Articles

United Nations Diplomatic Conference to Adopt the Statute Establishing the International Criminal Court

By Dr A Rohan Perera, Legal Adviser, Ministry of Foreign Affairs, Sri Lanka

Historical Background

Since the aftermath of the Second World War, the international community has demonstrated an active interest in evolving a legal mechanism for the exercise of international criminal jurisdiction in respect of a category of crimes which came to be regarded as "international crimes". The International Law Commission, from its very first session, was required to deal with the question of the establishment of an International Criminal Court, in the context of its work on the preparation of a draft Code of Offences against the Peace and Security of Mankind.[1]

The General Assembly of the United Nations which had requested the International Law Commission to study the possibility of establishing a permanent international criminal court, however, decided to postpone consideration of the draft code on the basis that the draft as formulated by the Commission, raised problems closely related to the question of the definition of "aggression" which, at the time, was being dealt with by a Special Committee of the United Nations. It was only in 1974 that the UN General Assembly adopted the "Definition of Aggression" by consensus, on the basis of the recommendation of the Special Committee.

Thereafter, it was in 1991 that the UN General Assembly decided to invite the Commission, to further consider and analyse, within the framework of the formulation of the draft Code of Offences, the issues relating to an international criminal jurisdiction, paying particular attention to the proposals made in the General Assembly for the establishment of an international criminal court or other international trial mechanism. This was the outcome of an initiative taken in the General Assembly by Trinidad and Tobago on the question of an international criminal jurisdiction in the context of transnational crimes such as international drug trafficking.

Certain developments in the international scene, both political and legal, acted as a catalyst to give an impetus to the work of the Commission. The end of the Cold War and the consequent easing of international tensions spawned by the super power rivalry, generated a revival of interest in the idea of establishing an International Criminal Court for the prosecution of serious crimes of

international concern. Further, the post Cold War developments in the former Yugoslavia, had brought to the surface the need to address the question of international responsibility of individuals for war crimes and crimes against humanity. These developments led to the creation of an *ad hoc* tribunal for crimes against international humanitarian law committed in the former Yugoslavia, soon followed by another in respect of Rwanda. However, the creation of *ad hoc* tribunals in these instances by the Security Council, the principal political organ of the United Nations, made these institutions suspect in the eyes of some, as institutions administering *ex post facto*, "Victors Law". It was in this context that the establishment of an International Criminal Court came to be perceived as a preferred institution to the creation of *ad hoc* tribunals.

Another development which was of significance to the process towards the establishment of an International Criminal Court was the Lockerbie dispute between Libya and the United States/United Kingdom. This case gave rise to fundamental issues which questioned the very basis of the "extradite or prosecute" regime in respect of grave international crime, namely, non-acceptance of the judicial system of a requested State by a requesting State in cases where a request for extradition is not granted. The view that an international trial mechanism in the form of an independent International Criminal Court would help to fill a jurisdictional vacuum, in situations where the requested State refuses to extradite its own nationals and where the requesting State clearly has no trust or confidence in the judicial system of the requested State, began to gain increasing attention.[2]

Work of the International Law Commission

The structure of the proposed Court as set out in the Report of the Working Group of the International Law Commission reflected a flexible and pragmatic approach to the establishment of an International Criminal Court, taking due account of the fundamental concerns of States.[3] The Preamble of the ILC Statute stated that the court is "intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole", and emphasised the principle of complementarity that "such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or ineffective". Many States viewed the principle of complementarity as the cornerstone and a fundamental safeguard in a Statute seeking to confer powers on an International Criminal Court, the exercise of which could, in given situations, impinge on their national jurisdictions.

The International Criminal Court was to be established by a Statute in the form of a treaty entered into by State Parties. The Court would exercise jurisdiction only over individuals and its jurisdiction would be limited to "crimes of an international character", namely, (a) genocide; (b) aggression; (c) serious violations of laws and customs applicable in armed conflict; (d) crimes against humanity; and (e) "crimes established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern". In accordance with the principle of complementarity, the jurisdiction of the court was to be concurrent and not exclusive, preserving the sovereign right of a State Party either to try the

offender itself, before its national tribunals or to refer the offender to the International Criminal Court. Moreover such jurisdiction depended on the specific consent of the State Party in which the crime had been committed (territorial State) and the State of which the offender was presumed to be a national (State of nationality).

While the draft Statute prepared by the Working Group of the International Law Commission thus sought to address some of the fundamental concerns of Member States relating to the primacy of national legal systems and institutions and their sovereign right to prosecute offenders, the discussion of the draft Statute in the Sixth (Legal) Committee of the General Assembly, as well as in the Preparatory Committee of the UN established to consider the Draft Statute, resulted in the emergence of a text, which departed substantially from the International Law Commission text.

Deliberations in the Preparatory Committee on the Establishment of the ICC

Pursuant to UN General Assembly Resolution 50/46 of 11 December 1995, the Preparatory Committee on the Establishment of an International Criminal Court was convened at the United Nations Headquarters in March 1996 with the mandate: "to discuss further the major substantive and administrative issues arising out of the draft Statute prepared by the International Law Commission and taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a Convention for an International Criminal Court as a next step towards consideration by a Conference of Plenipotentiaries".[4] The deliberations of the Preparatory Committee paved the way for the convening of the United Nations Diplomatic Conference on the Establishment of the International Criminal Court in Rome, in June 1998.

The deliberations in the Preparatory Committee, leading up to the Diplomatic Conference, while resulting in a substantial departure from the position as reflected in the text prepared by the International Law Commission, left little doubt that the Diplomatic Conference will be confronted with a series of complex issues of a fundamental nature both from the legal and political point of view. Among these, difficult and protracted negotiations were anticipated with regard to the following core issues:

(a) The nature of jurisdiction to be exercised by the Court;
(b) the scope of jurisdiction of the court or crimes to be covered under the Statute; and
(c) the relationship of the court to the Security Council.

(a) *The nature of jurisdiction*

According to the original draft text prepared by the International Law Commission, the fact that a State is a party to the Statute of the Court would not, *ipso facto*, confer jurisdiction on the Court in respect of a specific prosecution. Accordingly, a State Party would have a prior right of consent in respect of a specific crime and its prosecution before the Court. This approach, known as the "opt-in" approach is based on the voluntary acceptance by State Parties of the jurisdiction of the Court and makes a distinction between acceptance of the Statute and the acceptance of the jurisdiction of the Court.

However, during the deliberations in the Preparatory Committee, a strong trend emerged in favour of conferring, what was referred to as, "inherent jurisdiction" on the Court, so that the specific consent of a State would not be required for an individual prosecution or an investigation to proceed. According to this view, the Statute should provide that all States when ratifying or acceding to the Statute would automatically consent to the Court having inherent jurisdiction in respect of the crimes to be covered under the Statute and that no further State consent would be required. The genesis of the 'inherent jurisdiction' regime was a German proposal made in the Preparatory Committee in March, 1998[5] which was based on the customary international law principle of universal jurisdiction which permits the exercise of universal jurisdiction by all States in respect of war crimes, genocide and crimes against humanity, irrespective of the place of the commission of the crime, or the nationality of the victim or the offender. The German proposal was based on the thesis that this customary international law principle was equally applicable to an International Criminal Court which would exercise jurisdiction on the basis of its acceptance by virtue of a treaty, subscribed to by the international community of States.

The view had also emerged that since the Genocide Convention of 1948 envisaged trial by an International Criminal Court, State Parties to the Genocide Convention had already accepted the inherent jurisdiction of the Court in respect of the crime of genocide. Difficulties arise, however, in attempting to extend such "inherent jurisdiction" to other crimes, particularly, in the light of the fact that the "consent principle" occupies a pre-eminent position in international law and is inextricably linked to the attributes of sovereignty of States.

A related question was that of the "trigger mechanisms" which would "trigger" the exercise of jurisdiction by the Court. Of the several mechanisms under consideration, the least controversial was the provision that the jurisdiction of the Court could only be activated by a complaint made by a State Party to the Statute. The second possible trigger mechanism envisaged the Security Council referring a "matter or situation" relating to the "crime of aggression", rather than a specific case to the Court. Thereafter the Court would investigate the matter with a view to prosecuting any crimes arising from such situations. This proposal was shrouded in controversy, given the politically controversial nature of the composition and the powers of the Security Council. The conditionality which was a part of this proposal, that the Security Council should first grant permission to the Court, before the Court could act in respect of such situations, proved to be particularly controversial, since it carried with it the potential of compromising the independence of the Court, by giving the Security Council substantial political control over the Court. Apart from the legal complexities involved in defining the crime of aggression, due account needed to be taken of Art 39 of the UN Charter which stipulates that the Security Council shall determine the existence of an act of aggression, in addressing this issue.

The third possible "trigger mechanism" of giving the Prosecutor an independent role by vesting in him "*propio motu*" power to activate the jurisdiction of the Court, irrespective of a complaint by a State was also subject to extensive debate in the Preparatory Committee.. States expressed apprehension of a possible abuse

of power, on political and other grounds if the Prosecutor was vested with such extensive power. On the other hand, others argued that such an independent prosecutor was essential for the independent and effective functioning of the Court. The substance of this latter argument was the fact that the State complaint procedure and the referral by the Security Council would invariably be influenced by extra-legal, political factors, and that an alternate legal mechanism was required to ensure the independence and the effectiveness of the Court.

These issues which have a bearing on the political sensitivities of sovereign states required complex and protracted negotiations at the Diplomatic Conference.

(b) *Scope of jurisdiction – crimes to be covered under the Statute*

The view has been advanced during the Preparatory Committee meetings, particularly by the European countries, that the scope of jurisdiction of the Court should be limited to what are referred to as "core-crimes", *viz* crimes of genocide, war crimes and crimes against humanity. According to the proponents of this view, the efficacy of the proposed Court would be ensured if its jurisdiction was limited to what have been referred to as those which are "universally recognised as crimes and are firmly established in international law". This restrictive approach on the scope of jurisdiction of the Court, gave rise to apprehensions on the part of some States with regard to the practical utility and the effectiveness of the Court in combating serious international crime.

(i) *Question of the inclusion of acts of terrorism/drug-related crimes*

The International Law Commission draft included within the jurisdiction of the proposed Court "crimes established under or pursuant to the treaties listed in the Annexure to the Statute which, having regard to the alleged conduct, constitute serious crimes of international concern". This formulation of the International Law Commission draft was intended to cover crimes under existing international conventions relating to specific acts of terrorism such as the Conventions against Hijacking of Aircraft, the Convention against the Taking of Hostages, the Convention on Punishment of Crimes against Internationally Protected Persons, the Convention against Trafficking of Narcotic Drugs etc. These international Conventions which enjoy substantial adherence by Member States of the United Nations and provide for an "extradite or prosecute" regime are recognised as serious international crimes which are well established in international law.

Supporters of the "core crimes" approach argued, on the other hand, that there are already adequate arrangements for dealing internationally with crimes related to terrorism and drug trafficking and that including these in the Statute of the Court would "overwhelm it with its case work and detract from its main tasks".[6] This approach presupposes a Court with limited jurisdiction, primarily vested with jurisdiction relating to war crimes as in the case of the *ad hoc* tribunals which have been created in respect of the former Yugoslavia and Rwanda.

It would be relevant to note in this regard that the above argument would apply even with respect to the "core crimes" such as the crime of genocide or war crimes. The Genocide Convention itself provides for the "extradite or prosecute" regime for perpetrators of the crime of genocide as in the case of the Anti-Terrorism

Conventions. The Geneva Convention of 1949 provides "adequate arrangements" by requiring State Parties to bring war criminals before their own courts for prosecution or to hand them over for trial in another State. The argument to limit the jurisdiction of the Court to "core crimes" also overlooks the fact that the momentum for the establishment of an International Criminal Court was generated, in particular, by the Lockerbie incident where an act of terrorism committed against a civilian aircraft exposed the inherent weakness of the "extradite or prosecute regime" under the Anti-Hijacking Conventions, ie the Libyan refusal to extradite the offenders to the United States or United Kingdom on the ground that a fair trial could not be ensured and on the other hand, the unwillingness on the part of the United States and United Kingdom to accept the exercise of jurisdiction by the Libyan courts, on the ground that there was no credibility in the judicial system of a "terrorist" State.

It is in this scenario that the need for the creation of an independent International Criminal Court began to be pursued as a realistic option, to fill a judicial vacuum which would otherwise exist and to ensure that the perpetrators of terrorist crimes of serious international concern should not go unpunished. It is also ironical that the issue of an international trial mechanism which had been lying dormant over the years was revived in the United Nations in the context of the proposal made by Trinidad and Tobago for the establishment of an international criminal court for the purpose of combating drug trafficking.

It was therefore felt that the exclusion of such serious international crimes that are well-established in international law, by virtue of their incorporation in generally accepted multilateral conventions, from the jurisdiction of the proposed Court would seriously erode the practical utility of the Court and would give credence to apprehensions expressed by some that the Court would be an "expensive irrelevance", unless vested with substantial jurisdiction.

(ii) *Crime of aggression*

The Preparatory Committee could not reach agreement on whether or not the crime of aggression should be included within the jurisdiction of the Court. While it was generally recognised that the crime of aggression was one of the most serious international crimes which could lead to a spiral of other serious war crimes, the difficulties encountered in the Preparatory Committee with regard to the inclusion of this crime in the Statute of the Court was two-fold. The first, was the difficulty in formulating a legal definition of the crime satisfying the high threshold of specificity required in defining international crimes and in compliance with the well recognised principle *nullum crimen sine lege* (no crime without pre-existing law). It was generally recognised in this context that the "definition" contained in UN GA Res 3314 was more in the nature of guidelines for the use of the Security Council. Neither does the UN Charter provide a definition of aggression, although Charter Articles contain specific references to aggression, which in the final analysis would be determined by the Security Council on an *ad hoc* basis, governed primarily by political considerations.

The second factor was the primary responsibility vested in the Security Council in determining a situation of aggression by virtue of Art 39 of the UN Charter and

its possible implications on the International Criminal Court jurisdiction with regard to determining individual criminal responsibility for the crime of aggression. This factor brought to the surface the complex relationship between the Court and the Council, a subject of considerable discussion at the Rome Conference.

(iii) *Jurisdiction of the Court over internal conflict situations*

The idea that the Court should have jurisdiction over serious violations of humanitarian law both in international and non-international armed conflict situations which would be treated as war crimes under the Statute gained ground during the Preparatory Committee deliberations. Serious violations of humanitarian law would include grave breaches of the Geneva Conventions of 1949 and the Additional Protocol I of 1977 relating to international armed conflicts, as well as serious violations in non-international armed conflicts which include violations of Common Art 3 of the Geneva Conventions and Additional Protocol II of 1977. It has been observed by the proponents of this view that the Court should have jurisdiction over war crimes committed in internal conflict situations, since most war crimes today occur in internal conflict situations such as in Bosnia and Rwanda and that unless the Court is vested with jurisdiction over such crimes, the objectives of the establishment of the Court could be defeated.

The discussion on this item revealed its inherent complexity as well as the political sensitivities involved. While those who support the jurisdiction of the Court being extended to internal conflict situations wish to ensure that individuals found to be charged with grave violations do not enjoy impunity, particularly, where there is a failure at the national level to investigate and discipline service personnel, some States have argued that the International Criminal Court cannot be an instrumentality for interfering with the responsibility of a State to investigate and discipline their service members who violate the laws of armed conflict. It is thus seen as an erosion of the sovereign attributes of a State.

On the other hand, the Statute also envisages the specific situation of the jurisdiction of the Court being exercised where, either a State is unwilling or unable to genuinely carry out an effective investigation or prosecution, particularly in situations where there is a total or partial collapse or unavailability of the national legal system. The collapse of such national institutions during recent events in the former Yugoslavia and in Rwanda led to the establishment of *ad hoc* criminal tribunals by the Security Council. Problems arise however, where these instances are cited as creating a legal precedent for vesting the International Criminal Court with jurisdiction over violations of human rights or humanitarian law in all internal conflict situations, particularly, where there are functioning national legal systems and institutions.

(c) *The relationship between the Court and the Security Council*

The problems encountered in the Preparatory Committee with regard to the relationship between the Court and the Security Council surfaced at several levels. As already noted above, these difficulties relate to the question of the Security Council triggering the jurisdiction of the Court, independent of a complaint made

by a State, and the overriding power of the Security Council to determine whether a situation of aggression has occurred in terms of Art 39 of the UN Charter. A related issue which arose in the Preparatory Committee deliberations which tended to highten the "tension" in the relationship between the Court and the Security Council, was the question of the "veto" or the power of deferral of the Council over proceedings instituted in the International Criminal Court, where the Security Council is already "seized" of a situation.

On the question of the veto power, the proposals made in the Preparatory Committee ranged from the possibility of a veto on International Criminal Court proceedings once an issue is on the agenda of the Security Council, to that Court proceedings being suspended as long as a situation is being "actively dealt" with by the Security Council. These proposals gave rise to problems of interpretation as well as to the question of whether it would be the International Criminal Court or the Security Council which would determine whether a matter is being "actively dealt" with by the Council. A further option that was discussed was a proposal that would enable the International Criminal Court to commence proceedings 12 months after the Security Council had determined that a situation of aggression had arisen in terms of Art 39 of the UN Charter, which tantamounted to a 12 months moratorium on the powers of the International Criminal Court.

In the final analysis efforts made in the Preparatory Committee focused on the need to strike an acceptable balance between the functions of the Security Council as the primary organ for the maintenance of international peace and security under the UN Charter and the independence and effectiveness of the proposed Court, if it were to avoid political abuse and to achieve the objectives which the international community had envisaged for it.

UN Diplomatic Conference on the Establishment of an International Criminal Court

It was against the background of the comprehensive deliberations in the Preparatory Committee covering the period 1996/98 that the United Nations Diplomatic Conference on the Establishment of an International Criminal Court convened in Rome on 15 June 1998. As anticipated, the Rome Conference had to grapple with, over a period of five weeks, until the adoption of the Statute on 17 July 1998, a range of complex legal and political issues. For the purposes of the present article, however, its scope would be limited to an examination of some of the critical issues which arose for discussion in the Rome Conference, already adverted to in a preliminary manner in the preceding sections, in the context of the Preparatory Committee deliberations. These would be –

(a) jurisdictional issues, covering both acceptance of jurisdiction as well as crimes within the jurisdiction of the Court;
(b) the role of the Security Council;
(c) the powers of the Prosecutor; and
(d) issues of admissibility.

As the Rome Conference entered its final phase, the Committee of the Whole had before it, first a "Discussion Paper"[7] and thereafter a Revised "Bureau Proposal"[8] both prepared by the Bureau of the Conference on the basis of the

discussions which had taken place in the Committee, in an effort to reconcile divergent positions which had emerged on the core issues. These documents addressed Part 2 of the Statute relating to Jurisdiction, Admissibility and Applicable Law.

(a) *Jurisdictional issues*

Acceptance of jurisdiction

The Bureau Proposal reflected two distinct trends which had emerged in the Conference with regard to the acceptance of the jurisdiction of the Court by States. In Option I, it provided for the automatic or inherent jurisdiction of the Court in respect of all three "core crimes" covered by the Statute. Thus Option I of Art 7 *bis* provided that "*a State which becomes a Party to the Statute thereby accepts the jurisdiction of this Court*" with respect to the crime of genocide, crimes against humanity and war crimes. This was the preferred option of a substantial number of countries which, since the Preparatory Committee meetings had banded themselves as the "Like Minded Group" and comprising the West European group and a number of African countries.

Option II of this Art reflected the contrary trend by providing for automatic jurisdiction *only* for the crime of genocide and a specific *opting-in* by States in respect of the crimes against humanity and war crimes. Accordingly, a State which becomes a Party to the Statute would thereby automatically accept the jurisdiction of the Court with respect to the crime of genocide. With regard to crimes against humanity and war crimes, however, a State Party to the Statute, either –

(i) by lodging a declaration with the Registrar at the time it expresses its consent to be bound by the Statute; or

(ii) at a later time by lodging a declaration with the Registrar,

would signify its specific acceptance of the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.

The latter option reflected the concerns expressed by a number of countries with regard to the inherent jurisdiction sought to be conferred on the Court, overriding State consent. These countries sought to limit the inherent jurisdiction of the Court only to the crime of genocide and preferred a regime which required State consent with regard to other crimes by opting in. This position was sought to be justified on the basis that the legal clarity which existed under the Genocide Convention, which envisaged the exercise of jurisdiction by a future international criminal tribunal, did not necessarily extend to other crimes.

These concerns were clearly articulated in the Committee of the Whole by the Leader of the United States delegation, Ambassador David Scheffer:

> ...There are too many Governments which would never join this treaty and which, at least in the case of the United States, would have to actively oppose this Court, if the principle of universal jurisdiction or some variant of it were embodied in the jurisdiction of the Court.
>
> We have long believed that an effective International Criminal Court must recognise the realities of State practice and the potential for near universal State participation, provided the Court does not straightjacket States at its inception into an all-or-nothing acceptance of jurisdiction.

> Automatic jurisdiction over all the core crimes might satisfy the most optimistic requirements of theory, but it is a recipe for limited participation in the Court and in the result, an ineffective Court".[9]

As the deliberations at the Rome Conference progressed, it became evident that there was substantial opposition to the "opt-in" approach based on State consent, referred to by some delegations, rather simplistically as "jurisdiction *à la carte*". Those who opposed the State consent regime based their argument that customary international law, as reflected in the Nurnberg Principles, recognised the exercise of universal jurisdiction in respect of acts of genocide, crimes against humanity and war crimes. Any dilution of this position was generally viewed as a retrograde step. For instance, the International Committee of the Red Cross (ICRC), invoking the principle of universality, stressed the importance of the International Criminal Court being vested with automatic jurisdiction over war crimes and crimes against humanity and not only over the crime of genocide.

"By virtue of the principle of universal jurisdiction, every State has the right, and in many instances the duty, under international law to prosecute or extradite suspected war criminals. This principle reaffirms the fundamental rule that war criminals are not immune from prosecution, wherever they have committed their crimes and whatever their nationality. Any form of additional consent, such as an opt-in precondition for the exercise of the Court's jurisdiction, gives the impression that States can lawfully protect war criminals from prosecution. This would be a retrograde step for international law and would surely limit the Court's effectiveness".[10] This approach was supported by a number of Governments representing the "Like-Minded Group". These countries sought to justify the extension of the principle of universality to the exercise of jurisdiction by the Court, on the basis that the International Criminal Court was to be established through the adoption of an international treaty receiving the general consent of States and therefore should not be placed in a position any different to that applicable to States. This was also the rationale underlying the German proposal. The supporters of this approach also perceived an "opt-in" approach as substantially eroding the effectiveness of the Court for the reason that the subject matter jurisdiction of the Court could consequently vary from State to State, depending on the specific crimes in respect of which a particular State has opted in.

The Statute of the Court as adopted at the Rome Conference[11] reflects Option I preferred by the "Like-Minded Group" and provides for inherent jurisdiction in respect of all crimes covered in Art 5 of the Statute. Thus a State by becoming a Party to the Statute, *automatically* accepts the jurisdiction of the Court in respect of the crime of genocide, crimes against humanity and war crimes.

The text of the draft Statute considered by the Rome Conference also contained several options with regard to the pre-conditions that are required to be satisfied before the exercise of jurisdiction by the Court, where a situation has been referred to the Court by a State Party or where the Prosecutor has initiated an investigation. The least controversial were the pre-conditions for the exercise of jurisdiction by the Court in respect of the crime of genocide, in view of the generally accepted provisions of the Genocide Convention.

Thus Art 7 of the draft Statute provided that the Court may exercise its jurisdiction with respect to the crime of genocide, if one or more of the following States are Parties to the Statute, namely:

(a) the State on the territory of which the crime was committed or if the crime was committed on board a vessel or aircraft, the State of registration of the vessel or aircraft (Territorial State/State of Registration);
(b) the State that has the custody of the accused (Custodial State); or
(c) the State of nationality of the accused or the victim (State of nationality).

However with regard to the crimes against humanity and war crimes, the Bureau Proposal contained several options which took into account divergent views expressed in the Committee of the Whole. Option I of the Bureau Proposal required that *one or more* of the following States be parties to the Statute, as pre-conditions for crimes against humanity and war crimes, namely:

(a) Territorial State/State of Registration;
(b) Custodial State;
(c) State of nationality of the accused/victim.

Option II of the Proposal reflected the *cumulative approach* preferred by some delegations in terms of which pre-conditions for the exercise of jurisdiction in respect of crimes against humanity and war crimes required that *both* the *territorial* as well as the *custodial* State be parties to the Statute. Option III made provision requiring the *State of nationality* of the accused/suspect being a party to the Statute.

The Statute adopted at the Rome Conference reflects a "compromise" solution in that it provides for the *territorial State* or the *State of nationality* of the accused being parties to the Statute as pre-conditions for the exercise of jurisdiction by the Court in respect of crimes within the jurisdiction of the Court.[12]

(ii) *Crimes within the jurisdiction of the Court*

The Discussion Paper and the Revised Bureau Proposal, both maintained the distinction sought to be made in the Preparatory Committee deliberations and during the first phase of the Rome Conference, between what were referred to as "core crimes" namely, the crime of genocide, crimes against humanity and war crimes on the one hand and "treaty crimes" on the other. The Discussion Paper, listed as an option to be decided by the Conference "Terrorism, Drug Trafficking, United Nations and Associated Personnel" under the heading "Treaty Crimes". Similarly, "The Crime of Aggression" was also separately listed as an option to be decided by the Conference.

Acts of terrorism and drug-related crimes

The divergency of approach on the inclusion of acts of terrorism and drug-related crimes, which had characterised the deliberations in the Preparatory Committee continued in the discussions of the Committee of the Whole.

During the early phase of the Rome Conference, several countries, without prejudice to their preferred position as reflected in the International Law Commission draft, which included the above crimes as "crimes established under or pursuant to treaty provisions", proposed that acts of terrorism should also be

included in the Statute of the Court as a crime against humanity. This proposal was based on the rationale that different forms of indiscriminate use of violence, having regard to their nature and consequences, meets the threshold of gravity required for their consideration as crimes against humanity. Thus a proposal for the inclusion of acts of terrorism as a crime against humanity made by India, Sri Lanka and Turkey sought to define an act of terrorism as follows, for the purposes of its inclusion in the Statute:

> An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purpose of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime.
>
> The crime shall include any serious crime which is the subject matter of a multilateral Convention for the elimination of international terrorism which oblige the parties thereto either to extradite or prosecute an offender.[13]

Discussion of this issue in the Committee of the Whole revealed the reluctance of the "Like-Minded Group" to expand the subject matter jurisdiction of the Court beyond what were listed as "core-crimes". The principal argument which emerged in these deliberations against the inclusion of these crimes was that there was insufficient time during the Conference to examine and to define the elements of crimes other than the "core crimes" and that there was a need to avoid overburdening the Court, at least during its initial phase. The view was also expressed that the issue of the expansion of the subject matter jurisdiction of the Court could be examined by a Review Conference in the light of the experience of the Court in its initial phase.

Those advocating the expansion of the subject matter jurisdiction of the Court by the inclusion of the crimes of terrorism and drug-related crime such as drug trafficking, emphasised that these constitute the most serious crimes of international concern, with cross–border ramifications, and that the exclusion of these crimes from the Statute would constitute a serious lacuna in the jurisdiction of the Court, particularly at a time when the international community was embarking on the task of strengthening the enforcement machinery in international criminal jurisdiction.

It was also reiterated that the attempt to draw a distinction between what have been referred to as "core crimes" covering genocide, war crimes, and crimes against humanity and the so-called "treaty crimes" was without legal basis. The "core crimes" were also treaty–based, although some of these crimes may have an independent existence in customary international law. This would also be the case in some of the "treaty-based crimes", for instance aerial piracy.

As the Conference entered its final phase it became evident that the prospect of including the crime of terrorism and drug-related crimes was fast receding. In the background of this development, a proposal was submitted to the Conference by Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago, and Turkey to nominally include the crime of terrorism and drug crimes as crimes

within the jurisdiction of the Court, while leaving the definition and the elements of the crimes to be elaborated by the Preparatory Commission to be established with the adoption of the Convention.[14]

This "compromise proposal" sought to meet the argument of the "Like-Minded Group" that there was insufficient time to develop, at the Conference, elements of crimes other than the "core crimes" and therefore provided for the elaboration of the elements of the crimes by the Preparatory Commission on the basis of a mandate to be included in the Final Act of the Rome Conference.

The Conference, however, opted to leave this matter to be considered by a future Review Conference to be convened pursuant to Art 111 of the Statute, in the context of the possible future expansion of the jurisdiction of the Court. Thus the Final Act of the Conference in addressing the issue of terrorism and drug crimes states:

> ...Affirming that the Statute of the International Criminal Court provides for a review mechanism, which allows for an expansion in future of the jurisdiction of the Court,
>
> Recommends that a Review Conference pursuant to Art 111 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.[15]

The practical effect of this decision is to place vital issues of the day confronting the international community, international terrorism and drug trafficking, on the back-burner until the convening of a Review Conference at a future date. Quite apart from sending out a negative signal by the Conference, at a time when acts of terrorism are continuing unabated in different parts of the world, the failure of the Conference to address this issue in a practical and meaningful manner could also retard the universal adherence to the Convention which is essential for the effectiveness of the Court.

Crime of Aggression

The definitional difficulties surrounding the crime of aggression continued to persist during its consideration at the Rome Conference. These difficulties were compounded by the sensitive interplay of issues relating to the powers of the Security Council and the jurisdiction of the International Criminal Court respectively, in relation to the crime of aggression. These issues needed to be approached in the context of the over-riding authority vested in the Security Council by the UN Charter, and taking due account of the essentially political nature of a Council determination of a situation of aggression.

The attitude and approach of the Permanent Members of the Security Council to this issue was clearly articulated by the United States delegation which declared that there are no "realistic possibilities" to achieve a common definition of aggression. At the other extreme were countries such as Iran which referred to the crime of aggression as the "mother of all crimes." Several proposals were made which describe the crime of aggression as one carried out by an individual or individuals in a position of power strong enough to promote "the use of armed force on behalf of a State against the sovereignty, territorial integrity or political independence of a State or States".[16]

However in the face of sustained opposition by the Permanent Members, the Non-Aligned countries, in particular the Arab Group which strongly supported the inclusion of the crime of aggression, indicated its willingness to pursue a compromise path, by the inclusion of aggression as a generic crime in the Statute, pending the formulation of its elements by the Preparatory Commission or the Review Conference at a later stage.

It was thereafter, possible to reach agreement on this compromise proposal and the Final Act of the Conference now provides:

> The Commission shall prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of the Statute.[17]

Furthermore, Art 5 (2) of the Statute itself provides: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Arts 110 and 111 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations".[18] The formulation thus takes into account the sensitive issue of the relationship between the Security Council and the Court.

Although the compromise proposal on the crime of aggression had a more positive outcome than the proposal on terrorism and drug crimes, its consideration in the Preparatory Commission and the Review Conference would have to contend with, apart from the definitional issues, the complex political issues encountered in the present negotiations.

War Crimes

The draft Statute which emerged from the Preparatory Committee deliberations dealt with "war crimes" on the basis of the following categories:

(a) grave breaches of the Geneva Conventions of 1949;
(b) other serious violations of the laws and customs applicable in international armed conflicts;
(c) serious violations of Art 3 common to the four Geneva Conventions of 1949 committed in non-international armed conflicts; and
(d) other serious violations of the laws and customs applicable in non-international armed conflicts.

The Rome Conference was required to focus on two critical issues relating to the jurisdiction of the Court over war crimes, namely:

(a) the threshold for war crimes required to attract the jurisdiction of the Court; and
(b) the extension of the Court's jurisdiction to "non-international" or internal armed conflicts.

A related issue which proved to be controversial was the question of the use of indiscriminate weapons to be regarded as a war crime.

Question of threshold

The Bureau Proposal provided for two options on the threshold applicable to war crimes which reflected the general trend of the debate, both in the Committee of the Whole of the Rome Conference and in the Preparatory Committee deliberations which had preceded it. Option I provided that the "Court shall have jurisdiction in respect of war crimes *only* when committed as part of a plan or policy or as part of a large scale commission of such crimes".

This formulation reflected the view of those delegations which sought to place a high threshold on crimes to be treated as war crimes by the International Criminal Court. The formulation was designed to ensure that sporadic or isolated criminal acts would not amount to "war crimes" within the meaning of the Statute, *unless* it was part of a plan or policy resorted to in armed conflicts.

Option II, on the other hand, provided that the "Court shall have jurisdiction in respect of war crimes *in particular* when committed as a part of a plan or policy or as part of a large scale commission of such crimes".

The latter formulation sought to address the position of a substantial number of delegations who voiced their concern that the introduction of the additional element "when committed as part of a plan or policy" etc – as a mandatory requirement for the Court to exercise jurisdiction over war crimes would place a high threshold on the prosecution, which would make the Court ineffective in many cases of war crimes. Views were also expressed that this requirement was more in keeping with elements relevant to crimes against humanity and that the introduction of this element to war crimes was not justified under international humanitarian law and in fact would blur the distinction between war crimes and crimes against humanity. Thus the ICRC in a written statement expressed the view that:

> ICRC has already indicated that no such threshold exists in humanitarian law: every serious violation of the law is a war crime which States have the obligation to repress...[19]

Option II, by using the words "in particular" sought to eliminate this limiting factor in Option I. The Final Text adopted at the Rome Conference, addresses these concerns by incorporating in Art 8(1) the non-limiting formulation in Option II.[20]

Internal Conflicts

The draft Statute which emerged from the deliberations of the Preparatory Committee in December, included within the category of war crimes, crimes committed during non-international armed conflicts. Those who supported its inclusion were of the view that if the Court was to be an effective institution in prosecuting war crimes, it should necessarily be vested with jurisdiction over crimes committed in internal conflict situations, where the majority of war crimes are committed in the present day. The experience of the *ad hoc* tribunals established in respect of war crimes committed in the former Yugoslavia and in Rwanda provided the obvious rationale for this line of reasoning.

The Bureau Proposal contained two provisions in Art 5 quarter, dealing with acts committed in the course of armed conflicts not of an international character.

The first, covered a range of acts categorised under Section C, which were "serious violations of Art 3 common to the four Geneva Conventions of 12 August 1949". These acts were already covered under treaty law by virtue of their incorporation as war crimes under common Art 3 of the four Geneva Conventions, dealing specifically with acts committed during non-international armed conflicts. The objective of their inclusion in the Statute was to extend the jurisdiction of the Court to such crimes, where national judicial mechanisms fail and to thus strengthen the extradite or prosecute regime under the Conventions by providing a further option of a surrender to an International Criminal Court.

The second, was a provision listed as Section D which referred to "Other serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law". Given the general and imprecise nature of this formulation a substantial number of delegations had particular difficulties with this proposal.

The reservations of those delegations opposed to the inclusion of acts committed during internal conflict situations stemmed from concerns of a fundamental nature. The principled position taken up by a number of delegations was that the inclusion of crimes committed during internal conflict situations as war crimes, within the jurisdiction of the Court, could not be accepted where there were functioning national legal systems and institutions. According to this view, the jurisdiction of the Court could be extended to internal conflict situations *only* when there was a situation of a total or substantial collapse of national legal systems and institutions as was the case when *ad hoc* tribunals were established in the case of former Yugoslavia and in Rwanda, to deal with such extraordinary situations.

These delegations also argued that the extension of the Court's jurisdiction to all internal conflict situations in general, would also be tantamount to a contravention of the principle of complementarity, which was the underlying principle of the Statute establishing the Court as an institution complementary to national criminal jurisdiction, rather than one supplanting national jurisdiction.

Some delegations, which expressed reservations on the inclusion of internal conflicts in the Statute, however, indicated in the Committee of the Whole that they were prepared in a spirit of compromise to consider the inclusion of only the provision limited to serious violations of Art 3 common to the Geneva Conventions of 1949, (Section C) subject to a package on the Statute as a whole being adopted, namely the requirement of State consent as a pre-requisite for exercise of jurisdiction by the International Criminal Court being included and *propio motu* powers of the Prosecutor enabling him to refer cases to Court, independent of a complaint by the State, being deleted. This compromise was based on a clear preference for the inclusion of crimes which were recognised as war crimes under the Geneva Conventions and to the exclusion of "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law", which in their view did not enjoy the same degree of legal certainty as those acts covered under the Geneva Conventions.

The "Like-Minded Group" were however insistent that unless crimes committed in internal conflicts which are violations of customary international law were also covered, the jurisdiction of the Court would be unduly restricted in an area of armed conflicts of increasing relevance to contemporary events. These concerns were articulated by the ICRC in a written statement circulated at the Conference.

> ICRC considers it essential that these be included in the Statute and urges States to consider carefully the actual acts that are criminal, without reference to which treaty these may appear in. In particular, whether certain States are party or not to Additional Protocol II can be of no importance to this list as it must include actions which are violations of customary law and which are generally recognised by the international community as prohibited heinous acts".[21]

Many of the crimes listed under Section D, such as recruitment of children into the armed forces or using children to participate actively in hostilities, were sought to be included not on the basis of their incorporation in the Conventions or Additional Protocols but on the basis of general international law.

In order to address the concerns of those delegations entertaining reservations on the inclusion of crimes committed in internal conflicts within the jurisdiction of the Court, the Revised Bureau Proposal included two new provisions:

(1) Section D of this Article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

(2) Nothing in Sections C and D shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all means consistent with international law.

Although these provisions were introduced in order to address the concerns expressed by delegations on the inclusion of these crimes, the introduction of a threshold to determine which situations amounted to armed conflicts and which fell below the required threshold, created more problems than solving any.

Firstly, the reservations of delegations opposed to the inclusion of internal conflict situations stemmed from concerns of a fundamental nature, that the International Criminal Court could, in certain situations, be used as an intrusive mechanism particularly to intervene in situations within the sovereign jurisdiction of States. The extensive *propio motu* powers sought to be conferred on the Prosecutor to trigger the jurisdiction of the Court based on information, *inter alia*, from non-governmental organisations etc only served to highten these concerns. For States caught up in internal conflict situations, the wording of the second sentence of proposal (1) to determine the nature of armed conflicts to which the Article would apply, created particular difficulties. Reference to "organised armed groups" "responsible command" "control over part of its territory", which were based on the language of Art 1 of Additional Protocol II to the Geneva Conventions contained legal overtones which could be interpreted as

conferring a degree of legitimacy on dissident irregular groups engaged in an armed conflict with the State.

Secondly, this provision interpreting the applicability of Section D Art 5 quarter also had a limiting effect, in that it would cover only conflicts involving armed forces of a State and dissident armed forces or other organised armed groups and thereby excluding situations where dissident armed forces would be engaged in fighting one another. Some delegations which supported the inclusion of internal conflict situations also viewed the requirements in the new provision that these dissident armed forces or groups would have to –

(a) be under responsible command;
(b) exercise such control over part of the territory of a State as to enable them to carry out sustained and concreted military operations; and
(c) be able to implement international humanitarian law, as a highly restrictive threshold, which may preclude the Court in dealing with such crimes.

Thus the ICRC stated "The reality is that more and more States are confronted with non-international armed conflicts taking place on their territory involving a number of dissident armed groups fighting against one another or armed groups fighting against the established Government which either does not control part of the territory or does not have a proper chain of command. These types of non-international armed conflicts must also fall under the jurisdiction of the Court.

A threshold such as that found in the Bureau Proposal not only would represent a step back from existing law but would also be so restrictive that it would prevent the Court from dealing with the type of atrocities in conflicts which the world has witnessed over the years".[22]

Thus the new proposals contained in the Bureau Discussion Paper while failing to address the concerns of those who were not in favour of including internal conflicts in the Statute, also created difficulties for those who strongly supported their inclusion.

A related issue was the question of recruitment and use of children to participate in hostilities which occur primarily during internal armed conflict situations. The Bureau Proposal included the "conscripting or enlisting of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" which was listed under Section D as "serious violations of the laws and customs applicable in armed conflicts not of an international character within the established framework of international law." Given the reservations of many delegations on the far-reaching scope of this provision, which sought to cover a range of acts as violations of customary international law, a view emerged that States consider the question of internal conflicts not as a package, but with regard to the specific aspect of the use and recruitment of children in internal armed conflict situations. Some States supported this piecemeal approach, subject to an overall agreement on a State consent regime.[23]

As the negotiations progressed in the Committee of the Whole, it became evident that there was a substantial body of opinion supporting the inclusion of all acts committed in internal conflicts in its totality as contained in the Bureau Proposal, covering both violations of the Geneva Conventions and the Additional Protocols as well as customary international law. Thus Sections C and D of Art 5

quarter, as revised in the Bureau Proposal, imposing a criteria threshold to determine the situations amounting to an internal armed conflict situation, were adopted in the Final Text at the Rome Conference.[24]

The debate on this item was a reflection of both the sensitivities of governments in accepting any form of international jurisdiction in respect of internal situations, as well as an increasing recognition that internal conflicts are at the forefront of the present day international political agenda and that mechanisms providing for international criminal jurisdiction needed to address such situations.

The use of indiscriminate weapons as war crimes

Intense discussions took place in the Committee of the Whole on the issue of listing the use of indiscriminate weapons, such as nuclear weapons and landmines as war crimes. The initial Bureau Discussion Paper contained a list of weapons having an indiscriminate effect, which included nuclear weapons, blinding lasers and landmines.

It also contained a procedure with regard to the inclusion of new weapons systems by providing for "such other weapons or weapons systems as become the subject of a comprehensive prohibition, subject to a determination to that effect by the Assembly of States Parties".

The Revised Bureau Proposal omitted, particularly in the light of reservations expressed by the nuclear States, any specific reference to nuclear weapons, as well as reference to landmines or blinding laser weapons. The Conference was thus left with two options of either supporting a generic definition of prohibited weapons, which referred to weapons which caused superfluous injury or unnecessary suffering or a listing approach *without* a specific reference to nuclear weapons.

The question of a specific reference to nuclear weapons sparked off an intense political debate, with an amendment introduced by India to include the *use* of nuclear weapons as a war crime. This amendment attracted the widespread support of Non-Aligned countries who argued that it would be ironical to exclude the use of nuclear weapons from the category of war crimes, notwithstanding their inherently indiscriminate nature while including "bullets, other weapons and projectiles" etc. However some delegations viewed the proposal to include the use of nuclear weapons within the category of war crimes, as a potential "conference wrecker" given the political sensitivities involved.

The compromise which emerged in the text adopted with the Final Act reflected the following generic approach:

> Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons 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 Arts 110 and 111.[25]

The use of the words "provided that such weapons are the subject of a comprehensive prohibition" would have the effect of excluding the use of nuclear weapons from the category of war crimes in the absence of a clear prohibition on

their use *in any circumstance*, under international law.[26] The procedure for inclusion in an Annex to the Statute through recourse to the amendment procedure of the Statute, leaves the door open to future developments in this sphere.

(b) *Role of the Security Council*

The initial Discussion Paper of the Bureau contained two separate provisions on the Role of the Security Council which sought to address the concerns expressed by delegations on the vexed question of the inter-relationship between the Security Council and the Court. Option I dealing specifically with the determination of a situation of aggression provided:

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

This provision sought to strike a balance between what is essentially a political determination by the Security Council in acting under Chapter VII of the UN Charter on the question of aggression and the independent judicial role of the court in determining the question of individual criminal responsibility in such situations.

On the question of deferral by the Court, the Discussion Paper also reflected the "compromise proposal" of imposing a 12 month moratorium on the Court after the Security Council had acted under Ch VII of the Charter and requested the Court to make such deferral. Such a request would also be subject to renewal.

The debate in the Committee of the Whole, however, made it clear that given the political sensitivities involved, it was not possible for the Statute to be over-prescriptive on the question of the relationship between the Council and the Court. Some proposals were so far-reaching that they almost amounted to attempts to re-write Charter provision in Ch VII by imposing conditionalities with respect to the powers of the Security Council.

The Revised Bureau Proposal on this issue, pending a resolution of the question of including aggression as a crime under the Statute, thus focused on the compromise proposal and included a further option of providing for a moratorium "for a specified period of time" in addition to the compromise proposal which sought to impose a moratorium of 12 months.

The text adopted with the Final Act at the Rome Conference, contains the 12 months deferral of investigation or prosecution, subject to a further renewal of that request: "No investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Ch VII of the Charter of the United Nations, which has requested the Court to that effect; that the request may be renewed by the Council under the same conditions."[27]

The above formulation was necessitated, particularly, to take into account the concerns of the Permanent Members of the Council.

Propio motu powers of the Prosecutor and issues of admissibility

The *propio motu* powers sought to be conferred by the Statute on the Prosecutor to "trigger" the jurisdiction of the Court independent of a State complaint or a referral by the Security Council and issues of admissibility where a case is being investigated or prosecuted by a State at the national level, were also matters on which a substantial divergency of views prevailed until the final stages of the Rome Conference.

(c) *Propio motu powers of the Prosecutor*

Article 15 of the draft Statute seeks to vest the Prosecutor with the power to initiate investigations, *propio motu*, on the basis of information received by him on crimes within the jurisdiction of the Court. Accordingly, the Prosecutor is required to analyse the seriousness of the information received. For this purpose, the Prosecutor is empowered to seek additional information from States, organs of the United Nations, inter-governmental or non-governmental organisations, or other reliable sources.

The extensive mandate that was envisaged in the Statute for the purpose of clothing the Prosecutor with *propio motu* powers, naturally gave rise to justifiable apprehensions on the part of States, that these provisions could become a conduit for a plethora of politically motivated petitions against States made by interested individuals and organisations. The possibility of political abuse of those powers by the Prosecutor himself was also not discounted. These concerns were highlighted by the fact that the Statute sought to cover in a comprehensive manner a range of crimes in internal conflict situations, both in terms of common Art 3 situations and under general international law.

Those States who opposed the vesting of such powers on the Prosecutor argued that the Yugoslavia/Rwanda tribunal precedent cited by the proponents of the *propio motu* power concept, was inapplicable to the International Criminal Court. It was pointed out by these States that under the Statute establishing the *ad hoc* tribunals in respect of crimes committed in the former Yugoslavia, only the Prosecutor had the power to trigger the jurisdiction of the tribunal and the Statute did not provide for a mechanism for triggering jurisdiction of the tribunal on the basis of State complaints.[28] The Prosecutor was vested with such exclusive power in these instances, given the extraordinary circumstances which prevailed in Yugoslavia and in Rwanda. It was therefore argued that this precedent could not be extended to apply to all situations in general.

Those who advocated the vesting of *propio motu* power on the Prosecutor emphasised the need for an independent triggering mechanism to ensure the effectiveness of the Court, taking into account the fact that decisions by either States Parties or the Security Council whether or not to invoke the jurisdiction of the Court in a given situation, could be determined by extra-legal, political factors.

There was however recognition of the fact that the legitimate concerns of States on the possibility of political abuse of *propio motu* power needed to be addressed. Thus, the Statute adopted with the Final Act provides for a "safeguard clause" containing checks and balances against the possible abuse of such powers.[29] The safeguard clause provides for a "screening procedure" by a Pre-Trial Chamber of the Court, of the determination made by the Prosecutor.

Once the Prosecutor has concluded on a consideration of information received, that there is a "reasonable basis" to proceed with an investigation, he is required to submit to the Pre-Trial Chamber, a request for "authorisation" of an investigation together with any supporting material collected. Victims of alleged crimes may also make representations to the Pre-Trial Chamber, in accordance with Rules of Procedure and evidence to be adopted by the Court.

If the Pre-Trial Chamber, upon an examination of the request and the accompanying material, considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, it is required to authorise the commencement of the investigation. The decision of the Pre-Trial Chamber would be without prejudice to a subsequent determination by the Court with regard to the jurisdiction and admissibility of a case.

The Statute further provides that a refusal of the Pre-Trial Chamber to authorise an investigation by the Prosecutor would not preclude the presentation of a subsequent request by the Prosecutor, based on new facts or evidence regarding the same situation. Similarly, if after the preliminary examination, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, such conclusion would not preclude the Prosecutor from considering further information submitted to him regarding the same situation in the light of new facts or evidence.

Thus the Statute as adopted provides for the *propio motu* powers of the Prosecutor as a distinct and independent mechanism for triggering the jurisdiction of the Court, subject to the safeguard clause of a Pre-Trial Chamber procedure. This however, did not fully meet the concerns of those States who entertained reservations of a fundamental nature on the vesting of such power on the Prosecutor.

(d) *Issues of admissibility*

The principle of complementarity which forms a cornerstone of the Statute requires that primacy be given to national jurisdiction. Thus the Bureau Discussion Paper provides for a determination by the Court, that a case is inadmissible where –

(a) the case is being investigated or prosecuted at the national level by a State which has jurisdiction over it; or
(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.

However, the draft Statute further provides that this primacy given to national jurisdiction, must give way to the jurisdiction of the International Criminal Court when such national jurisdictions are *not* functioning in accordance with minimum international standards.

Thus the principle of primacy of national jurisdiction is displaced when the Court determines either:

(a) the State is *unwilling* or *unable* genuinely to carry out an investigation or prosecution; or
(b) the decision of the State not to prosecute a person resulted from the *unwillingness or inability* of the State to genuinely prosecute.

The draft Statute further provides specific criteria for the Court to take into account, in determining "unwillingness or inability" to prosecute a particular case. To determine "unwillingness" in a particular case, the Court would consider whether one or more of the following factors exist:

(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 in respect of the alleged crimes;
(b) there has been unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice; and
(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.

In order to determine "inability" in a particular case, the Court is required to 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.

There were concerns expressed by several delegations that some of the criteria contained in these provisions could give a handle to interested parties to use the Court in an intrusive manner, in a given situation. Particular concern was expressed that the terms "unjustified delay" and proceedings not being conducted "independently and impartially in accordance with the norms of "*due process recognised by international law*" in determining "unwillingness", could give rise to narrow and arbitrary interpretations overlooking genuine constraints in domestic legal processes. Similar concerns were expressed with regard to the phrase "total or *partial* collapse" of the national judicial system, in the criteria to determine "inability".

To accommodate some of these concerns, the phrase "in accordance with the norms of due process recognised by international law" which appeared in the original Bureau Discussion Paper was deleted in the Final Text. Similarly, the term "total or *partial* collapse" was amended to "total or *substantial* collapse" of the national judicial system.[30] Concerns remained however that these provisions, still leave open a considerable degree of latitude for a determination by the Court of "unwillingness" or "inability" to prosecute on the part of a State.

Conclusion

The Rome Conference set out to achieve a long cherished ideal sought by the international community of establishing a permanent judicial institution, dealing with individual criminal responsibility, to ensure that most serious crimes of concern to the international community as a whole should not go unpunished. It was particularly regrettable in this context that well recognised serious international crimes such as terrorism and drug trafficking, in respect of which the numerous multilateral Conventions, UN GA Resolutions and Declarations had required States to impose severe penalties, taking into account their grave nature, did not find a place in the Statute. While the pre-occupation with "core crimes" in

the background of the Yugoslav/Rwanda experience was understandable, similar horrors unleashed on innocent persons by indiscriminate acts of terrorism in many parts of the world, did not warrant the deferment of their consideration to a future Review Conference. The horrendous terrorist bombings in Nairobi and Dar es Salaam in the aftermath of the Rome Conference and the retaliatory unilateral action in Afghanistan and Sudan, only served to underline this point with telling effect.[31] The continuing developments on the "Lockerbie Crisis", in search of an independent territory to hold an "impartial" trial, is a further illustration of the irony in excluding international terrorism from the Court's jurisdiction.[32]

Heads of State or Government or the South Asian countries expressed their sense of disappointment over the non-inclusion of these crimes in the Statute of the Court at the Colombo Summit of the South Asian Association for Regional Co-operation in the following terms:

> The Heads of State or Government noted the outcome of the recent UN Diplomatic Conference on the establishment of an International Criminal Court and the fact that the Conference had not addressed such issues as the crime of drug trafficking and the crime of terrorism with its use of indiscriminate violence aimed at innocent civilians and use of weapons of mass destruction. They emphasised the need to ensure that the proposed Court should respect the sovereignty of States consistent with the principle of complementarity with national jurisdiction on which the Statute of the Court is based.[33]

The erosion of the "consent principle" which still occupies a pre-eminent position in international law, through "inherent jurisdiction" being conferred on the Court; the overriding powers of the Security Council; the legal uncertainty which prevails over the *propio motu* powers sought to be conferred on the Prosecutor and similar uncertainties which prevail on the jurisdiction sought to be conferred on the Court, on the basis of customary international law norms relating to internal conflict situations, have collectively, served to enhance apprehensions on the part of States of a possible political abuse of the Court.

As Prof Cherif Bassiouni pertinently observes in his introduction to the draft Statute of an International Penal Tribunal, prepared for the Association International De Droit Penal:

> The international community is not ready to plunge into the establishment of a new international institution whose results cannot be predictably measured, to justify the creation of another international bureaucracy with unforeseen costs. Furthermore, the fear of prosecutorial abuse, embarrassment to governments and the possibility, even if all this is avoided, of having an ineffective institution are genuine concerns that must be addressed. Conversely, there are many valid concerns that such a tribunal could fall under the control or dominant influence of one or a few governments who would use it to further their policy interests.[34]

It is in this context that the question must be raised whether the Rome Conference in its haste to adopt a Statute in some form, even with defects, pursued an approach which, in the long-run could be counter-productive. As the League of Nations initiative to establish an International Criminal Court clearly demonstrated,[35] the realisation of the idea of an independent and effective International Criminal Court requires that it must command the widest possible international acceptance and generate the trust and confidence, that the Court

would be empowered to address the grave crimes confronting the international community as a whole. Limited participation in the Court would only result in an ineffective Court.[36]

Endnotes

1. See further, A R Perera, "Towards the Establishment of an International Criminal Court", *Commonwealth Law Bulletin*, Vol 20 No.1 Jan 1994, p 298.
2. See further, A R Perera, "Order of the International Court of Justice in the Lockerbie Dispute between Libya and the USA", *Sri Lanka Journal of International Law*, Vol 4 (June 1992) p 175.
3. For Text of Draft Statute, see Report of the ILC on the work of the Forty-Fifth Session, 3 May–23 July 1993; UN GA Records, Forty–Eighth Session, Suppl No.10 (A/48/10) Annex pp 258–335.
4. Also see UN GA Res 51/207 of 17 Dec 1996; and UN GA Res 52/160 of 15 Dec 1997.
5. UN Doc A/AC 249/1998/DP2, 23 March 1998.
6. Pre-Conference Briefing Paper circulated by the Government of the United Kingdom, 18 May 1998.
7. UN Doc A/Conf 183/CI/L 53, 6 July 1998.
8. UN Doc A/Conf 183/CI/L 59, 10 July 1998.
9. Statement in the Committee of the Whole, 9 July 1998.
10. Statement of ICRC Delegation, Reported in *Terra Viva*, IPS Publication, Issue No. 23, 15 July 1998.
11. Article 12 of Final Text of the Statute for the International Criminal Court, annexed to Final Act of the Conference. See UN GA Doc A/CONF 183/CI/L76/Add 14, 16 July 1998.
12. The Statute also contains in Art 12 (3) provision, imposing specific obligations on non-State Parties:

    "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".

    Part 9 of the Statute contains comprehensive provision on general obligations to cooperate fully with the court in its investigations and prosecution of crimes within the jurisdiction of the Court.

    These provisions were the subject of criticism by some delegations as virtually obliterating the distinction between State Parties and Non State-Parties.

    Concerns have also been expressed that Art 12 read with Arts 121 and 124 of the Statute could create a situation where non-Parties to the Statute assume greater obligations than State Parties. According to Art 124, a State on becoming a Party to the Statute, may declare that for a period of 7 years after the entry into force of the Statute for that State, it would not accept the jurisdiction of the Court with respect to war crimes. Further, according to Art 121 para 5, any amendment to Arts 5 to 8 of the Statute dealing with crimes within the jurisdiction of the Court will not have effect with regard to State Parties that have not accepted the addition of a new crime or change in the definition of an existing crime. Thus State Parties could invoke the above provisions to opt out of the Court's jurisdiction over the crimes in question. However, in a situation where the territorial State or the State of nationality of the accused is a State Party and has accepted the Court's jurisdiction in terms of Art 12, a non-Party will not be able to invoke the same grounds to refuse the Court's jurisdiction over the crimes in question.

See the statements of the Representatives of the United States and the People's Republic of China in the Sixth Committee at the Fifty-eighth Session of the United Nations General Assembly, October 1998, Agenda Item 153, The Establishment of an International Criminal Court.

13. UN Doc A/CONF 183/CI/L 27, 29 June 1998.
14. UN Doc A/CONF 183/CI/L 71, 14 July 1998.

    The proposal stated: "The definition and elements of the crimes of terrorism and drug trafficking shall be elaborated by the Preparatory Commission" The accompanying footnote stated: "The mandate for the Preparatory Commission to elaborate the definition and elements will be included in the Final Act."
15. Section E of Final Act; *supra* n 11.
16. For instance the German Proposal. First introduced at the 1998 March/April Sessions of the Preparatory Committee.
17. Section F, para 7 of Final Act; *supra* n 11.
18. See Final Text, *supra* n 11.
19. ICRC Statement of 8 July relating to the Bureau Discussion Paper; UN Doc A/CONF 183/INF/10, 13 July 1998.
20. See Final Text, *supra* n 11.
21. *Supra* n 19.
22. International Committee of the Red Cross: Concerns on Threshold for War Crimes committed in Non-International Armed Conflicts as contained in the Bureau Proposal. UN Doc A/CONF/A 183/INF/11, 13 July 1998.
23. See for instance Statement issued by the Caucus on Children's Rights in the ICC on *"Inclusion of War Crimes Committed in Internal Armed Conflicts within the Jurisdiction of the Court"*:

    "The Children's Caucus is aware that several States object to the inclusion of Parts C and D of Article 5 within the Statute of the Court. We strongly urge those States to consider the need to penalise the crimes committed against children, who are undoubtedly a high percentage of the civilian victims in such internal conflicts. We strongly urge States to consider the question of internal armed conflicts (Part D) not as a package, but in its own right with regard to specific items protecting children, such as Article 5, D(f) which applies to the recruitment of children under the age of 15 into armed forces or groups or using them to participate actively in hostilities".

    The Delegation from Sri Lanka made a Statement in the Committee of the Whole supportive of such an approach.
24. Article 8, See Final Text, *supra* n 11.

    The text adopted with the Final Act, also contained the following formulation of a general nature intended to address the varying concerns expressed by those who advocated the inclusion of internal conflict situations in the Statute as well as those who opposed it, in particular the concerns expressed by the ICRC: "Paragraph 2 (e) applies to armed conflicts not of an international character and this does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State when there is protracted armed conflict between Governmental authorities and organized armed groups or *between such groups*."
25. Article 8 (2) (B) (XX) (g) – See Final Text, *supra* n 11.
26. Also see the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* which decided that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such, ICJ Advisory Opinion of 8 July 1996 – Request for Advisory Opinion by the General Assembly of the United Nations.

27. Article 16 – See Final Text, *supra* n 11.
28. Article 18 (1) of the Statute of the Yugoslav Tribunal States; "The Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from Governments, United Nations Organs, inter-governmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed". Also see Art 17 of the Statute of the Rwanda Tribunal.
29. Article 15 – See Final Text, *supra* n 11.
30. Article 17, See Final Text, *supra* n 11.
31. The Durban Declaration at the recently concluded Summit Meeting of the Non-Aligned Movement calls for the convening of an International Summit Conference under the auspices of the United Nations, in order to "formulate a joint organised response of the international community to terrorism in all its forms and manifestations. See Final Document, XII NAM Summit, Durban 29 Aug – 3 Sept 1998.
32. In terms of the most recent proposal jointly made by the Governments of United States and United Kingdom, the two Governments, with the concurrence of the Government of the Netherlands, have agreed as an exceptional measure, to arrange for the two accused charged with causing the PAN AM explosion to be tried before a Scottish Court, sitting in the Netherlands. See letter dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General; UN Security Council DocS/1998/795 of 24 August 1998.
33. Tenth SAARC Summit, Colombo Declaration, Colombo, 31 July 1998.
34. Draft Statute, International Penal Tribunal – M Cherif Bassiouni, Association Internationale De Droit Penal (Eres) 1993.
35. See League of Nations, Proceedings of the International Conference on the Repression of Terrorism 1937; Document C 94 M 47 1938 V. See A R Perera, *International Terrorism* (1997), Ch 2 at p 36, Vikas Publishing House Ltd, (India).
36. Although the Statute of the ICC was approved on 17 July 1998 at the Rome Conference with 120 countries voting in favour, 7 against and 21 abstentions, only 29 countries signed the Statute when it opened for signature on 17-18 July. These are: Bolivia, Cameroon, Congo, Liberia, Mali, Malta, Mauritius, Namibia, Niger, Samoa, South Africa, Zambia, Zimbabwe, Albania, Andorra, France, Georgia, Ghana, Greece, Italy, Liechtenstein, Madagascar, Monaco, Netherlands, Panama, San Marino, Senegal, Spain and Switzerland.