humanidade. Assim, o uso do conceito de liberdade como idéia transcendental é apenas "regulativo e não constitutivo, porque a ele não se pode dar qualquer esquema de sensibilidade correspondente e nem um objeto em concreto".[74] É exatamente dessa maneira que se pode conceber a liberdade como critério universal de reconhecimento do que é justo ou injusto. Ora, a liberdade como autonomia do querer é sintetizada no imperativo categórico da Fundamentação da Metafísica dos Costumes: "age de tal maneira que a máxima de tua ação possa tornar-se uma lei universal".[75] Assim, Kant condiciona o indivíduo que quiser ser livre a orientar-se por esta maneira de agir moral e interior. Como descrito por Linklater, Kant "considerava a possibilidade de que o poder estatal seria subjugado pelos princípios da ordem internacional e que, no seu tempo, a ordem internacional seria modificada até que estivesse em conformidade com os princípios da justiça cosmopolita".[76]

Kelsen parte de uma teoria que assume como pressuposto a inexistência de valores absolutos que regulam o direito vigente, reconhecendo apenas a legitimidade de valores relativos: para ele a valoração do direito positivo não deve ser fundada na dependência da sua relação com a justiça. A partir dessa afirmação podemos relacionar Kelsen numa proposta diametralmente oposta à tese universalizante do jusnaturalismo, pois ele "sustenta que os únicos juízos cuja verdade ou falsidade é determinável racionalmente são (com exceção dos juízos analíticos, cuja verdade está determinada por sua estrutura lógica) aqueles que tem conteúdo empírico".[77] Assim, a norma fundamental de sua teoria é uma pressuposição lógico-transcendental, com o claro objetivo de validar a ordem jurídica

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[73] KANT, Immanuel.**Crítica da razão pura.** Tradução de Alex Martins. (São Paulo: Ed. Martin Claret, 2002) Obs.: Grifo em negrito do autor.
[74] Idem.
[75] Ibidem.
[76] LINKLATER, Andrew. "What is a Good International Citizen?" In: KEAL, Paul. (Ed.). **Ethics and Foreign Policy.** (Canberra: Allen & Unwin in association with Australian National University, 1992), p.36. Obs.: Tradução do Autor.
[77] NINO, Carlos S. **Introducción al análisis del derecho.** (Buenos Aires: Ed. Astrea, 1984, 2ª. Ed.), Cap. 1. Obs.: Tradução do autor.

positiva. Então, o sistema jurídico é visto como hierarquia de normas autorizantes, derivadas de uma primeira norma posta, que tem como fundamento último a norma hipotética fundamental, também jurídica. Com efeito, a partir deste caráter lógico "o que é necessariamente comum a todos os sistemas morais possíveis não é outra coisa senão a circunstância de eles serem normas sociais, isto é, normas que estatuem, que dizer, estabelecem como devida (devendo ser) uma determinada conduta de homens referida – imediata ou mediatamente – a outros homens. O que é comum a todos os sistemas morais possíveis é a sua forma, o dever-ser, o caráter da norma".[78]

Diante do problema da certeza e segurança jurídica posto pelo modo de produção capitalista, Kelsen restringiu o idealismo de Kant, propondo uma ciência neutralizada de valores. Para tanto, levou às últimas conseqüências a análise estrutural e lógica dos sistemas normativos, contrapondo a ciência do direito à valoração proposta pelos jusnaturalistas (kantianos). Entretanto, exatamente por causa dessa preocupação com a neutralidade, a teoria kelseniana revelou sérias limitações epistemológicas: o ceticismo ético do juspositivismo possibilitou um relativismo (em termos do conceito de justo e injusto) que serviu a regimes ditatoriais (constitucionalizados ou não).

Já Habermas concebe a sua ética discursiva baseada nos pressupostos kantianos universalistas anteriormente expostos. Para compreender a ética discursiva habermasiana é preciso lembrar que ela é apenas uma proposição derivada da sua teoria do agir comunicativo (ou ação comunicativa), o qual ocorre "(...) quando as ações de outros atores participantes não ficam coordenadas através de cálculos egocêntricos de interesses, mas através do entendimento (Verständigung). Na ação comunicativa os agentes não se orientam primariamente por ou a seu próprio êxito, mas sim pelo entendimento".[79] Então, naqueles momentos em que um princípio, uma norma social ou instituição perde legitimidade ou quando o consenso é anulado, a ética discursiva entra em cena – como uma tentativa de, consensualmente, fixar novos princípios ou arranjos institucionais. "De acordo com a ética discursiva, acordos políticos, leis ou configurações institucionais recém-estabelecidas,

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[78] KELSEN, Hans. "Teoria Pura do Direito". (São Paulo: Ed. Martins Fontes, 1987) Apud AVERSA, Marcelo. **A filosofia da história de Kant em Norberto Bobbio.** 1997. 32f.. Dissertação (Graduação em Direito). Faculdade de Direito, Pontifícia Universidade Católica de São Paulo. pp. 10-11. Resumo disponível em http://www.pucsp.br/^filopuc/inicia.htm, Acesso em 20/11/2003.

[79] HABERMAS, Jürgen. **Teoria de la acción comunicativa: complementos y estudios previos.** Traducción de Manuel Jimenez Redondo. (Madrid: Ed. Cátedra, 1994, 2ª. Ed.), p. 385. Versão espanhola. Original em alemão. Obs.: Tradução do autor.

somente podem ser consideradas válidas se puderem receber a aprovação de todos aqueles que serão afetados pelas mesmas".[80]

Estabelecidas as teorias em relação à origem e definição do direito, ao relacionarmos as assertivas de Kant, Kelsen e Habermas com a parte II do Estatuto de Roma fica evidente que esse se apresenta extremamente simpático aos ideais universalistas kantianos.

Por conseguinte, a decisão de um Estado assinar ou não o Tratado pode deixar transparecer uma política externa que claramente opta por ideais liberais ou humanitários. A posição liberal é uma síntese do universalismo medieval dos jusnaturalistas e o particularismo de um contrato entre empregador e empregados: na Declaração dos Direitos do Homem e do Cidadão (da Revolução Francesa), por exemplo, temos o universalismo do Artigo 1 – Homens nascem e permanecem iguais perante a lei – contrastando com o Artigo 3 – A nação é essencialmente uma fonte de soberania – tipicamente particularista.

Nesse caso, os defensores da diferença argumentam que a lei internacional, da forma como está redigida (e.g. no Estatuto de Roma), já representa uma expressão pura da dominação de uma cultura sobre as outras: o Ocidente e seus ideais 'universalistas' na realidade escondem um desejo implícito (explícito, em alguns casos) de ampliar as fronteiras de seus mercados através da irradiação dos valores e costumes de sua cultura por todo o mundo. "O universalismo é destrutivo não somente em relação às diferenças indesejáveis entre sociedades, mas [também] de diferenças desejáveis e desejadas".[81]

Vários problemas de ordem global – como o superaquecimento da atmosfera terrestre, a poluição crescente nas nascentes de água potável ou as conseqüências de atos de grupos terroristas de caráter planetário – têm aumentado o sentimento de insatisfação de algumas populações em relação ao fato de que a doutrina predominante hoje no direito internacional ainda mantém uma estrutura voltada para o ideal kantiano de universalismo.

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[80] HABERMAS, Jürgen. **Moral Conciousness and Communicative Action.** Translated by Christian Lenhardt and Shierry Weber Nicholsen. (Cambridge: Cambridge University Press, 1990), pp. 65-66. Versão inglesa. Original em alemão. Obs.: Tradução do autor.

[81] BROWN, Chris. "Human Rights: Universalism challenged." In: BAYLIS, John. e SMITH, Steve. **The Globalization of World Politics. An Introduction to International Relations.** (Oxford: Oxford University Press, 2002) Cap. 28, pp. 610-61. Obs.: Tradução do Autor.

O TPI apresenta disponíveis, neste sentido, vários mecanismos de proteção ao princípio da soberania dos Estados. Um exemplo claro é a necessidade de uma autorização - por parte do Estado que detém a custódia de um acusado, seja ele Estado-Parte ou não - para que este possa vir a ser julgado no Tribunal Penal Internacional. Entretanto, rememorando, para iniciar uma investigação (não um julgamento), nada disso se faz necessário: o próprio Promotor pode, unilateralmente, decidir investigar um caso até reunir as provas mínimas para testar a sua admissibilidade junto à câmara de admissão de casos.

Finalmente, essa configuração de 'forças' pode, segundo uma teoria neo-medieval (que já encontra um ´quase´ exemplo concreto na atual estrutura da União Européia), estabelecer uma ordem política ideal, onde os indivíduos são governados por um sem número de autoridades sobrepostas. "De acordo com este modelo de ordem mundial, o Estado transferiria alguns poderes para as instituições internacionais que se encarregariam dos problemas globais, e transferiria outros poderes para as regiões internas aonde o sentimento de identidade cultural distinta permanece forte.(...) Nenhuma dessas autoridades reinaria suprema, nenhuma dessas lealdades seriam absolutas. Se essa visão normativa algum dia se aplicará a todas as pessoas do mundo é um ponto discutível".[82]

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[82] LINKLATER, Andrew. "Globalization and the transformation of political community: The changing nature of political community." In: BAYLIS, John. e SMITH, Steve. **The Globalization of World Politics. An Introduction to International Relations.** (Oxford: Oxford University Press, 2002) Cap. 29, p. 627. Obs.: Tradução do Autor.

V. CONCLUSÃO

Considerando-se a evolução do Direito Internacional e de seus órgãos de aplicação, desde o início do século passado até os dias de hoje e, especialmente em relação aos direitos humanos, é possível inferir que esse mesmo direito apresenta hoje regras que suportam duas definições concorrentes para si próprio: ao mesmo tempo que alguns o vêem como um tipo peculiar de norma fundamental universal, detentor de uma supremacia sobre as leis nacionais e, eventualmente, o pilar de sustentação de um futuro governo internacional, outros enxergam-no apenas como uma norma programática, válida para um mundo politicamente dividido em um grande número de Estados soberanos.

Diante dessa ambigüidade que percorre a história, pensadores como Norberto Bobbio buscam a legitimação de um processo de universalização dos direitos do homem[83] (o qual, por analogia, pode ser relacionado ao fio condutor *a priori* do progresso da humanidade instituído por Kant) através da utilização dessa linha evolutiva como um parâmetro crítico das instituições políticas. Uma crítica ao uso retórico dos direitos do homem, os quais, na atualidade, são freqüentemente proclamados e constantemente não efetivados.

Por outro lado, encontramos autores como Robert Cox, que apesar de concordar com a estrutura dialético-evolutiva proposta por Bobbio, acrescenta um elemento normativo a esta, ao admitir que as estruturas que compõem uma organização social também são formadas socialmente, isto é, "tornam-se parte do mundo objetivo em virtude da sua existência na intersubjetividade dos grupos relevantes"[84]. Assim, para ele a "história gera a teoria; a teoria não é o conhecimento absoluto, não é uma revelação final ou inteireza do conhecimento racional das leis históricas, mas um conjunto de hipóteses de trabalho viáveis"[85].

Relacionando essas hipóteses no âmbito das relações internacionais, Linklater afirma que o modo pelo qual as comunidades políticas ao redor do planeta podem estar

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[83] Para Bobbio, "os direitos do homem nascem como direitos naturais universais, desenvolvem-se como direitos positivos particulares, para finalmente encontrarem sua plena realização como direitos positivos universais. A Declaração [Universal dos Direitos do Homem, 1948] contém em germe a síntese de um movimento dialético, que começa pela universalidade abstrata dos direitos naturais, transfigura-se na particularidade concreta dos direitos positivos, e termina na universalidade não mais abstrata, mas também ela concreta, dos direitos positivos universais." In: BOBBIO (1992), p. 30.
[84] COX (2000), p. 191.
[85] Idem, p. 187.

evoluindo ou deveriam evoluir deu origem a três correntes distintas de pensamento teórico-normativo:

Cosmopolitanismo

"Os cosmopolitanistas argumentam que soluções para os problemas globais (como, por exemplo, a destruição do meio ambiente) favoreceriam a prosperidade da humanidade como um todo"[86]. Autores na área do Direito internacional que seguem esta linha de pensamento afirmam que somente uma comunidade internacional organizada de forma coesa, unida, seria capaz de defender adequadamente as vítimas de crimes de guerra e crimes contra a humanidade, independentemente da localização dessas vítimas ao redor do globo.

Pós-Modernismo

"Todas as formas de conhecimento – incluindo aquelas que são destinadas a contribuir para a liberdade humana – são potencialmente perigosas"[87]. Os pós-modernistas acreditam que distinções entre aqueles que possuem a verdade e aqueles que vivem na ignorância, podem levar a casos de dominação dos primeiros sobre os últimos. Por exemplo, em teses teóricas como o cosmopolitanismo - em que a existe uma diferença entre aqueles que pensam globalmente e aqueles que permanecem apegados à comunidades particulares – a corrente de pensamento pós-modernista enxerga uma grande possibilidade de submetimento da cultura ocidental sobre as outras. Este argumento repercute na cultura de universalização dos direitos humanos (e, conseqüentemente, no suporte à jurisdição universal do TPI) e das intervenções humanitárias, tão defendidas pelos autores ocidentais.

Comunitarismo

Comunitaristas alegam que os seres humanos não são movidos por noções intrínsecas de humanidade e valores universais. Defendem esse ponto de vista sob o argumento de que é exatamente através da condição de membro de uma comunidade particular que os indivíduos adquirem os seus direitos e deveres fundamentais e que, portanto, eles não dariam importância e nem seriam leais a uma ordem mundial cosmopolitanista, onde o culto à diferença existente entre suas atuais identidades nacionais seria substituído por uma reverência à padronização, característica do status conferido por uma suposta cidadania mundial. No caso da jurisdição universal do TPI, os comunitaristas dão ênfase a possibilidade

[86] LINKLATER (2002), p. 629.
[87] Idem, p. 630.

de que essa seja apenas mais uma face do plano de instituição de uma civilização global de negócios, calcada em normas ocidentais, beneficiando os Estados expoentes no processo de globalização.

O princípio da autodeterminação dos povos procura resguardar o direito que um povo tem de constituir-se em Estado, com a total liberdade de escolha de governo e direito, sem a submissão a qualquer forma de intervenção de algum outro Estado. Celso de A. Mello ensina que a autodeterminação dos povos "é o direito do Estado de ter o governo e as leis que bem entender sem sofrer interferência estrangeira", e que ainda, num outro entendimento, é o "direito de uma população não ser cedida ou entregue a outros Estados sem o seu consentimento" [88].

Assim, segundo afirmam seus defensores, a jurisdição universal do TPI constituiria, simultaneamente, uma causa e uma conseqüência de um novo modo de se encarar as noções de justo e injusto, certo e errado, a justiça cosmopolita.

Finalmente, o órgão que hoje mais se aproximaria dessa realidade seria a Corte Européia de Direitos Humanos, a qual esta habilitada para julgar apenas Estados. Então, visto que somente o Tribunal Penal Internacional poderia julgar indivíduos – mesmo que sob uma égide teórica neo-medievalista – a possibilidade de uma ordem política-jurídica única e válida para todos os indivíduos do planeta, ainda é contestável.

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[88] MELLO, Celso D. de Albuquerque. **Curso de Direito Internacional Público**. 11. ed. (Rio de Janeiro: Renovar, 1997. 2v.). p. 414.

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ANEXO I

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

UNITED NATIONS
1998

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1
The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

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

Article 3
Seat of the Court

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

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

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

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

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

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

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

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

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

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

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

2. For the purpose of this Statute, "war crimes" means:

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

(i) Wilful killing;

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

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

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

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

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

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

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

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

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

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

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

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) 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 or her interest, and which cause death to or seriously endanger the health of such person or persons;

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

(xii) Declaring that no quarter will be given;

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

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

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

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

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

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

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

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

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

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

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

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

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

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

(iii) Taking of hostages;

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

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

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

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

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

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping

mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

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

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

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

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

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

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

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

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

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

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

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

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

(b) The State of which the person accused of the crime is a national.

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

Article 13
Exercise of jurisdiction

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

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

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

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she

deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

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

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

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

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

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

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a

ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

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

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

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

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

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21
Applicable law

1. The Court shall apply:

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

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

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

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by

analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

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

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

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

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

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

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

3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

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

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure

laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at

least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

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

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

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

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

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

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

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

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

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

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

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

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance

with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

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

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

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

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

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

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

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

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

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

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by

such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

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

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

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

Article 49
Salaries, allowances and expenses

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

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

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

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under

this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:
(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:
(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

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

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

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

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2 . (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are

met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or

withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69

Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86
General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of

the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

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

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for

conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the

Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or

course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of
sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106
Supervision of enforcement of sentences and

conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112
Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113
Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to

article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the

category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of

any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.