

INSTITUTE *for* MEDIA, POLICY *and* CIVIL SOCIETY

JOURNALIST'S GUIDE TO THE INTERNATIONAL CRIMINAL COURT

MIKE CRAWLEY *FOR* IMPACS

 I M P A C S



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910-207 West Hastings St
Vancouver, BC V6B 1H6
Tel (604) 682 1953
Fax (604) 682 4353
E-mail: media@impacs.org
Web site: www..impacs.org

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ICCTAP assists interested states with the process of ratifying and implementing the Rome Statute of the ICC, which provides for the establishment of a permanent court to try persons accused of committing genocide, crimes against humanity and war crimes. Through 2000 and 2001, ICCTAP hosted workshops for governments, civil society organizations and the media in the South Pacific, the Caribbean, and in Anglophone and Francophone Africa. This handbook was developed for the journalists who attended these workshops. It was revised based on their questions and insights and has been re-edited by Mike Crawley, Joanne Lee and Rosemary Poole to serve as a reference guide for journalists and others

interested in the ICC. The handbook is also available in French.

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Shauna Sylvester
Executive Director
IMPACS

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BRIEF OVERVIEW OF THE ICC

The International Criminal Court (ICC) is the first permanent global tribunal for prosecuting the most serious violations of international humanitarian law. It can prosecute individuals for war crimes, crimes against humanity and genocide, whether committed in international or non-international armed conflict.

The treaty establishing the court was agreed to in Rome on 17 July 1998, with 120 nations voting in favour, seven voting against, and 21 abstaining. The Rome Statute took effect on 1 July 2002, after it was ratified by more than the required 60 national governments. The ICC can prosecute crimes committed anytime after that date, either on the territory of a state that has ratified the treaty or against any citizen of a state that has ratified the treaty, or whenever the UN Security Council refers a current conflict to the court.

It is hoped that the ICC will act both as a device to punish those responsible for war crimes and as a deterrent against such atrocities. In the words of UN secretary-general Kofi Annan, the ICC is "a giant step forward in the march towards universal human rights and the rule of law."

Some of the key legal principles governing the ICC are:

- All persons have the right to a fair trial and all persons are innocent until proven guilty.

- The burden of proof lies on the prosecution and guilt must be proven beyond a reasonable doubt.
- Intent to commit the crime must be proven.
- Persons cannot be tried twice for the same alleged offence, as long as the initial trial is genuine and not a 'sham' trial.
- Alleged crimes that occurred before the court takes effect cannot be tried.
- The court cannot try anyone who committed the alleged offence while under age 18.
- There is no statute of limitations on the crimes covered by the court.
- An accused person has certain rights upon arrest, such as the right to legal advice, the right to remain silent, and freedom from coercion or degrading punishment.
- Accused persons cannot use "following orders" as a defence except in the rarest of circumstances.
- Convicted persons have the right to a review of their sentence after serving two-thirds of their term.
- The ICC can try any person regardless of their official status or any immunity from prosecution they may ordinarily enjoy because of that status. This means the ICC can even prosecute heads of state.

Why is the International Criminal Court newsworthy?

Fundamentally, the ICC is important

because it can investigate and bring to justice people who commit the most serious violations of international humanitarian law. Such crimes have only increased in recent years, as civilians more frequently become the target of conflict. Civil society groups therefore conducted a vigorous campaign to see the ICC established.

Some aspects of the court are ground-breaking in terms of international law. They include: recognition of sexual violence as a war crime (first recognized in the tribunal for the former Yugoslavia), special services to victims and witnesses, and the court's independence from the control of the UN security council.

The ICC's creation is not without controversy. Most notably, the U.S. government is opposed to the ICC, arguing that it challenges the country's judicial sovereignty and its armed forces personnel may face

politically motivated trials. Proponents of the ICC counter that many checks and balances are built into the process. Still, the U.S. Congress passed a bill to withdraw military assistance from small states who ratify the ICC treaty and the Bush administration formally revoked U.S. support for the court.

For other countries, some provisions in the ICC treaty may conflict with their constitutions. Most notably, heads of state are not immune from prosecution by the ICC. Other ICC treaty provisions that may have constitutional implications for countries include: no statute of limitations, no right to a trial by jury, extradition requirements and the potential imposition of a life sentence.

(For more detailed overview, please refer to the final section of this workbook)

FREQUENTLY ASKED QUESTIONS ABOUT THE ICC

How was the ICC created?

In June and July 1998, representatives of 160 nations gathered in Rome to discuss creating a permanent International Criminal Court (ICC) that would investigate and prosecute alleged genocide, crimes against humanity and war crimes. On 17 July 1998, the final text of the Statute for the ICC was approved.

When did the ICC statute take effect?

1 July 2002. The court does not have jurisdiction to prosecute crimes that occurred before this date.

What is the ICC's jurisdiction?

The ICC has jurisdiction over crimes committed anywhere by nationals of all States Parties or crimes committed by anyone on the territory of all States Parties. (For a current list of States Parties, [see www.un.org/law/icc/statute/status.htm](http://www.un.org/law/icc/statute/status.htm)) The Court can also assume jurisdiction over crimes not involving any States Parties if the Security Council refers the matter.

What crimes fall under the ICC's mandate?

Crimes against humanity, war crimes and genocide. These crimes are explicitly defined in the Rome Statute. The ICC will eventually cover the crime of aggression, but only after States Parties have agreed on a definition.

What are crimes against humanity?

Crimes committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack. This includes: murder; enslavement; deportation or forcible transfer of populations; torture, sexual violence (such as rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization) and apartheid. It also includes persecution against any identifiable group on political, racial, national, ethnic, cultural, religious or gender grounds.

Where is the ICC located?

The seat of the court is at The Hague, The Netherlands, but it will be authorized to try cases in other venues when appropriate.

How is the ICC different from the International Court of Justice in The Hague?

The ICC has jurisdiction over criminal actions of individuals, while the ICJ (also known as the World Court) resolves disputes between nations.

How is the ICC different from the tribunals for Rwanda and the former Yugoslavia?

The ICC is not a creation of the UN Security Council and its jurisdiction is not limited to events in a particular nation during a specific time frame.

Who oversees the work of the ICC?

An Assembly of States Parties composed

of representatives from each state that ratifies the Statute.

How is the ICC funded?

Proportionate contributions from States Parties, similar to the method by which contributions to the UN are assessed. The UN General Assembly may also provide funding for the court. The court will also accept voluntary donations.

How can an ICC case be initiated?

A State or the Security Council can refer a situation to the ICC prosecutor, or the prosecutor can initiate an investigation based on information from a reliable source. This means that any victim, victim's representative, NGO, non-State Party or individual can provide information to the Prosecutor.

How does a case proceed to trial?

First, a pre-trial chamber decides whether there is a reasonable basis to proceed with an investigation. Generally, states are informed of the case. Once the accused has been transferred to the court, a confirmation hearing is held to determine if there is sufficient evidence to proceed to trial.

Who hears the trial and passes judgment?

A three-judge panel. There is no right to a trial by jury.

How are judges selected?

The court's 18 judges are elected by secret ballot by the Assembly of States Parties, and must be elected by at least two-thirds of the voting states. States must take into account the need for equitable geographic representation, the need for a fair representation of female and male judges, and the need to have judges with legal expert-

ise in the following: criminal proceedings, international law and violence against women and children.

What penalties can the ICC impose?

Imprisonment of up to 30 years, or in extremely grave cases, a life sentence. The ICC can also impose a fine and order individuals to forfeit proceeds of crime, but cannot impose the death penalty.

What are the ICC's working languages?

English and French. However, accused persons have the right to interpretation in their first language.

How can the ICC assist victims of crimes?

Victims and witnesses can be protected by such measures as the use of closed hearings, the presentation of evidence by electronic means, and the withholding of information that would endanger their security. A Victims and Witnesses Unit, staffed by people with expertise in trauma, will be created to provide protective measures and counselling. The court can order a convicted person to make reparations to victims and witnesses. A trust fund may be established for the benefit of victims and their families.

How will the ICC affect states' own jurisdictions?

National courts will continue to have priority in investigating and prosecuting crimes within their jurisdiction. The ICC will be a default court that will only act in the absence of judicial action by national systems. In other words, the court can only investigate or prosecute a case if the State is unwilling or unable to carry out the investigation or prosecution itself.

What are some common constitutional issues facing states that ratify the treaty?

Some provisions in the treaty may conflict with elements of some countries' constitutions. For instance, under the ICC treaty, heads of state are not immune from prosecution, there is no statute of limitations, accused persons have no right to a trial by jury, life sentences can be imposed, and states can be required to extradite their nationals to face prosecution.

What if a state party doesn't co-operate with the ICC?

If a state refuses to co-operate, the Court may make a finding to that effect and may refer the matter to the Assembly of States Parties or in some cases to the Security Council

Can the Statute be changed in the future?

A review conference will be held seven years after the Statute takes effect. Any amendment to the statute must first be adopted by two-thirds of the State Parties at the conference, and within one year thereafter, must be ratified by seven-eighths of all States Parties. The UN Secretary-General can initiate more review conferences after that, whenever the need arises.

How do I stay up-to-date on ICC developments?

You can subscribe to the Coalition for the International Criminal Court's listserv. It produces an average of four e-mails daily. To subscribe, e-mail: icc-info-subscribe@onelist.com. There is also a Spanish and French listserv: listasrcp@listas.rcp.net.pe. Please also see the resources listed in this guide.

THE ROME STATUTE OF THE ICC

Note: Excerpted from Coalition for an ICC website: <http://www.igc.apc.org/icc/html/presstatute.html>

The ICC Statute agreed upon in Rome on July 17, 1998 is comprised of 13 Parts and 128 Articles. The following is a brief outline of the parts and subject matter of the Rome Statute.

Part 1: Establishment of the Court

Part 1 concerns the establishment of the Court and its relationship with the United Nations. The Court is to be established by treaty and based in The Hague, The Netherlands. The relationship of the Court to the UN will be determined by an agreement to be negotiated during upcoming Preparatory Committee meetings.

Part 2: Jurisdiction, Admissibility, and Applicable Law

Part 2 concerns crimes within the Court's jurisdiction, the role of the Security Council, the admissibility of cases, and the applicable law for cases coming before the Court. The Court initially will have jurisdiction over war crimes, genocide, and crimes against humanity. Additionally, the Court will exercise jurisdiction over the crime of aggression once agreement can be reached on a definition of this crime at some point in the future. Part 2 defines the crimes within the Court's jurisdiction (and, notably, includes rape,

sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence).

Part 3: General Principles of Criminal Law

Part 3 involves principles of criminal law drawn from different legal systems. This section upholds the principle of non-retroactivity, whereby the Court will not have jurisdiction over conduct committed before the Statute enters into force. It recognizes the principle of individual criminal responsibility, which makes it possible to prosecute individuals for serious violations of international law. Part 3 also addresses the responsibility of leaders for actions of subordinates, the age of responsibility, the statute of limitations, and an individual's responsibility for both an act and an omission.

Part 4: Composition and Administration of the Court

Part 4 details the structure of the Court and the qualification and independence of judges.

Part 5: Investigation and Prosecution

Part 5 addresses the investigation of alleged crimes and the process by which the Prosecutor can initiate and carry out investigations. Part 5 also defines the rights of suspects.

Part 6: The Trial

Part 6 deals with trial proceedings, the question of a trial in the absence of the accused or following an admission of guilt, and the rights and protection of the accused. The Statute states that "everyone shall be presumed innocent until proved guilty in accordance with law." This section also details the rights of victims and witnesses and the ability of the Court to order a guilty person to make reparation and to determine the extent of damages.

Part 7: Penalties

Part 7 covers applicable penalties for persons convicted of a crime, which include: life imprisonment, imprisonment for a designated number of years, and fines, among other sentences. The death penalty is not a sentence of the Court. Part 7 also establishes a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of victims.

Part 8: Appeal and Review

Part 8 includes appeal against judgment or sentence, appeal proceedings, the revision of conviction or sentence, and the compensation to a suspect, accused, or convicted person. A person or the Prosecutor may bring an appeal before the Court on grounds that the fairness of the proceedings was affected. The Statute states that anyone wrongfully arrested, detained, or convicted is entitled to compensation from the Court.

Part 9: International Cooperation and Judicial Assistance

Part 9 addresses international cooperation and judicial assistance between States and the Court. It involves the surrender of persons to the Court, the Court's ability to

make provisional arrests, and State responsibility to cover costs associated with requests from the Court.

Part 10: Enforcement

Part 10 includes the recognition of judgments, the role of States in enforcement of sentences, the transfer of the person upon completion of a sentence, and parole and commutation of sentences.

Part 11: Assembly of States Parties

Part 11 establishes an Assembly of States Parties, formed by one representative for each State Party, to oversee the various organs of the Court, its budget, and reports and activities of the Bureau of the Assembly. Representatives would have one vote and decisions would be reached either by consensus or some form of a majority vote.

Part 12: Financing of the Court

Part 12 states that funding for the Court shall be provided by three sources: (a) assessed contributions from States Parties; (b) funds provided by the United Nations; and (c) voluntary contributions from governments, international organizations, individuals, and corporations and other entities.

Part 13: Final Clauses

Part 13 addresses the settlement of disputes, reservations and amendments of the Statute, and ratification. Part 13 states that no reservations may be made to the Statute. However, seven years after the Court has entered into force, any State Party may propose amendments to the Statute. The Statute allows for a State Party

BACKGROUND NOTES

Ratification of the ICC Statute

Before the Rome Statute of the ICC could take effect, the governments of at least 60 countries had to ratify it. Many diplomats believed this would take at least 10 years from the 1998 creation of the statute, but the benchmark was achieved and surpassed on 11 April 2002. For a current list of countries that have ratified that statute, see www.un.org/law/icc/statute/status.htm

A standing ovation concluded the official ratification ceremony at the United Nations in New York, where U.N. legal counsel Hans Corell said: “A page in the history of humankind is being turned.”

Groups that had lobbied for the ICC’s creation hailed the event. “The establishment of the ICC has been declared the most significant advance in international law since the founding of the United Nations,” said William Pace, convenor of the NGO Coalition for the ICC. “This court is capable of ending an era of impunity and is a symbol of the triumph of law over violence and brutality.”

“The task now is to ensure that these rules are conscientiously applied — that the court, in its implementation, adheres to the values and the moral authority that inspired it,” said Kenneth Roth, executive director of Human

Rights Watch. Under the terms of the treaty, the statute officially entered into force on the first day of the month after the 60th day after the 60th state ratified — 1 July 2002. The court does not have retroactive jurisdiction over any crimes that took place prior to that date.

U.S. objection to the ICC

One of the key challenges facing the International Criminal Court is opposition from the United States. Such opposition has put the U.S. at odds with such usual allies as Britain and Canada and on the same side as countries with whom it usually doesn’t want to be associated: Iraq, Libya, and China. The U.S. was one of only seven countries to vote against the Rome Statute in 1998, even though the Clinton administration initially supported the establishment of a permanent warcrimes tribunal.

The strongest pressure against the ICC has come from U.S. military officials. Their public arguments against the court have been couched in terms of American sovereignty: they claim the court infringes on U.S. jurisdiction. However, many observers feel the military wants a total guarantee that no American could ever be prosecuted by the court.

The government’s official stance is that

the statute puts U.S. military personnel at risk of frivolous prosecution and hinders the president's ability to deploy armed forces.

Specifically, the U.S. has stated its objection to these statute provisions:

- Nationals of a state that is not party to the treaty can be prosecuted if their alleged crime occurs on the territory of a state that has ratified the treaty;
- The prosecutor can initiate an investigation without referral from either a state party or the U.N. Security Council;
- The ICC will have jurisdiction over the crime of aggression, potentially without a referral from the Security Council, which has primary responsibility under the UN Charter for determining that state acts of aggression have occurred (i.e. invading another country).

During the negotiations leading up to the vote on the Statute in 1998, the U.S. wanted the Security Council to have more power over the ICC than other nations were willing to give it. The U.S. wanted the statute to say that the ICC could only begin an investigation if authorized by the Security Council. This would have given the U.S. (and the other four permanent members of the Security Council) an effective veto over prosecutions.

The majority of nations rejected this

demand. They believed the veto power of the Security Council's permanent members would hinder the universality of the court. The Security Council has in the past failed to act on cases of serious human rights abuses (for instance, China blocked the establishment of a tribunal in the case of the Cambodian dictator Pol Pot.) Instead, the Security Council was given the power to put an ICC investigation on hold for one year, but only if nine of its 15 members (including all five permanent members) vote to do so.

Another key argument by the U.S. is that its enemies would use the ICC to pursue a politically motivated or frivolous case against American military personnel. But the Rome Statute includes several provisions to prevent this from happening:

- A prosecution will only be launched against someone if their own country is unable or unwilling to conduct a proper investigation and trial. This provision gives all countries the right to conduct a proper trial of their own nationals without the ICC's involvement.
- The ICC prosecutor and judges will be respected, experienced legal expert chosen by majority vote of the countries participating in the court.
- The prosecutor cannot start an investigation without permission from a pre-trial chamber of three judges who decide whether there is a reasonable basis to proceed with

an investigation. A confirmation hearing must be held to determine if there is sufficient evidence to proceed to trial. The suspect and the states concerned also have the right to challenge the jurisdiction of the court or the admissibility of the case at any stage.

The U.S. did manage to weaken the provisions of the treaty in some key areas. Many countries, led by Germany, wanted the ICC to have universal jurisdiction, so that anyone who commits a war crime anywhere on the planet could face prosecution. The U.S. wanted the court to have jurisdiction only over nationals of countries that ratified the treaty. A compromise proposal put forward by South Korea would have given the ICC jurisdiction over crimes committed:

- By nationals of any country that ratified the treaty
- On the territory of any country that ratified the treaty
- Against nationals of any country that ratified the treaty
- By anyone who comes into custody of any country that ratified the treaty.

The final text of the statute kept only the first two provisions. Despite the concessions, the U.S. still did not vote in favour of the Rome Statute.

The U.S. Congress has joined the administration in opposing the ICC.

The “American Servicemembers Protection Act” prohibits the U.S. from co-operating in any way with the ICC and authorizes the U.S. to use force to liberate persons detained on behalf of the court. It also calls on the government to retaliate against countries that ratify the statute by stopping military assistance to them (except for NATO members and major allies). The act’s opponents, who have nicknamed the legislation the “Hague Invasion Act”, argue that it will do more to protect war criminals than American military personnel.

Introduced in June 2000, the Act was finally passed by both the U.S. Houses of Parliament and signed into law by President Bush on 2 August 2002, after undergoing several different reviews. For example, the Act now includes a discretion for President Bush to provide military assistance to countries if it is in the national interest. For a section-by-section analysis of the final version of the Act, go to the website of the CICC <http://www.iccnw.org>.

President Clinton signed the Rome Statute just before leaving office, on December 31, 2000. It is believed that he personally supported the ICC, but had so little support for it that he could only sign the treaty in the dying days of his administration, with the knowledge that the Republicans were set to take over the White House.

In May 2002, a month after the treaty had been ratified by the required 60 states, the Bush administration announced it was formally revoking the

U.S. government's support for the ICC. President Bush is also threatening to withdraw all U.S. personnel from all peacekeeping and other military operations worldwide, unless they are all guaranteed immunity from prosecution by the ICC, even if they commit war crimes, such as deliberately attacking civilians without justification. On 12 July 2002, the UN Security Council agreed to a compromise with the U.S., which prevents the ICC from investigating or prosecuting anyone involved in a UN operation who is not from a state that has ratified the treaty for a period of 12 months from 1 July 2002.

This decision can be renewed for another 12 months in July 2003, and beyond, if the U.S. can keep exerting enough pressure on Security Council members..

The U.S. is the only country actively opposing the court before it has even started hearing cases. Other countries with concerns about the court, such as China, are taking a "wait-and-see" approach, giving the court a chance to prove its legitimacy and effectiveness, before actively undermining its potential to create a more just and peaceful world.

INTERNATIONAL CONTACTS

Coalition for an International Criminal Court

Adele Waugaman, Media Associate.
E-mail: ciccmedia@iccnw.org
Tel: 1 212 687 2176.
Fax: 1 212 599 1332

This is the umbrella organization of NGOs lobbying for the ICC, your best first point of contact for almost any questions pertaining to the campaign for the ICC. Its members include Amnesty International, Human Rights Watch, the International Commission of Jurists, Lawyers Committee for Human Rights, and more than 1,000 other NGOs worldwide.

UN Department of Public Information

Ellen McGuffie, information officer.
Website: <http://www.un.org/icc>
Tel: (1 212) 963 0499 (New York).
Fax: (1 212) 963 1186

INTERNATIONAL NGOs:

Amnesty International

Christopher Hall
E-mail: chall@amnesty.org
Tel: (44) 20 7413 5733 (London).
Fax: (44) 20 7956 1157

Coalition for International Justice

Nina Bang-Jensen, Executive Director and General Counsel
E-mail: coalition@cij.org
Tel: (1 202) 662 1595 (Washington).
Fax: (1 202) 662 1597

Human Rights Watch

Richard Dicker
E-mail: dickerr@hrw.org
Tel: (1 212) 216 1248 (New York).
Fax: (1 212) 736 1300

International Commission of Jurists

Fredrico Andreu
E-mail: andreu@icj.org
Tel: (41) 22 979 3809 (Geneva).
Fax: 41 22 979 3801

Lawyers Committee for Human Rights

Fiona McKay, Senior Coordinator,
International Justice Program
E-mail: mckayf@lchr.org
Tel: (1 212) 845 5200 (New York)
Fax: (1 212) 845 5299

No Peace Without Justice

Marco Perduca
E-mail: m.perduca@agora.it
Tel: (1 212) 980 1031 (New York).
Fax: (1 212) 980 1072

Parliamentarians for Global Action

Shazia Rafi.
E-mail: shaziapga@aol.com
Tel: (1 212) 687 7755 (New York).
Fax: (1 212) 687 8409

Women's Caucus for Gender Justice in the ICC

Vahida Nainar, Executive Director, or Pam Spees, Outreach Co-ordinator
E-mail: iccwomen@igc.org
Tel: (1 212) 697 7741 (New York).

Fax: (1 212) 949 7996.

World Federalist Movement
William R. Pace
E-mail: cdil@igc.org
Tel: (1 212) 599 1320 (New York).
Fax: (1 212) 599 1332

Academic/Legal Experts:

International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada
Frances Gordon, Executive Director
E-mail: fgordon@law.ubc.ca or
jlee@law.ubc.ca
Tel: (1 604) 822 9875
Fax: (1 604) 822 9317

International Centre for Human Rights and Democratic Development
Antonio Almeida
E-mail: ajalmeid@ichrdd.ca
Tel: (1 514) 283 6073 (Montreal).
Fax: (1 514) 283 3792

International Committee for the Red Cross, Advisory Service, Geneva
Anna Segall, Legal Adviser
Email: asegall.gva@icrc.org
Tel: (41) 22 730 2701
Fax: (41) 22 733 2057

Inter-American Bar Association
E-mail: iaba@iaba.org
Tel: (1 202) 393 1217

Fax: (1 202) 393 1241.

Carr Center for Human Rights Policy, Boston
Sarah Sewall, Co-editor of the book "The United States and the International Criminal Court."
E-mail: sarah_sewall@harvard.edu
Tel: (1 617) 496 4843

Center for Reproductive Law and Policy
Katherine Hall Martinez, Deputy Director, International Program
E-mail: info@crlp.org
Tel: (1 917) 637 3600 (New York).
Fax: 1 212 514 5538.

School of Law, City Univ. of New York
Prof. Rhonda Copelon, Director,
International Women's Human Rights Law Clinic
E-mail copelon@mail.law.cuny.edu
Tel: (1 718) 340 4329

Center for International Human Rights, Northwestern University School of Law
Douglass Cassel, Director
E-mail: d-cassel@nwu.edu
Tel: (1 312) 503 2224 (Chicago)
Fax: (1 312) 503 5950

Open Society Institute, Budapest
Bruce Broomhall
E-mail: Bbroomhall@sorosny.org

SOUTH PACIFIC REGIONAL CONTACTS

**Centre of International and Public Law,
Australian National University, Canberra**
Hilary Charlesworth and Andrew Byrnes
E-mail: hilary.charlesworth@anu.edu.au
or
Andrew.Byrnes@anu.edu.au
Tel: (61) 2 612 50 455
Fax: (61) 2 612 50 150

University of Melbourne
Tim McCormack, Professor of
International Humanitarian Law
E-mail: t.mccormack@law.unimelb.edu.au
Tel: (61) 3 9344 6595
Fax: (61) 3 8344 0054.

**Criminal Lawyers Association of
Australia**
Philip Scales
E-mail: scales@camtech.net.au
Tel: (61) 8 8212 4334
Fax: (61) 8 8212 5054 .

Flinders University, Adelaide.
Ustinia Dolgopol, Senior Lecturer
E-mail: tina.dolgopol@flinders.edu.au
Tel: (61) 8 8201 3880
Fax: (61) 8 8201 3630

New Zealand Peace Foundation
Richard Northey
E-mail: northey@voyager.co.nz

**Samoan Delegation to the ICC
Preparatory Commission**
Roger Clark, (also professor, International
Law Rutgers University, New Jersey,
U.S.)
E-mail: rsclark@crab.rutgers.edu
Tel: 1 856 225 6390

**Australian Delegation to the ICC
Preparatory Commission**
Helen Brady
E-mail: hjbrady@ozemail.com.au

Australian Red Cross
Helen Durham
E-mail: hdurham@nat.redcross.org.au
Tel: (61) 3 9345 1800.

Human Rights Watch, Asia Division
Sidney Jones
Email: joness@hrw.org
Tel: (1 212) 216 1228 (New York).

Lyn Stevens, New Zealand academic
E-mail: lynstevens@llschambers.co.nz

**International Committee of the Red
Cross, Australia**
Alfred Boll
Email: sydney.sydney@icrc.org

AFRICA REGIONAL CONTACTS

ANGOLA

Angolan Coalition for the ICC
Tomas S. Da Silva, President
E-mail: tomassilva@netangola.com
Tel: (244-2) 32 27 77
Fax: (244-2) 32 63 30
<http://www.oaang.org>

ciduidh@fasonet.bf
Tél.: (226) 31 31 50
Fax: (226) 31 32 28

Lawyers: Savadogo Mamadou, Dabiré
Enoch, Sankara Bénéwendé.
Tel: (226) 34 42 07
Fax: (226) 34 43 33

BENIN

Amnesty International
Jean Baptiste Gnohoue.
E-mail: aibeninn@nakayo.leland.bj

**Mouvement Burkinabe des Droits de
l'Homme et des Peuples**
President: Halidou Ouedraogo
Email: mbdhp@fasonet.bf

**UNESCO des droits de la personne et de
la démocratie.**
Théodore Holo, Titulaire de la Chaire
E-mail: chaire.unesco@bj.refer.org

BURUNDI

La Ligue Burundaise des Droits de
l'Homme.
Louis-Marie Nindorera
Email: louis_marie_nindorera@yahoo.fr
Tel: (257) 22 8636
Fax: (257) 22 0004

BOTSWANA

Gabarone University
Prof. Daniel Nsereko
E-mail nserekod@yahoo.com

CAMEROON

**Club Internationale pour la Recherche de
la Paix**
Pierre Roger Zebaze
Email: zepiro@hotmail.com
Tel: (1 718) 992 7130
Fax: (1 718) 992 7130
Women's Caucus for Gender Justice
Sume Epie-Eyoh
E-mail: sume_e@yahoo.com

Botswana Council of NGOs.
Gaogakwe Phorano
Email: bocongo@bocongo.bw
Tel: 267 311 319
Fax: 267 312 935

BURKINA FASO

Judges: Kambou Kassoum, Dermé
Maïmouna, or Kontogomdé Wambi
Email: mbdhp@fasonet.bf or

CENTRAL AFRICAN REPUBLIC

Nicolas Tiangaye, Lawyer
E-mail: tiangaye@intnet.cf
Tel: (236) 61 25 71
Fax: (236) 61 33 10

COTE D'IVOIRE

Ligue Ivoirienne des Droits de l'Homme.
Martin Bleou, Président.
E-mail: ngouin@globeaccess.net

GHANA

Ghana Fellowship of Former Members
of Parliament
Gladys Boateng
Tel: (233) 21 668359 / 667634
Fax: (233) 21 665957

GUINEE

Organisation Guineenne des Droits de
l'Homme
Abdoul Gadiri Diallo
E-mail: ogdh@mirinet.net.gn

KENYA

Federation of Women Lawyers
Betty Murungi
Email: kaari@iconnect.co.ke
Tel: (254) 2 251 435

LESOTHO

Transformation Resource Centre
Lira Theko, Democracy Officer
Email: centre@lesoff.co.ls
Tel: (266) 31 4463
Fax: (266) 32 2791

MALAWI

Malawi Institute of Democratic and

Economic Affairs
Shyley Kondowe, Executive Director
Email: midea@malawi.net
Tel: (265) 754 742
Fax: (265) 754 720

MALI

Organisation Malienne des Droits de
l'Homme
Maître Kadidia Sangare ou Cissé
Moustapha, Avocat.
E-mail amdh@malinet.ml
Tél/Fax: (223) 22 70 06

Maïga Soyata, Lawyer
E-mail: cabinetsoyata@malinet.ml

Michela Beati, Government External
Relations
E-mail: michi1973@hotmail.com
Fax: (223) 22 26 01

MAURITANIA

Mine Abdoullah, lawyer.
E-mail: mine_abdoullah@optechnology.mr

MAURITIUS

Union pour le Progres
Jean Yves Violette, Chairperson
Email: sodalis@intnet.mu

MOZAMBIQUE

Mozambican League of Human Rights
Paulo Hancale.
E-mail: liga@zebra.uem.mz or,
ligadh@teledata.mz
Tel: (258) 1 401 256
Fax: (258) 1 406 022

NAMIBIA

CICC

Jotham Rwamiheto, SADC Coordinator
E-mail: ciccsadc@iccnw.org

NIGER

Association Nigérienne des Droits de L'homme.

Khalid Ikhiri, Haïdara Assita, Souna Issaka
E-mail: anddh@intnet.ne
Tel/Fax: (227) 73 22 61

NIGERIA

Baobab for Women's Human Rights
Sindi Medar Gould, Programme Director
Email: sindi@baobab.com.ng

SENEGAL

Organisation Nationale des Droits de l'Homme

Maître Sidiki Kaba - Ibrahima Tounkara
E-mail: ondh@telecom.sn
Tél: (221) 822 2800
Fax: (221) 823 6087

International Justice Programme

Mouhamed Kebe, Director
E-mail: mhkebe@sentoo.sn

Mame Ibrahima
E-mail: mitounk@yahoo.fr

Rencontre Africaine pour la Defense des Droits de l'Homme

Alioune Tine
Email: raddho@telecomplus.sn
Tel: (221) 824 6056

SEYCHELLES

Centre for Rights and Development

Mathew Sarvina, President
Email: lungos@seychelles.net
Tel: (248) 225 529
Fax: (248) 224 460

SIERRA LEONE

Sierra Leone Coalition for the ICC
Lansana Augustine
E-mail: sliccwa@yahoo.com;
alansana@hotmail.com

SOUTH AFRICA

South Africa Coalition for an International Criminal Court

Anil Naidoo
Email: anil@fahamu.org
Tel: (27) 12 303 8932 or (27) 82 579 5431

SWAZILAND

HUMARAS/SARINGON Swaziland

Vulindlela Msibi
Email: sales@snhb.co.sz
Tel: (268) 602 1041
Fax: (268) 404 5224

TANZANIA

Legal and Human Rights Centre

Helen Kijo-Bisimba, Executive Director
Email: lhrctz@raha.com
Tel: (255) 22 2117 767
Fax: (255) 22 2113 1177

UGANDA

Foundation for Human Rights Initiative
Mary Kabogoza (also CICC Coordinator for East Africa)

E-mail: fhri@starcom.co.ug

AFRICA REGIONAL CONTACTS

Tel: (256) 41 530095

Fax: (256) 41 540561

ZAMBIA

**Southern Africa Human Rights NGO
Network**

Pamela Mhlanga, Coordinator

Email: Pamela@afro.net.org.zm

Tel: (260) 1 251 813

Fax: (260) 1 251 776

ZIMBABWE

**Women and Law in Southern Africa
Research Trust**

Laurah Harrison-Bachnak

Email: wlsa@samara.co.zw

Tel: (263) 4 253 001

Fax: (263) 4252 884

INTERNATIONAL CONTACTS (FRENCH-SPEAKING)

Amnesty International

Karine Bonneau
E-mail kbonneau@amnesty.asso.fr
Tel: (33 1) 49 23 11 87
Fax: (33 1) 43 38 26 15

Amnesty International

Agnes Cauchon
E-mail acauchon@amnesty.asso.fr
Tel: (33 1) 53 38 65 65
Fax: (33 1) 53 38 55 00

Coalition for an International Criminal Court

Irune Aguirrezabal.
E-mail cicc.europe@beon.be
Tel/Fax: (32) 2-223-22-89 (Brussels)

ELSA International

Simen Strand
E-mail elsa@nic.inbe.net
Tel: (32-2) 646 2626 (Brussels)
Fax: (32-2) 646 2923

Federation Internationale des Ligues des Droits de l'Homme

Jeanne Sulzer
E-mail: jsulzer@fidh.org
Tel: (33 1) 4355 2518 (Paris)
Fax: (33 1) 4355 1880

Lawyers Committee for Human Rights

Gaelle Laroque, Senior Associate,
International Justice Program
E-mail: laroqueg@lchr.org
Tel: 1 212-845-5241 (New York)
Fax: 1 212-845-5299

Union Inter africaine pour les Droits de l'Homme

Christophe Compaoré or Ben Traoré
E-mail uidh@fasonet.bf
Tel: (226) 31 61 45 (Ouagadougou,
Burkina Faso)
Fax: (226) 31 61 44

Barbara Bedont, Consultant

E-mail: barbaracbedont@yahoo.com

INTERNET RESOURCES

General information

UN ICC Index:

<http://www.un.org/law/icc/index.html>

Text of Rome Statute:

<http://www.un.org/law/icc/statute/romefra.htm>

List of countries that have signed and/or ratified the Rome Statute:

<http://www.un.org/law/icc/statute/status.htm>

United Nations Department of Public Information,

Overview of the ICC:

<http://www.un.org/law/icc/general/overview.htm>

Briefing paper on the ICC:

<http://www.un.org/News/facts/iccfact.htm>

Questions and answers on the ICC:

<http://www.un.org/law/icc/statute/iccq&a.htm>

Essential NGO Websites

Coalition for the International Criminal Court

<http://www.iccnw.org>

On-line press kit

<http://www.igc.apc.org/icc/html/presskit.html>

List of contacts

<http://www.igc.apc.org/icc/html/presssources.html>

ICC Overview

<http://www.igc.apc.org/icc/html/pressoverview.html>

Country specific info pages:

<http://www.igc.apc.org/icc/html/country.html>

Derechos and Equipo Nizkor

Good links to various resources by Latin American human rights group... (also in Spanish)

<http://www.derechos.org/nizkor/impu/tipi/eng.html>

Human Rights Watch:

Making the Treaty Work: International Court Ratification Campaign. Thorough page with access to plenty of reports.

<http://www.hrw.org/hrw/campaigns/icc/icc-main.htm>

International Centre for Criminal Law Reform and Criminal Justice Policy

Manual on the Ratification and Implementation of the Rome Statute; key document for project to help governments put ICC legislation in place. Available in English, French, Spanish, Russian, Arabic, Portuguese, and soon in Chinese and Georgian.

<http://www.icclr.law.ubc.ca>

International Centre for Human Rights and Democratic Development:
 Good summary of the main provisions of the Statute:
<http://www.ichrdd.ca/111/english/com-mdoc/publications/romeStat.html>

International Commission of Jurists
 The ICC in a nutshell
<http://www.icj.org/icc/iccdoc/iccn.htm>
 Main features of the ICC:
<http://www.icj.org/icc/iccdoc/mficc.htm>

Lawyers Committee for Human Rights:
 Briefing papers, articles on why the ICC is needed and how it will work, FAQs.
<http://www.lchr.org/lchr/feature/50th/main.htm>

Women's Caucus for Gender Justice:
 Good site for gender issues and the ICC. Reports, articles, newsletter, background papers.
<http://www.iccwomen.org/>, and
<http://www.iccwomen.org/reports/index.htm>

Other war crimes tribunals

International Criminal Tribunal for the Former Yugoslavia (ICTY)
<http://www.un.org/icty/index.html>

International Criminal Tribunal for Rwanda (ICTR)
<http://www.icttr.org>

The U.S. position on the ICC

There are several U.S. coalitions for the ICC:

American Non-Governmental Organizations Coalition for the ICC (AMICC)

John Washburn, Convenor
 Anne Heindel, Deputy Convenor
 E-mail: jwashburn@unausa.org;
aheindel@unausa.org
 Tel: (212) 907-1317/1358
 Fax: (212) 682-9185
 USA for the International Criminal Court
 c/o Campaign for UN Reform
 Tel: (202) 546-3956
 Fax: (202) 546-8703
<http://www.usaforicc.org>

Washington Working Group on the ICC (WICC)
 Heather Hamilton, Coordinator
 E-mail: hbhamilton@wfa.org
 Tel: (202) 546-3950 ext. 107 or (202) 415-4524

United Nations Association of the U.S.
 UNA-USA has long called for action to establish an International Criminal Court. Good first stop for information about why the U.S. is not in favour of the court, and why it ought to change its position.
<http://www.unausa.org/programs/icc.htm>

"The Court the U.S. Doesn't Want"
 Article by Kenneth Roth succinctly describes the Clinton administration's opposition to the ICC.
<http://www.nybooks.com/nyrev/WWW/archdisplay.cgi?19981119045F>

Center for Global Security Studies
 Briefing paper: "A Pragmatic and Philosophical Justification for the International Criminal Court (ICC): A Response to U.S. Objections"
<http://www.cgss.org/iccbrief1.htm>

United States Permanent Mission to the UN

For the official government view:
Statements on the ICC by U.S. govern-
ment officials:

<http://www.un.int/usa/icc.htm>

State Department backgrounder on ICC:

<http://www.un.int/usa/99icc719.htm>

Sites in French

Coalition for an International Criminal
Court:

<http://www.igc.apc.org/icc/html/french.htm>

Fédération Internationale des Ligues des
Droits de l'Homme, Un dossier spécial au
Cour pénale internationale:

<http://www.fidh.imagnet.fr/actu/cpi/impunite.htm>

Lawyer's Committee for Human Rights:

<http://www.lchr.org/lchr/feature/50th/mainfr.htm>

No Peace Without Justice

Bref Commentaire sur le Statut de la Cour
Pénale Internationale (CPI)

<http://www.agora.stm.it/npwj/ratif2.htm>

DETAILED OVERVIEW OF THE ICC

Excerpt from "International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute," a joint project of Rights and Democracy (www.icrdd.org) and the International Centre for Criminal Law Reform and Criminal Justice Policy (www.icclr.lam.ubc.ca)

The attainment, in July 1998, of a Statute for a permanent International Criminal Court (ICC) with the power to investigate and prosecute those who commit genocide, crimes against humanity and war crimes, represents a significant achievement for the world community.

Of the 160 or so States that assembled in Rome for the United Nations conference that finalised and adopted the Statute for the ICC (Rome Statute), 120 voted in support of the Statute's final text. The creation of the Court will therefore represent the realisation of a strong consensus among States - a remarkable feat, considering the various interests and legal systems that contributed to the process, as well as the fact that the General Assembly had first addressed this question some 50 years ago.

The ICC, once operational, will not only be a principal means of combating impunity, but will also contribute to the preservation, restoration and maintenance of international peace and security. More than 90 State governments have already signed the Statute, and the number of ratifications is growing steadily.

The Statute will enter into force once it is ratified by 60 States.

The place of the ICC in the international legal system

The ICC will fill a significant void in the current international legal system. It will have jurisdiction over individuals, unlike the International Court of Justice which is concerned with issues of State Responsibility. Furthermore, unlike tribunals that have been established by the Security Council on an ad hoc basis, such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY/R), the jurisdiction of the ICC will not be restricted to dealing with crimes committed in one specific conflict or by one specific regime during one specific time period, and will be able to act more quickly after an atrocity has been committed. However, the ICC will only have jurisdiction over crimes committed after it has come into existence (article 11).

As a treaty-based institution, the ICC will have a unique relationship with the United Nations system. Unlike the ICTY/R, the ICC is not a creation of the Security Council, nor will it be managed by the UN General Assembly. Yet it will be based in the Hague and will receive some financial support from the UN, particularly when the Security Council refers matters to it for investigation (arti-

cles 3, 13(b) & 115(b)).

The exact relationship between the ICC and the UN will be detailed in a special agreement that will be negotiated and approved by the ICC Assembly of States Parties (article 2). This Assembly, comprising representatives from each State Party, will also be responsible for making decisions on such matters as the administration and budget of the Court, as well as on future amendments to the Statute (article 112).

The expenses of the Court and of the Assembly of States Parties will be paid from the funds of the Court, which will be provided by States Parties on an agreed scale of assessment, as well as by the UN and any voluntary contributors (articles 114-116). Thus, States Parties to the Rome Statute will have a significant role to play in the management of the ICC. If the Court is to realise its potential, it must be aided by States to enforce the existing rules, laws and norms that prohibit serious crimes of concern to the international community as a whole. However, the ICC is intended to complement, not substitute national criminal justice systems.

This principle of complementarity ensures that the Court will only intervene in cases where national courts are unable or unwilling to initiate or conduct their own proceedings (these circumstances are carefully defined in the Statute, article 17(1)). The Court will not therefore encroach on an individual State's jurisdiction over crimes covered by the Statute.

How the ICC will function

Article 5 lists the crimes that will be within the jurisdiction of the Court: genocide, crimes against humanity, war crimes, and the crime of aggression. Article 6 provides that the crime of genocide will be defined in the same way for the purposes of ICC prosecutions as it is currently under article 2 of the Genocide Convention 1948. Both crimes against humanity (article 7) and war crimes (article 8) have been carefully defined in the Statute to incorporate crimes from different treaty and customary sources, which 120 States at the Rome Conference agreed were "the most serious crimes of concern to the international community as a whole" (article 5).

The Court will have jurisdiction over all the crimes except aggression once the Statute enters into force. Articles 5(2), 121 & 123 together provide that the Court will have jurisdiction over the crime of aggression when a suitable definition is accepted by a two-thirds majority of all ICC States Parties, at a Review Conference to be held seven years after the entry into force of the Statute. The provision on the crime of aggression must also set out the conditions under which the Court may exercise jurisdiction over this crime, which must be consistent with the Charter of the United Nations.

The procedural provisions of the Rome Statute have been drafted to create an optimal balance between the following priorities:

- (i) the need for an independent, apolitical, representative international Court, which can function efficiently and effectively to bring to justice those responsible for the most serious crimes of concern to the international community as a whole;

- (ii) the right of States to take primary responsibility for prosecuting such crimes if they are willing and able;
- (iii) the need to give victims of such crimes adequate redress and compensation;
- (iv) the need to protect the rights of accused persons; and lastly,
- (v) the role of the Security Council in maintaining international peace and security, in accordance with its powers under Chapter VII of the Charter of the United Nations.

These considerations are all reflected in the functions and powers of the Court, and its relationship with other entities, as set out under the Statute.

The personnel of the Court

The ICC will be comprised of the following organs: the Presidency, the Pre-Trial Division, the Trial Division, the Appeals Division, the Office of the Prosecutor, and the Registry (article 34). The President and First and Second Vice-Presidents will be elected by an absolute majority of the judges and will have limited terms of appointment to these positions (article 38). The Assembly of States Parties will elect the judges, after nominations have been made by States Parties (article 36). The elected judges will serve on the Court for a maximum of nine years (article 36(9)).

The criteria for nominating judges is:

- (i) high moral character, impartiality and integrity;

- (ii) possession of the qualifications required in their respective States for appointment to the highest judicial offices;

- (iii) 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 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 capacity which is of relevance to the judicial work of the Court; and lastly,

- (iv) excellent knowledge of and fluency in at least one of the working languages of the Court, which are English and French (articles 36(3) & 50(2)).

The Assembly of States Parties may only elect one judge from any one State (article 36(7)), and the selection process outlined in the Statute requires the Assembly to take into account the need for judges who:

- (i) represent the principal legal systems of the world;
- (ii) represent an equitable geographical representation;
- (iii) comprise a fair representation of female and male judges; and finally,
- (iv) have legal expertise on specific issues, such as violence against women and children (article 36(8)).

Therefore the highest standards of competence and representativeness will be

ensured in the selection of the judges.

The Assembly of States Parties also elects the Prosecutor and Deputy Prosecutors, based on similar criteria to that for judges (article 42). The judges will elect the Registrar (article 43(4)), who will be responsible for establishing a special Victims and Witnesses Unit within the Registry, which will employ staff with expertise in trauma (article 43(6)).

The ICC judges, Prosecutor, Deputy Prosecutors and the Registrar will be independent in the performance of their functions and the Statute provides that they should be accorded the same privileges and immunities as heads of diplomatic missions when they are engaged on or with respect to the business of the Court (article 48). However, they may be removed from office for serious misconduct or a serious breach of any of their duties under the Statute (article 46).

The same sanctions apply to the Deputy Registrar, although the Assembly of States Parties is responsible for the removal of judges and prosecutorial staff, while an absolute majority of the judges will decide whether the Registrar or Deputy Registrar should be removed (article 46(2) & (3)).

Triggering an investigation

There are three ways by which an ICC investigation may be initiated:

(i) a State Party may refer a "situation" to the Prosecutor, where it appears that one or more crimes within the jurisdiction of the Court have been committed (articles 13(a) & 14);

(ii) the Security Council may refer a "situation" to the Prosecutor, when acting under Chapter VII of the Charter of the United Nations, where it appears that one or more crimes within the jurisdiction of the Court have been committed (article 13(b)); or

(iii) the Prosecutor may initiate investigations proprio motu, on the basis of information received from any reliable source as to the commission of crimes within the jurisdiction of the Court (articles 13(c) & 15).

The Prosecutor will be responsible for determining which individuals should be investigated and for which particular crimes, when a "situation" is referred by either a State Party or the Security Council. However, there are rigorous procedures set out in the Statute to ensure that the Prosecutor's decision to proceed with an investigation is reviewed by the Pre-Trial Chamber, that all States Parties are informed of any ICC investigations that have been initiated on the basis of State Party referrals or proprio motu by the Prosecutor, and that States have a chance to challenge certain decisions of the Pre-Trial Chamber in this regard (articles 15-19). The Security Council may also request the Court to defer any investigation or prosecution for 12 months, by means of a resolution to that effect adopted under Chapter VII of the UN Charter (article 16).

The Court can only assume jurisdiction where the alleged crime was committed after the entry into force of the Rome Statute (article 11(a)); and, in most cases, where:

(i) the alleged crime was committed on

the territory of a State Party; or

(ii) the crime was allegedly committed by a national of a State Party (article 12).

However, non-States Parties may accept the jurisdiction of the Court over particular crimes committed on their territory or by their nationals, by means of a declaration lodged with the Registrar (article 12(3)). If a State becomes a Party after entry into force of the Statute, the Court may only exercise its jurisdiction with respect to crimes committed after entry into force of the Statute for that State, unless the State has already made a declaration under article 12(3) as a non-State Party with respect to the crime in question (article 11(b); see also article 126(2)). In addition, when the Security Council refers a situation to the Court, the Prosecutor may investigate and prosecute crimes that were committed on the territory, or by the nationals, of non-States Parties, and the Court will have jurisdiction over such matters (articles 12 & 13).

General principles of criminal law

The Statute incorporates existing international standards and principles for the prosecution of crimes. For example, no person will be prosecuted or punished by the ICC for any conduct that did not constitute a crime, or did not carry such a punishment, at the time the conduct was performed (articles 22 & 23). In addition, no person will be prosecuted by the ICC for any conduct which formed the basis of crimes for which the person has already been convicted or acquitted by the Court, or by another court, unless the proceedings in another court were for the purpose of shielding that person from criminal responsibility, or were not con-

ducted independently or impartially in accordance with the norms of due process recognized by international law, and were conducted in a manner that was inconsistent with an intent to bring the person to justice (article 20). Article 26 also provides that no person will be prosecuted who was under the age of 18 at the time of the alleged crime.

The Statute provides for individual criminal responsibility, including responsibility as an accessory or accomplice to a crime, or other similar involvement in the commission or attempted commission of a crime (article 25)). However, under article 25(1), the Court only has jurisdiction over natural persons. The Court therefore does not have jurisdiction over corporations per se (as might be the case in national law, when such law lists corporations as legal persons). The result of this is that corporations cannot be indicted nor tried by the ICC. However, this is not to be confused with corporate officers and employees, who can be held individually criminally responsible for genocide, crimes against humanity and war crimes, or responsible as "commanders" or "superiors" under article 28. That article specifically provides for the responsibility of commanders and other superiors for the actions of their subordinates, in certain circumstances.

At the same time, the Statute recognises certain grounds for excluding criminal responsibility, such as self-defence, mental incapacity, and mistake of fact (articles 31 & 32). Note however that a person cannot claim as a defence that they were acting pursuant to the order of a Government or a superior, unless (i) the person was under a legal obligation to obey orders of the Government or the

superior in question; (ii) the person did not know that the order was unlawful; and (iii) the order was not manifestly unlawful. The Statute further provides that an order requiring a person to commit genocide or crimes against humanity is a manifestly unlawful order (article 33). Note also Article 30, which stipulates that an intent to commit the crime and knowledge of the crime be proven, in accordance with the relevant definitions in the Statute.

How a case is brought to trial

Upon the application of the Prosecutor, the Pre-Trial Chamber decides whether or not to issue a warrant for the arrest and surrender of a person suspected of committing an ICC crime. The Statute sets out a number of factors that the Chamber must take into account, before issuing such a warrant, including reasonable grounds to believe that the person committed the crime that is under investigation (article 58). States Parties are required to assist the Court in executing requests to arrest and surrender persons to the ICC (articles 59 & 89).

Once the person is brought before the Court, either voluntarily or by means of a warrant, the Pre-Trial Chamber must hold a confirmation hearing, to ensure that the Prosecutor has sufficient evidence to support each charge (article 61(5)). The person is entitled to apply for interim release at several stages in the pre-trial phase (articles 59(3) & 60(2)). There are also several opportunities for the accused, the Prosecutor and States to ask the Pre-Trial Chamber to review various decisions of the Prosecutor and to appeal certain decisions of the Pre-Trial Chamber prior to the commencement of

a trial (for example, see articles 19 & 53).

The right to a fair trial

The right to a fair trial is guaranteed in the Statute. For example, the accused must be present during the trial (article 63); the accused is entitled to be presumed innocent until proven guilty before the Court in accordance with the applicable law (article 66(1)); the Prosecutor has the onus to prove the guilt of the accused, and must persuade the Court of the guilt of the accused beyond a reasonable doubt (article 66(2) & (3)). Article 67 sets out the rights of the accused to a fair and public hearing, which will be conducted in accordance with standards that are derived from the International Covenant on Civil and Political Rights and other widely accepted international instruments.

Vulnerable witnesses and victims will also be protected during any proceedings, and the Court will decide which evidence is admissible or not (articles 68 & 69). The Court will be able to prosecute persons who attempt to interfere with the administration of justice, for example by giving false testimony or by bribing or threatening judges (article 70).

Article 74 provides that all the judges of the Trial Chamber must be present at each stage of the trial and throughout their deliberations, and must attempt to reach a unanimous verdict. Their decisions must be handed down in writing and contain reasons (article 74(5)). Article 76(4) provides that any sentence imposed must be pronounced in public and, wherever possible, in the presence of the accused. The Statute also allows for appeals against various decisions of the

Trial Chamber, such as a decision to convict or to impose a particular sentence on a person (articles 81-84). All such appeals will be heard by the Appeals Chamber, which will be composed of the President and four other judges, in every instance (article 39).

The Court may impose the following penalties on a convicted person:

- (i) imprisonment for a maximum of 30 years; or
- (ii) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person; and/or
- (iii) a fine; and/or
- (iv) forfeiture of the proceeds of that crime (article 77).

In addition, the Court may order the convicted person to pay reparations to victims, in the form of restitution, compensation or rehabilitation (article 75(2)).

The Statute provides that the Court will have its own Rules of Procedure and Evidence, which will be finalised by the Assembly of States Parties (article 51). These will provide greater detail on the provisions in the Statute pertaining to the conduct of all ICC proceedings. For example, the Rules are likely to stipulate such practical matters as the factors that the Court must take into account when imposing a fine, the procedure for determining what reparations may be appropriate, and the time period for lodging an appeal.

The Court will rely on States to provide

co-operation and assistance throughout the investigation, prosecution, and punishment process, as necessary (articles 86-103). States Parties are required to respond to requests for assistance from the Court, unless genuine national security interests would be threatened (article 72), and in certain other very limited circumstances. States Parties may also be required to help enforce fines and forfeiture orders or reparations orders (articles 75(5) & 109). In addition, any State may volunteer to accept and supervise sentenced persons (articles 103-107). However, such States may not modify the sentence of the person, nor release the person before expiry of the sentence pronounced by the Court (articles 105 & 110).

Other important features of the Court

The Statute embodies a traditional concept of justice that provides for the prosecution and punishment of the guilty and obliges the Court to establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation (article 75). Furthermore, article 79 provides that a Trust Fund will be established by decision of the Assembly of States Parties. The Fund will be managed according to criteria to be determined by the Assembly (article 79(3)). The Court can decide whether to compensate victims through this Fund and it may order that money or other property collected through fines and forfeiture be transferred to the Fund (articles 75(2) & 79(2)).

The Statute goes beyond this and gives victims a voice - to testify, to participate at all stages of the Court proceedings and to protect their safety, interests, identity

and privacy. Such inclusive participation reflects the principles of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, to be implemented by national judicial systems. The provisions of the Statute require the Court to provide these protections and rights in its proceedings (eg. article 68). The inclusion of these provisions in the Statute demonstrates the importance of victims in the whole process and it is hoped that the Court will provide an effective forum for addressing grave injustices to victims the world over. The participants in the Rome Conference

were particularly sensitive to the need to address gender issues in all aspects of the Court's functions. The Statute includes important provisions with respect to the prosecution of crimes of sexual and gender-based violence. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence are defined as crimes against humanity and war crimes. The Court will be staffed with people knowledgeable in issues relating to violence against women, and there will be a fair representation of both female and male judges on the Court.

WORKSHEET:

IDEAS FOR STORIES ON THE ICC

SIGNING AND RATIFYING THE TREATY

- Where does my government stand on the ICC.
- What is happening with the process of ratifying the ICC statute in my country?

THE HUMAN SIDE

- How will the ICC approach topical issues like child soldiers, gender, the impact on victims?

ICC Activism

- What are national lobby groups doing to pressure the government to ratify the ICC statute?
- What do lawyers associations, human rights organizations have to say?

LEGAL ISSUES

- What are the legal implications of ratifying the ICC? (for instance, how will it affect presidential immunity)
- How will national laws need to be changed to implement the ICC?

REGIONAL PERSPECTIVE

- What are neighboring countries doing about ratifying the ICC?

LOOKING BACK

- Have incidents occurred in my country or region in the past that would have fallen under the jurisdiction of the ICC?

OTHER TOPICS?

OTHER TOPICS
