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The Secretariat of the Assembly of States Parties has received a communication from Italy on the outcome of a conference held in Turin, Italy, from 14 to 18 May 2007. In accordance with the request in the communication, a report on the outcome of the conference is submitted to the Assembly.*

* The content of the report and its translations were prepared by the organizers of the Turin conference.

Table of contents

	<i>Paragraphs</i>	<i>Page</i>
Table of contents.....		2
Part I - Proceedings.....	1-15	6
Part II - Introduction		8
A. The Foundation of International Criminal Justice.....		8
1. <i>International and mixed jurisdictions: means and achievements of mechanisms established by States and the United Nations - Paola Gaeta, Professor, University of Florence.....</i>	1-11	8
2. <i>The experience of the ad hoc Tribunals and their completion strategies.....</i>		9
(i) International Criminal Tribunal for the former Yugoslavia, Fausto Pocar, President.....	1-14	9
(ii) International Criminal Tribunal for Rwanda, Erik Møse, President	1-12	11
(iii) Special Court for Sierra Leone, Amelie Zinzius, Senior Legal Officer, Appeals Chamber	1-7	12
3. <i>National jurisdictions and international assistance: rule of law and defence perspectives - Chris Engels, Director of the Criminal Defence Section, Court of Bosnia and Herzegovina.....</i>	1-10	13
4. <i>The establishment of a permanent international criminal court: scope and role of the International Criminal Court - René Blattmann, Vice President, International Criminal Court.....</i>	1-13	14
B. Promoting International Criminal Justice.....		16
1. <i>First achievements of the International Criminal Courts and its opportunities: Organization, operations and professionals perspectives in the International Criminal Court - Bruno Cathala, Registrar, International Criminal Court.....</i>	1-5	16
2. <i>Implementing legislation of the Rome Statute: Regional Experiences - Allieu Kanu, Ambassador, Sierra Leone.....</i>	1-5	17
3. <i>The role of NGOs in the operational phase of international criminal justice - Alison Smith, No Peace Without Justice.....</i>	1-3	17
4. Defence and Victims Issues.....		18
(i) <i>Defence and Victims basic issues and representation - Didier Preira, Head of the Division of Victims and Counsel, International Criminal Court</i>	1-7	18
(ii) <i>Victims' assistance in the field - Mariana Peña, Fédération internationale des ligues des droits de l'Homme.....</i>	1-8	19
(iii) <i>The role of representatives bodies of counsel and legal associations - Fabio Galiani, Counsel, International Criminal Bar.....</i>	1-5	20
C. The Review Conference of the Rome Statute.....		20
1. <i>The Rome Statute process, from its adoption to the Assembly of States Parties - Umberto Leanza, Professor University of Rome.....</i>	1-5	20

2.	<i>From the Rome Conference to the Review Conference: the principle of universality, or achieving momentum and consensus - Jürg Lindenmann, Ministry of Foreign Affairs, Switzerland.....</i>	1-9	21
3.	<i>Amendments and revision: provisions, timing, real needs and procedure - Rolf Fife, Ministry of Foreign Affairs, Norway.....</i>	1-11	22
4.	<i>The object of the review mechanisms - Otto Triffterer, Professor, University of Salzburg.....</i>	1-11	23
5.	<i>The role of non-governmental organizations in the lead-up to the Review Conference - William Pace, Convenor, Coalition for the International Criminal Court.....</i>	1-11	25
Part III - The crime of aggression			27
A.	<i>The State responsibility for acts of aggression under the UN Charter: a review of cases - Edoardo Greppi, Professor, University of Turin.....</i>	1-8	27
B.	<i>Individual criminal responsibility for the crime of aggression: a background perspective, from the Nuremberg trials to the consolidation of the subject matter international criminal jurisdiction - Muhammad Aziz Shukri, Professor, University of Damascus.....</i>	1-9	28
C.	<i>Policy issues under the UN Charter and the Rome Statute - David Scheffer, Northwestern University School of Law.....</i>	1-6	30
D.	<i>The elaboration of the definition and procedure for accountability of the leadership crime of aggression before the International Criminal Court.....</i>		32
1.	Christian Wenaweser, Ambassador, Liechtenstein.....	1-3	32
2.	Claus Kress, Professor, University of Cologne.....	1-10	33
E.	<i>National legislation on individual responsibility for conduct amounting to aggression - Astrid Reisinger, Salzburg Law School on International Criminal Law.....</i>	1-11	35
F.	<i>The principle of complementarity under the Rome Statute and its interplay with the crime of aggression - Pål Wrangé, Counsellor, Foreign Ministry, Sweden.....</i>	1-16	37
Part IV - The experience of the international criminal jurisdictions and their contribution to the development of International Criminal Law.....			40
A.	Investigations on International Crimes		40
1.	Carla del Ponte, Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia.....	1-11	40
2.	Hassan B. Jallow, Chief Prosecutor, International Criminal Tribunal for Rwanda.....	1-11	41
3.	Alfred Kwende, Investigation Unit, International Criminal Tribunal for Rwanda	1-9	43
4.	Stephen Rapp, Chief Prosecutor, Special Court for Sierra Leone.....	1-4	44
5.	Deborah Wilkinson, Deputy Chief Prosecutor, Department of Justice, United Nations Mission in Kosovo.....	1-7	44

6.	Chea Leang, National Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia.....	1-3	45
7.	Toby Cadman, Counsel, Office of the Prosecutor, Bosnia and Herzegovina.....	1-3	46
8.	Fatou Bensouda, Deputy Prosecutor, International Criminal Court.....	1-7	46
9.	Alice Zago, Investigator, International Criminal Court.....	1-3	47
10.	<i>Enhancing State-to-State and State-to-International Organisations cooperation</i> - Nicola Piacente, Prosecutor, District Anti Mafia Direction, Milan.....	1-6	47
B.	International Prosecutions.....		48
1.	Hassan B. Jallow, Chief Prosecutor, International Criminal Tribunal for Rwanda.....	1-4	48
2.	Silvana Arbia, Senior Trial Attorney, International Criminal Tribunal for Rwanda.....	1-6	48
3.	Stephen Rapp, Chief Prosecutor, Special Court for Sierra Leone.....	1-7	49
4.	Fatou Bensouda, Deputy Prosecutor, International Criminal Court....	1-5	50
5.	Deborah Wilkinson, Deputy Chief Prosecutor, Department of Justice, United Nations Mission in Kosovo.....	1-6	51
6.	William Smith, Deputy International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia.....	1	53
7.	Toby Cadman, Counsel, Office of the Prosecutor, Bosnia and Herzegovina.....	1-3	53
8.	<i>Human Rights Law compliance in international criminal procedure</i> -Francesco Crisafulli, Counsellor, Permanent Mission of Italy to the Council of Europe.....	1-7	54
	Part V - International Case Law.....		55
A.	Genocide.....		55
1.	Susanne Malmstrom, Legal Officer, International Criminal Tribunal for the former Yugoslavia	1-8	55
2.	Silvana Arbia, Senior Trial Attorney, International Criminal Tribunal for Rwanda.....	1-9	56
B.	Crimes Against Humanity.....		57
1.	Don Taylor, Associate Legal Officer, International Criminal Tribunal for the former Yugoslavia	1-4	57
2.	Silvana Arbia, Senior Trial Attorney, International Criminal Tribunal for Rwanda.....	1-6	58
3.	Antoinette Issa, Appeals Counsel, International Criminal Tribunal for the former Yugoslavia.....	1-7	59
4.	Amelie Zinzius, Senior Legal Officer, Appeals Chamber, Special Court for Sierra Leone.....	1-2	60

5.	<i>Protection of civilians in armed conflicts: development of international humanitarian law, from the perspective of war crimes to crimes against humanity</i> - Anne-Marie La Rosa, International Committee of the Red Cross, Advisory Service on International Humanitarian Law.....	1-2	60
C.	War Crimes.....		60
1.	Motoo Noguchi, Professor, United Nation Asia and Far East Institute..	1-7	60
2.	Guido Acquaviva, Legal Officer, International Criminal Tribunal for the former Yugoslavia	1-4	61
3.	Alice Zago, Investigator, International Criminal Court.....	1-3	62
4.	Antoinette Issa, Appeals Counsel, International Criminal Tribunal for the former Yugoslavia.....	1-6	62
5.	Amelie Zinzius, Senior Legal Officer, Appeals Chamber, Special Court for Sierra Leone.....	1-5	63
6.	Tarik Abdulhak, Senior Adviser to the Registrar of Bosnia and Herzegovina.....	1-7	64
7.	Melika Busatic, Legal Officer, War Crimes Chambers of Sarajevo.....	1-4	65
8.	<i>The role of NGOs in documenting war crimes</i> - Niccolò Figà Talamanca, No Peace Without Justice.....	1-4	66
9.	<i>International obligations on war crimes and their implementation: the practice of States</i> - Anne-Marie La Rosa, International Committee of the Red Cross, Advisory Service on International Humanitarian Law....	1-5	66
Annexes			
I.	List of Participants.....		68
II.	Conference Programme.....		94
III.	Inauguration Ceremony.....		100

Part I - Proceedings

1. The “Conference on International Criminal Justice” was held in Turin from 14 to 18 May 2007, as an officially organized and sponsored Italian event, aimed at contributing to the development of International Criminal Law and Justice.
2. The Conference was convened, organized and presided over by Judge Roberto Bellelli, President of the Military Tribunal of Turin.
3. Appropriate funding and logistic support was raised among central and local Italian public authorities, as well as other donors. Organizational, financial and other logistic support was provided by the following: Military Tribunal of Turin, Ministry of Foreign Affairs, Army, City of Turin, Province of Turin, Region Piedmont, University of Turin and the United Nations Interregional Crime and Justice Research Institute (UNICRI) (including through the joint “2006-2007 LLM Master in International Organizations, International Criminal Law and Crime Prevention”). Funding was also made available through contributions from of the Department for European Policies, Compagnia di San Paolo, Fondazione CRT and Planethood Foundation.
4. All Conference services were provided by a Secretariat established within the Military Tribunal, also thanks to the staff support of the Army, Carabinieri and Guardia di Finanza, who also ensured substantial means to set up the local transportation system of participants. Civilian staff also volunteered in the Secretariat, and a composite team of assistants supported the preparation of the report.
5. The Secretariat of the Assembly of States Parties of the International Criminal Court provided invaluable assistance in some of the preparatory work for the conference, as well as in the preparation of the report. The Permanent Mission of Liechtenstein to the United Nations (UN) also contributed with the preparation of Part III of the report.
6. The President invited the following to participate in the Conference: all States, representatives of intergovernmental organizations and other entities that had received a standing invitation from the General Assembly of the United Nations (UNGA) pursuant to its relevant Resolutions, as well as representatives of regional intergovernmental organizations and other international bodies invited to the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (Rome, June/July 1998), accredited to the Preparatory Commission for the International Criminal Court or invited by the Assembly.
7. Furthermore, all participants in the 2006 Princeton inter-sessional meeting of the Special Working Group on the Crime of Aggression (SWGCA) of the Assembly of States Parties to the Rome Statute of the International Criminal Court, as well as the Coalition for the International Criminal Court (CICC) were invited to the Conference.
8. A dedicated website (www.torinoconference.com) was created to disseminate information on the Conference and for outreach purposes on International Criminal Law and Justice, which will be updated and maintained in the follow-up to the Conference.
9. The Conference was attended by some 436 participants, representing 95 States, as well as all relevant international organizations and NGOs. A number of academics, judges, prosecutors, counsels and students also attended. The different organs of the international and hybrid tribunals and courts, as well as other forms of national internationally assisted jurisdictions were represented at senior levels, including: the International Criminal Court (ICC), the United Nations ad hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda

(ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the War Crimes Chamber of Sarajevo (WCC), and the United Nations Interim Administration Mission in Kosovo (UNMIK). The list of delegations and registered participants is contained in Annex I to the present report.

10. The ad hoc Fund established to cover travel and accommodation expenses of least developed countries and other developing countries (LDC/ODC) was able to assist delegates from 41 States.

11. The organization also provided all participants with free meals and local transportation, as well as with airport welcome and cultural visits.

12. During its different sessions, the Conference was addressed by a total of 56 speakers. Simultaneous interpretation was provided in English, French, and Italian. The program of the Conference, as actually performed, is contained in Annex II to this report. The present report contains summaries based on the oral presentations of the speakers, while more comprehensive papers will be published separately.

13. The Conference was introduced by a formal inauguration ceremony, opened by the President of the Conference, Judge Roberto Bellelli. The President presented the objectives, scope and structure of the Conference, focusing on the essential role of international criminal justice in strengthening the principle of legality. In this respect, wider participation to the Rome Statute of the International Criminal Court would contribute to restoring basic conditions for lasting peace, and serve the interest of the victims by fighting impunity of those most responsible for the atrocious crimes falling within the Court's jurisdiction.

14. The Undersecretary of State of the Ministry of Foreign Affairs, Senator Gianni Verneti, underpinned the continuous commitment of Italy in favour of the International Criminal Court (ICC), the deterrent effect of the Court vis-à-vis the commission of the most serious international crimes, and the importance of its timely investigations in the Darfur situation. The Undersecretary of State of the Ministry of Justice, Senator Alberto Maritati, stressed the continued cooperation offered by Italy to the United Nations ad hoc Tribunals, and submitted that the Italian implementing legislation of the Rome Statute will be soon presented to the Parliament on a priority lane. The Deputy President of the Region Piedmont, Mr. Sergio Deorsola, underlined the need for all States to accept limitations of their sovereignty, in order to comply with the principle of accountability for those most responsible for atrocious international crimes. The Deputy President of the Province of Turin, Ms. Aurora Tesio, addressed the need for the international community to restore the rule of law, and to keep alive the memory of the many tragedies ensuing conflicts and authoritarian regimes. The Deputy Major of Turin, Mr. Michele Dell'Utri, underlined the natural vocation of the Town of Turin to host the Conference, in line with its historical and cultural role. The Officer-in-charge of the United Nations Interregional Crime and Justice Research Institute (UNICRI), Ms. Doris Buddenberg, recalled the road which led to the establishment of the ICC, and drew the attention on the commitment of UNICRI to implement programs on international criminal law and justice. The Presidents of the ICTY, Judge Fausto Pocar, of the ICTR, Judge Erik Møse, the Vice-President of the ICC, René Blattmann, the Cambodian Co-Prosecutor at the ECCC, Ms. Chea Leang, and the Legal Officer from the SCSL, Ms. Amelie Zinzus, introduced the main achievements and challenges of their respective jurisdictions. All speakers praised the organizer of the Conference, and welcomed its timely holding and wide scope. Speeches delivered during the inauguration ceremony will appear in Annex III to this report.

15. On the occasion of the Conference, an off-site meeting of the Presidents, Prosecutors and Registrars of the international and internationalised Tribunals and Courts on the Legacy

of the Tribunals and on related issues was also hosted by the organization in the historical location of *Castello del Valentino*.

Part II - Introduction

Chair: Roberto Bellelli, President of the Military Tribunal of Turin

A. The Foundation of International Criminal Justice

1. *International and mixed jurisdictions: means and achievements of mechanisms established by States and the United Nations* - Paola Gaeta, Professor, University of Florence

1. The panellist made a reference to the historical concepts of international and mixed jurisdiction, and how they had been regulated. In this connection, she indicated that in the past, the understanding of crimes related more to crimes of a private nature, such as trafficking of women and children and piracy. Faced with such international and often organized crime, States felt it necessary to sign treaties to strengthen cooperation and more effectively counter this class of international crimes. These treaties generally followed a pattern: the crime was defined, then national laws were developed, along with jurisdictional criteria for the criminal prosecution of these crimes. This coordination effort to counter private crimes was a preliminary form of criminal justice.

2. A new form of crime was addressed at the Nuremberg Tribunal: crimes committed by State organs acting on behalf of the State as such. Nuremberg and Tokyo also had their shortcomings: the trials were subject to political pressure and were ruled by the concept of victor's justice. Nonetheless, they represented a fundamental change for international criminal justice by addressing violations committed by State organs, or with the support of the State.

3. International criminal justice institutions are indispensable now more than ever. The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC) are veritable experiments to affirm international criminal justice. Moreover, domestic legal systems are required to give greater reach to international criminal justice.

4. In treaties such as the Geneva Conventions, the Torture Convention and the Genocide Convention, States were called upon to regulate behaviour and jurisdictional issues, as well as to encourage cooperation among States. However, these values were rarely enforced by domestic tribunals.

5. The ICTY and ICTR, followed by the ICC and mixed tribunals constituted a significant change. International and national law could cease to rely solely on domestic tribunals. These international institutions defined laws and procedural rules. International bodies could directly bring individuals to trial, without intervention by States. For the first time, international courts broke the monopoly of domestic law and asserted its values directly through their trial chambers.

6. This evolution of international tribunals, and their development of Rules of Procedure and Evidence (RPE), had an impact on national judges as well. In 1994, domestic judges started to prosecute perpetrators of international crimes in domestic courts.

7. The main difference in national trials was that domestic judges no longer acted as truly national: they became “the arms and legs” of international criminal justice. This entailed splitting their functions in a novel manner: they were domestic judges relying on national *and* international law. This process changed the way international criminal law is seen.

8. International tribunals have had to overcome a plethora of challenges: being perceived as geographically distant to the place where the crimes were committed (such as The Hague); close proximity, however, also raised security concerns (i.e., the SCSL); language issues; ensuring cooperation from State and non-State actors for the execution of arrest warrants and for the collection of evidence. In numerous instances, these institutions had to rely on the will of sovereign States, whose decisions to cooperate with international tribunals is sometimes political.

9. Nonetheless, international tribunals are continuously improving their performance.

10. An issue of serious concern for all international tribunals is the appearance of impartiality. The perception of impartiality is crucial to the legitimacy of the Court or tribunal. A choice not to prosecute certain crimes can lead to the appearance of partiality (such was the case when the ICTY chose not to prosecute the North Atlantic Treaty Organisation (NATO) bombings against Serbia).

11. In conclusion, the international tribunals still have much to address, including how to decrease the length of trials and to streamline their procedures. Nonetheless, the enormous progress attained so far provides much hope for the future.

2. *The experience of the ad hoc Tribunals and their Completion Strategies*

(i) International Criminal Tribunal for the former Yugoslavia - Fausto Pocar, President

1. The panellist agreed that the international community should stop establishing ad hoc courts/tribunals for universal crimes where national courts are not capable or not willing to deal with the cases, since justice should preferably be administered through one universal court: the International Criminal Court.

2. The ad hoc courts set up by the United Nations Security Council (UNSC) were necessary to accelerate the developments towards establishing a permanent international court. Nonetheless, some shortcomings similar to those of the Nurnberg and Tokyo tribunals were recurrent in the United Nations established tribunals, except as regards the criticism of being perceived as based on victor’s justice. This required the development of international jurisdiction based on a criminal code that could be applied for future crimes.

3. The statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) was contained in a United Nations Security Council Resolution passed while the conflict was still ongoing in the former Yugoslavia. Thus, although the ICTY had only to administer justice, its establishment was also meant to contribute to the end of hostilities or at least to make them more humane.

4. The main shortcomings of ICTY were already inherent in the Resolution adopting the Statute which, inter alia:

- (a) Did not define the applicable law;
- (b) Indicated the crimes but did not define their scope and elements;

(c) Recalled that the ICTY had to operate according to the basic principles of a fair trial, but did not define the procedures according to which the Tribunal should operate.

5. *Definition of the applicable criminal law.* In order to respect the principle of legality, the ICTY resorted to customary international law and to treaties in force at the time of the commission of the crime. One major problem was determining which treaties were in force in the period (1991-1992) since the succession of the successor States of the former Yugoslavia to the treaties concluded by the latter raised issues which are not completely clear. Another major problem was the difficulty in assessing customary international law. The ICTY could not adopt a progressive approach to customary law and had to strictly apply the principle of legality.

6. *Definition of procedure.* Unlike the case of national judiciary systems, where the legislative branch defines the applicable procedural law, at the ICTY the judges had to define and apply their own procedures. The Nuremberg trial provided little experience in the field of procedure, and everything had to be developed from scratch.

7. While getting evidence may be relatively easy for national tribunals, it was very difficult for international courts as they have no control over territory but rely completely on State cooperation. In the case of the ICTY, as written documents were frequently not available, trials were based on witnesses and oral evidence.

8. A framework of rules of procedure was developed, based on common law approach and with some presence of civil law traditions. Although amended over the years, it still constitutes the framework governing all procedures before the ICTY.

9. In this connection, it was pointed out that the International Criminal Court (ICC) has a great advantage by being able to rely on and apply a body of substantive law adopted in the Rome Statute, which creates a sort of criminal code, and to avail itself of Rules of Procedure and Evidence (RPE) adopted by the Assembly of States Parties.

10. *Completion strategy.* Given its ad hoc nature, the Tribunal would have to close down at some point. Nonetheless, crimes committed before the establishment of the ICC in 2002 would still need to be dealt with, and therefore solutions have to be found.

11. The principle of complementarity, which is one of the cornerstones of the ICC, should remain the guiding light for future activities in the field of international justice.

12. A partnership between local and international courts for successfully dealing with international crimes would be pivotal: cases with low ranking perpetrators should be addressed at local level, while those persons with high ranks would be dealt with at the international level, thus avoiding the complications that may arise when attempting to prosecute high ranking perpetrators of war crimes and/or crimes against humanity in the country where they committed the crimes.

13. In this connection reference was made to the practice of the ICTY whereby, after a thorough assessment of the capacity of local courts to deliver fair trials, the ICTY had sent back some cases, regarding mostly lower rank perpetrators, to domestic courts in Bosnia, Croatia and Serbia.

14. Furthermore, local jurisdictions should be supported if necessary by assistance from the international community. This was the case of Kosovo, where local and internationally appointed judges worked together.

(ii) **International Criminal Tribunal for Rwanda - Erik Møse, President**

1. It was noted that the United Nations Security Council (UNSC) had decided that the International Criminal Tribunal for Rwanda (ICTR) should complete all trials by December 2008, and that the Tribunal was on course to completing its work within that timeframe.

2. Whereas at its outset the ICTR was to capture and try between 65 to 70 persons, it had a total of 68 individuals in the docket: 34 persons had been tried, 26 were under trial, 8 were awaiting trial.

3. Its greatest achievements had been to bring to justice a leadership group from the 1994 genocide, thanks to the ICTR's own work and the fact that States were willing and able to make arrests and transfer the accused to Arusha. Nonetheless, the cooperation of other States continue to be necessary, since 18 individuals are still at large.

4. The main challenges facing the ICTR in the coming months include:

- (a) arresting the 18 fugitives;
- (b) transferring the cases to national tribunals; and,
- (c) completing the trials in docket.

5. *Arrest the 18 individuals.* Since the ICTR cannot deal with all 18 cases on its own, a division of labour is envisaged between the ICTR and national jurisdictions. Six individuals are so important that they should be tried in Arusha, including the case of *Kabuga*, a millionaire allegedly behind the financial planning of the genocide. Pressure need to be maintained upon States to arrest those 18 individuals.

6. *Transfer to national jurisdictions.* The ICTR had recently proceeded with the first transfer of a person to a national tribunal. After ascertaining whether certain conditions had been fulfilled, including if the person can receive a fair trial and does not risk the death penalty, the Trial Chamber had decided to transfer the person to the Netherlands, based on Rule 11 *bis* of the Rules of Procedure and Evidence.

7. As regards the query of the place to which the case should be transferred the logical option would be to countries as close as possible to the place the crime was committed, or at least within the African continent. However, it was noted that many States lack the capacity, have overcrowded jails and under-resourced courts.

8. The second alternative is to resort to States which have more resources, even if they are remote from the scene of the crimes. In particular the States that have indictees hiding within their national borders should try them. Nonetheless, it was noted that some European States were able but not willing to prosecute these individuals.

9. The third alternative is to try the individuals in Rwanda, which is willing to receive these persons. The Prosecutor plans to transfer the accused to one particular court in Rwanda, where a special act of legal guarantees is being adopted by Rwandan authorities. It will be for the Trial Chambers to decide on the Prosecutor's request for transfer.

10. *Completion of the 26 ongoing trial.* While most trials were moving towards the end, the main challenge lay in the 5 trials with multi-accused. One of these had only the closing arguments left. The figures for this trial include: more than 400 days in court, 240 witnesses heard, and over 4000 pages of closing briefs. Cases with only one accused normally require between 27 and 40 days, and 20 to 40 witnesses for each side.

11. The ICTR was a full-fledged modern and efficient court which had attained this status by a series of measures: increasing the number of judges and courtrooms; a shift system between different cases, “twin tracking”, as well as continuous improvements by both the Prosecution and Registry in methods and efficiency.

12. *Looking to the future.* The ICTR will have made a significant contribution to the development of international criminal justice by rendering decisions on 65 to 70 cases, while ensuring the highest standards of a fair trial. Furthermore, its work will have contributed to ascertaining the truth of what happened in Rwanda, and to national reconciliation.

(iii) Special Court for Sierra Leone - Amelie Zinzius, Senior Legal Officer, Appeals Chamber

1. The Special Court for Sierra Leone (SCSL) differs from the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) due to its different mandate, structure, financing and completion strategy, as well as its smaller size.

2. The SCSL was established as a result of a specific request by the President of Sierra Leone to the United Nations Security Council (UNSC). In August 2000, the UNSC established an independent special court, while not invoking United Nations Charter Chapter VII.

3. The SCSL is different from the previous ad hoc tribunals:

(a) It is a treaty based court, as it was established by an agreement (signed on 16 January 2002 in accordance with national law) which was ratified in April 2002 by the Parliament. The only State legally bound to cooperate is Sierra Leone, while other States can only be invited to co-operate;

(b) Its jurisdiction is limited to persons with the greatest responsibility, with no mandate for lower level offenders;

(c) It is an hybrid tribunal, an international body exercising jurisdiction over domestic crimes (such as abuse of girls and wanton destruction of property);

(d) It adjudicates only a limited number of cases (12 persons indicted, while 1 is still at large);

(e) It is located in the country where the crimes were committed, and the people can attend and follow the proceedings directly;

(f) It has an outreach program very successful, and implemented through over 800 events and programs;

(g) Its legacy program is also innovative.

4. The budget of the Special Court is contingent upon voluntary contributions from States, an issue which raises challenges for planning and for the perception of impartiality.

5. Pardons for combatants and collaborators, contained in 1999 peace agreement, are not binding, and in 2005 joint trials were ordered, whereby accused members of warring factions were grouped under one trial.

6. The SCSL is now in its busiest years, with 4 trials ongoing. The trial of Charles Taylor, who was transferred to The Hague for security reasons, would commence in June 2007, end in December 2008, and a judgment would be rendered in early 2009. The Appeals Chamber awaits final judgments and would conclude its judicial activities by December 2009.

7. *Completion strategy.* The completion strategy is a model for other courts considering legacy issues: plans for the future use of the court building, documents are being archived and training courses are provided for local professionals. At the end of the mandate transitional justice mechanisms would be in place, and assistance would be provided to local authorities that would try lower level offenders.

3. *National jurisdictions and international assistance: rule of law and defence perspectives - Chris Engels, Director of the Criminal Defence Section, Court of Bosnia and Herzegovina*

1. There are several reasons to support international assistance to domestic jurisdictions. Domestic courts are increasingly harmonizing their legislation vis-à-vis international law. Without significant international assistance to domestic jurisdictions, there is a considerable risk that the law will not be applied correctly.

2. As a result of domestic application of international criminal law, that body of jurisprudence is subject to develop quickly. As an example, in Bosnia 12 verdicts were rendered in 2006 and there are thousands of cases left to try.

3. Domestic implementation constitutes new state practice, which in turn shapes the development of international criminal law. Thus, it is vital that international criminal law continue to develop once the ad hoc tribunals reach the end, and that law should be properly conveyed to domestic courts.

4. Such assistance should be holistic, including both judges and defense attorneys, and part of long term plan.

5. In the case of Bosnia and Herzegovina (BiH), there is both a short and a long term plan for defense attorneys practicing before the War Crimes Section of the Court in Bosnia. A group of 200 attorneys is being trained.

6. The short term assistance consists of substantive legal support, which initially consisted of legal research and drafting. The trainees were given an intensive course in international criminal law. The trainers drafted on procedure and domestic law, with *and* for the domestic attorneys. This sought to address the imbalance of untrained domestic lawyers facing international prosecutors and judges.

7. In a second phase, in order to continue building domestic capacity, the international experts limited themselves to writing memoranda while the domestic attorneys interpreted and produced domestic arguments as well as applied national style. The ultimate goal is for domestic courts to apply the new body of law.

8. The long term plan is to convey to the local defense bar a significant, well based and deep understanding of international criminal law. To attain this goal, a long term program was established. The training program was mandatory for any defense attorney wishing to act before the War Crimes Section. Experts from different regions of the world, both practitioners and academics, are employed as temporary trainers and educators. The domestic defense attorneys apply the law, while the international experts facilitate.

9. These trained attorneys will then move on to the cantonal courts. It was recalled in this connection that part of the completion strategy of the International Criminal Tribunal for the former Yugoslavia (ICTY) consists of transferring cases to the Bosnia and Herzegovina Court (BiH) who would, in turn, transfer the lower level cases to the cantonal courts.

10. The expectation is that the objective of fair, expedient and just trials in court of BiH would be attained.

4. *The establishment of a permanent international criminal court: scope and role of the International Criminal Court - René Blattmann, International Criminal Court Vice-President*

1. The establishment of the International Criminal Court was a necessity resulting from the fact that, in some exceptional instances, national courts are unwilling or unable to act. A permanent court also avoids some of the issues that have beset other international tribunals: being criticized for carrying out victor's justice, being focused on a specific geographic location, having limited jurisdiction, being subject to political pressure from the international community.

2. After a lengthy negotiation process with the participation of all States, the Rome Statute of the International Criminal Court was adopted in Rome in 1998. Within 8 years, 104 States have become parties to the Statute, a truly remarkable pace.

3. The most salient features of the International Criminal Court include:

(a) Jurisdiction over crimes on the territory of State Party or committed by a national of State Party. Nonetheless, other States may voluntarily choose to accept the Court's jurisdiction over crimes committed after 1 July 2002;

(b) It incorporates legal systems from the different parts of the world;

(c) It acts on the principle of complementarity;

(d) It exhibits a strong sense of a universal approach: common law and Romano-Germanic system are incorporated, and the advice of many participating actors was sought;

(e) A geographical and gender-sensitive balance is sought in the selection of its judges;

(f) The Statute is applicable to all individuals without any distinction based on official capacity;

(g) Its jurisdiction is limited to the most serious crimes: genocide, crimes against humanity, war crimes and crime of aggression, though the exercise of its jurisdiction over this latter crime is contingent upon an agreement among States Parties;

(h) It acts as a court of last resort;

(i) It has taken a systematic approach to the codification of international criminal law.

4. The principle of complementarity is a fundamental principle of the Court. The Court acts only if national authorities are unwilling or unable to prosecute a perpetrator. States have the primary responsibility to do so, and the International Criminal Court is thus a court of last resort. It is up to the Court to determine whether a national judicial system has collapsed completely or partially, or whether a State is trying to shield an accused. Both the State and the accused can challenge the jurisdiction of the Court.

5. There are three possibilities for the Court to exercise its jurisdiction. The first is a referral to the Prosecutor by a State Party, which were also made concerning crimes committed on the territory of the referring State ("self-referrals"). The Court has received referrals from the Democratic Republic of the Congo (DRC), Uganda, and the Central African Republic.

6. The second possibility is a referral by the United Nations Security Council (UNSC) acting under Chapter 7 of the United Nations Charter. This occurred with the referral of the situation in Darfur, Sudan to the Prosecutor.
7. The third possibility is a *proprio motu* investigation, initiated by the Prosecutor of the Court, after obtaining the authorization of the Pre-Trial Chamber (PTC).
8. In the case against Mr. *Thomas Lubanga*, who is in the custody of the Court and is accused of war crimes committed in the Democratic Republic of Congo (DRC), the Pre-Trial Chamber has confirmed the charges, and, subject to the result of an appeal, the trial could commence in the latter part of 2007. Also, arrest warrants have been issued on counts of crimes against humanity and war crimes in the situation of northern Uganda. Some proceedings have also taken place in the investigation on Darfur.
9. Victims are allowed to play a significant role in all stages of proceedings if their personal interests are affected. The judges apply their discretion to decide in which way victims can participate. The PTC has identified a differentiation between the participation of victims in a “situation” and in a “case”. The former refers to proceedings taking place in the phase prior to and including the investigation; the latter to proceedings taking place after the issuance of a warrant of arrest or a summons to appear. Rule 85(a) of the Rules of Procedure and Evidence (RPE) establishes the four criteria to be met in order to obtain the status of victim. The threshold for participation in the proceedings of a case is higher since it is necessary to demonstrate that there is a sufficient causal link between the harm suffered and the crime for which the arrest warrant for the accused has been issued.
10. According to the confirmation of charges, the principle of co-perpetration entails a degree of joint control over the crime, and also concerns the concept of principle and accessory perpetrators.
11. In terms of challenges, the Court runs several field operations, which are critical to the functioning of the Court since they, inter alia, facilitate victim participation, protect witnesses, run outreach programs and support domestic defense attorneys. These field missions frequently take place in the midst of ongoing conflicts, where crimes continue to be committed. Therefore, the issue of security in the field for victims, witnesses and the staff is a primary concern. Additional challenges are of a logistical and linguistic character.
12. As regards expectations for what can be attained by the Court, it was emphasized that the Court will not be able to end impunity alone, but will continue to depend on the cooperation of States, international and regional organizations and civil society. This is particularly true insofar as assistance required in executing arrest warrants, enforcing sentences and collecting evidence. It was also noted that non-governmental organizations play a key role in different areas, and that they often make important contributions via their direct local knowledge of the situations, as well as by disseminating information about the Court and increasing awareness of its activities.
13. The creation of the International Criminal Court was a historical achievement, but it constitutes a small step on the lengthy road which has yet to be forged with the cooperation of many actors.

B. Promoting International Criminal Justice

1. *First achievements of the International Criminal Court and its opportunities: organisation, operations and professional perspectives in the Court* - Bruno Cathala, International Criminal Court, Registrar

1. The panellist noted that the impact of the International Criminal Court was difficult to measure since it had only been in existence for 5 years. The implementation of the Court's « Strategic Plan » would be vital in enhancing such impact.

2. The Court, which has three situations under investigation, has 750 staff members from more than 70 States.

3. *How the Court could become a model of quality of justice.* This could be attained through 4 issues: detention, defence, victims, and witnesses.

(i) Detention. To reach a model of detention of persons under the Court's responsibility, the Court had organised seminars with the International Committee of the Red Cross on the principles of detention centres and conditions of detention in accordance with international standards.

(ii) Defence. The aim is to reach a balance between the defence/prosecution and to ensure the equality of arms. In this connection, it was noted that more than 200 lawyers were registered with the Court, more than 50 from Africa, and that efforts were on-going in order to increase that number.

(iii) Victims. Their participation posed numerous difficulties. The Court had however developed means to limit the number of victims representatives during the proceedings. There were about 250 petitions to participate in the three situations falling under the jurisdiction of the Court. Most of those petitions originated in the Democratic Republic of Congo (DRC). Furthermore, the work of the Trust Fund for Victims was being consolidated.

(iv) Witnesses. Ad hoc solutions were required to address, for each situation, the psychological and logistical issues, such as ensuring that they come to the Court and providing them with the necessary protection.

4. *Adequate support and recognition for the Court:*

(i) The support of population/States is crucial in enhancing the legitimacy of the Court. In this connection, outreach programmes and awareness campaigns to reach all populations play a key role;

(ii) State co-operation is essential to the work of the Court, for example in the case of transporting a detainee from the DRC to The Hague. Other practical issues arose regarding the means to execute arrest warrants in Uganda and Darfur, when the Court has no police force to do so.

5. *The Court as a model of public administration:*

(i) Accountability and transparency are essential to the functioning of the Court, States need to be informed of the financial status and expenditures of the Court. For this purpose a « Court Capacity Model » has been developed to determine the output that can be attained with a given amount of resources, or vice-versa.

(ii) Given the need for a universal Court, candidates for posts are sought from different legal backgrounds. Programmes for internships and visiting professionals, funded by targeted contributions to that effect, also play an important role.

(iii) Non bureaucratic administration. The establishment of a common culture, which cuts across the different nationalities and occupations, is a challenging and on-going endeavour.

2. *Implementing legislation of the Rome Statute: Regional experiences - Allieu Kanu, Ambassador, Sierra Leone*

1. The panellist highlighted Sierra Leone's commitment to international justice and pointed out that a demonstration of this commitment was the fact that it was among the first States to sign and ratify the Rome Statute.

2. It was noted that despite having ratified the Statute, domestic courts in Sierra Leone could not invoke it as a source of law, since implementing legislation enacted by the Parliament was required for its incorporation into the national legal system.

3. In this connection, there are two schools of thought regarding incorporation of treaties as part of the State's legal systems: the dualist school, which requires legislative incorporation, and the monist school, which considers the incorporation to be automatic.

4. Since Sierra Leone followed the dualist approach, the incorporation of the Rome Statute into its national legislation is required, so as to enable it to:

- (a) Meet requests for the arrest and surrender of persons wanted by the International Criminal Court;
- (b) Cooperate with requests for assistance in areas like investigations;
- (c) Meet obligations enunciated in concepts like universal jurisdiction and *aut dedere aut judicare*.

5. After being prepared in consultations with parliamentarians and civil society, Sierra Leone has a draft bill which incorporates the crimes of genocide, crimes against humanity and war crimes into its domestic law and which also enabled their investigation and prosecution. The draft legislation also contains provisions to enable full cooperation with the International Criminal Court and other State Parties.

3. *The role of non-governmental organizations in the operational phase of international criminal justice - Alison Smith, No Peace Without Justice*

1. The panellist referred to the experience of the NGO No Peace Without Justice (NPWJ) and the Government of Sierra Leone in the establishment and operations of the Special Court for Sierra Leone (SCSL). The role of NGOs did not end with the establishment of the SCSL because it also covered outreach in the field and conflict mapping assistance. This latter assistance consisted of interviewing key individuals in different areas across the country, as well as in reconstructing and analysing orders, chains of command, decision-making processes of each fighting force etc., so as to identify those who bear the greatest responsibility for the commission of the crimes.

2. The fieldwork, which is one of the ways by which NGOs promote international criminal justice, is carried out in agreement with international criminal justice institutions and sometimes independently. For instance, in 1999, NPWJ, working with the International Crisis

Group, had a formal agreement with the International Criminal Tribunal for the former Yugoslavia (ICTY) related to the collection of testimonial evidence from the field.

Initially, much of NPWJ's work was directed at building and strengthening political will for the establishment of international criminal justice institutions and on ensuring the best possible design for those institutions, through work in their Statutes and other supporting norms. This support to international criminal justice also takes place through lobbying and advocacy, particularly with those responsible for setting those institutions. In this respect, the establishment of the International Criminal Court constitutes one of the best examples of cooperation between States and non-State actors working together.

3. Furthermore, NPWJ has a judicial assistance program that helps governments from developing countries by offering the services of experienced legal advisers to their delegations during negotiations for the establishment of international institutions. This program played a useful role in promoting international criminal justice by facilitating geographical representation of several States in the negotiations, increasing the knowledge of substantive international criminal law issues, and by increasing the likelihood and pace of ratification and implementation of the Rome Statute.

4. Defence and Victims issues

(i) *Defence and Victims basic issues and representation* - Didier Preira, Head of the Division of Victims and Counsel, International Criminal Court

1. *Victims.* The role given to victims in the Rome Statute of the International Criminal Court was an absolute novelty. Article 68 of the Statute gives victims the right to participate in proceedings if it is in their personal interest, while article 75 provides for the right of victims to reparation.

2. *Victims' rights.* Practical problems require defining the notion of « victim », the different modes of their participation in proceedings, and the challenges that an effective victims' participation poses to the Court.

3. As regards the definition of « victim », it was noted that on 17 January 2006, Pre-Trial Chamber I had interpreted for the first time rule 85 (1) of the Rules of Procedure and Evidence (RPE) giving a broad interpretation to the notion « victim ». This had occurred vis-à-vis 6 victims' petitions on the situation in the Democratic Republic of Congo (DRC).

4. *Participation in the procedure.* There are important logistical and security difficulties in implementing the mandate of assisting victims for their participation. The strategy to fight those difficulties has been to make awareness campaigns with chosen partners (in respect of ethics) close to the victims, to provide training to these partners, to place the application form for victims on the website of the Court, etc. Essential aspects are the transmission of the application form, strengthening capacities, and the improvement in quality/quantity of applications received from victims.

5. *Right to reparation.* Article 75 of the Statute refers to the right to reparation for victims. There are different forms of reparation: restitution, compensation, and rehabilitation. However, only time and practice will provide answers to queries posed by the lack of specific norms such as the type of the harm suffered (serious, grave, minimum), the causal link between the harm and the reparation, or the standard of vulnerability (flexible or strict).

6. *Counsel.* Article 67, 1. (d), of the Statute and rule 90.1 RPE established the principle of freedom for the accused to be assisted by a counsel of his or her own choosing. The Court

provides for a free legal assistance system for the indigent accused or victims to guarantee the right to a fair trial. More than 200 lawyers have registered with the Court for that purpose.

7. In order to assist counsel, the Court have already made an investment of € 500,000 for an Information Technology (IT) independent network system, designed to allow the intervention of counsel in the same effective manner as that of the Office of the Prosecutor, thus ensuring the right to a fair trial and the effectiveness of public administration.

(ii) *Victims' assistance in the field* - Mariana Peña, Fédération internationale des ligues des droits de l'Homme

1. The Rome Statute undoubtedly represented a step forward in the recognition of the role of the victims in international criminal law, by allowing them to participate in the proceedings before the Court, to claim for reparations, to seek protection and to be legally represented.

2. The work of NGOs in the area of assistance to victims of international crimes includes not only actions in the field, but also advocacy for their rights at the governmental and inter-governmental level.

3. When it comes to direct assistance to victims in the field it is important to bear in mind that victims of international crimes need a variety of forms of assistance that go from providing for their basic needs (such as food, cloth, shelter and education), offering medical, psychological care and social rehabilitation, and assisting them in actions related to national, transitional and international justice.

4. The importance of NGOs in assisting victims for the exercise of the rights enshrined in the Rome Statute was highlighted.

5. NGOs help by disseminating information regarding victims' rights and the way to exercise them. This is attained by providing basic information about the Court, victims' rights (participation, reparations, legal representation and protection) as well as on the developments at the International Criminal Court (ICC) and how those developments might affect their involvement in the Court's activities. It is particularly important that victims are informed of the possible negative consequences of their involvement in ICC proceedings (such as risk of reprisals or further trauma) so that they are in a position to make an informed decision as to whether they want to participate in the proceedings or not.

6. Furthermore, NGOs assist victims to participate in the proceedings by helping them to fill out the applications and forwarding them to ICC offices in the field or in The Hague. In addition, victims are assisted to find one or more lawyers that are ready to represent their interests before the ICC. Although there is yet no practice in this regard, NGOs might play in the future a similar role at the reparations stage.

7. Since the issue of victims' involvement in international criminal proceedings is novel in international law, NGOs also help by organising trainings for lawyers who wish to represent victims before the ICC.

8. It was finally mentioned that when assisting victims, it is necessary to manage their expectations by striking the right balance between bringing hope and being realistic about the likely outcome of the process.

(iii) *The role of the representative bodies of counsel and legal associations - Fabio Galiani, Counsel, International Criminal Bar*

1. The importance of the role of counsel within the international criminal law arena was stressed. The effectiveness of a permanent international criminal tribunal requires procedural guarantees, which are constantly monitored and improved by the defence. Unfortunately, the defence and counsel are often perceived as opponents of the regular functioning of justice. The attribution of culpability by mass-media to certain accused threatens the presumption of innocence, becoming certainty of culpability before delivering a sentence. This gives to the public opinion a misperception of the role of counsel in international criminal justice, that is different from the classic role of counsel.

2. International instruments protecting the role of lawyers (United Nations Basic Principles, for instance) provide for the independence of counsels through their continuous training, respect to dignity, establishment of ethics and deontology codes, etc.

3. The differences in structural and functional systems for counsel at the domestic level do not allow for a unique model for counsels in the system of international criminal justice. Within the International Criminal Court, there is a consultative role for counsels and legal associations for the purpose of providing legal assistance or the specialisation and training of counsels under the Rome Statute (rule 20.3, Rules of Procedure and Evidence (RPE)).

4. The International Criminal Bar was created on 15 June 2002 at the Montreal Conference with the participation of 350 lawyers and NGOs from more than 48 countries, and participated in the discussions of the Court's Code of Professional Conduct for counsel. In accordance with rule 20.3 RPE, the International Criminal Bar (ICB) intends to be officially recognised by the Assembly of States Parties as an independent institution representing counsels.

5. Unlike the domestic systems of legal defence, the Court needs the full cooperation of States and civil society for its effective functioning. In this sense, an essential role can be played by an independent institution representing counsel, given its credibility vis-à-vis civil society and States for focusing on the rights of due process, to a fair trial and on the rights of the defence.

C. *The Review Conference of the Rome Statute*

1. *The Rome Statute process, from its adoption to the Assembly of States Parties - Umberto Leanza, University of Rome, Professor*

1. Some problems which could not be resolved during the Preparatory Commission, mainly due to lack of time, might re-surface. In particular, it was noted that, though not in an explicit manner, there had been attempts to modify the Rome Statute via the Rules of Procedure and Evidence (RPE) and the Elements of Crimes, by indicating that these were secondary sets of norms which could not affect the integrity of the Statute, and also because the Court would interpret those two sets of norms when applying them.

2. Another issue which had arisen during the Preparatory Commission was the differences between the common law and the civil law systems, especially in relation to the RPE.

3. Reference was also made to the issue of the definition of victims and their participation in the proceedings. A delicate balance had been struck between a very broad definition of victims, which may have resulted in large numbers of victims perhaps affecting

the conduct of proceedings, and the need to ensure their adequate participation. The balance found was a definition based on the harm infringed upon the victim and the causal link to the crimes in question.

As regards the interpretation of article 98 of the Statute, the panellist noted that one interpretation had been to read it as inclusive of agreements arising after the entry into force of the Rome Statute (i.e., post 1 July 2002). In this connection, the European Union had adopted guidelines stressing the principles to be respected when entering into bilateral agreements bearing upon article 98.

4. In relation to the elements of crimes, those pertaining to the crimes against humanity included the disappearance of individuals, where some were of the view that the respective material element should have been limited in time; nonetheless others had felt that the material element had to be present at all times.

5. Finally, the panellist emphasized that the quest for universality should not be limited to obtaining the ratification or accession of more States Parties, because it is vital to have implementing legislation passed at the national level, as well as to provide the Court with the indispensable cooperation regarding, inter alia, the arrest warrants and the execution of sentences.

2. *From the Rome Conference to the Review Conference: the principle of universality or achieving momentum and consensus - Jürg Lindenmann, Ministry of Foreign Affairs, Switzerland*

1. The process of negotiation for the establishment of the International Criminal Court was based on consensus. The *Zutphen* version of the draft Statute had contained about 1600 brackets and over 100 different options, that were then addressed at the 1998 Rome Diplomatic Conference. The process after 1998 has remained inclusive and consensus-driven, with the active participation of non-States Parties in the Preparatory Commission as well as in the Assembly of States Parties.

2. New York has been an auspicious venue for meetings of the Special Working Group on the Crime of Aggression (SWGCA), given the links of the subject matter with the United Nations Charter and the presence of representatives of all States, including non-State Parties, in New York.

3. A group called “Friends of the International Criminal Court”, which is also open to non-State Parties and to NGOs, informally discusses subjects related to the Court.

4. A Court which aims to be universal should reflect the communality and diversity of the world. Both the crimes and the principle of complementarity are universally recognized. Diversity can also be found in the Court’s procedural law, as well as in the composition of the judges (regional and gender balanced). All States joining should feel part of the Court, and that the Court is part of them.

5. The Court does not exercise universal jurisdiction, and therefore it does not affect non-State Parties. It is thus necessary to explain not just what the Court can, but also what it cannot do. By combating against impunity, the Court shall ensure ever growing support over time.

6. In order to enhance the universal acceptance of the Court, numerous actors carry out various roles in increasing the awareness and support for the Court: States, NGOs and civil society.

7. The panellist made reference to two sets of expectations. The Court needs to bear in mind that its future and the Review Conference depend on whether the Court is able to retain its political momentum. The Court responds to a real need and has thus become part of the international security architecture. The Court should continue to satisfy the needs and expectations of State Parties and to fulfil its obligations under the Rome Statute. Although the Court operates in a political environment, it should nonetheless continue to carry out its mandate as a court of law and thus enhance its image as a well-respected institution.

8. For their part, States should retain the atmosphere of transparency and inclusion within the Assembly of States Parties and when reviewing the Rome Statute. Furthermore, States should respect the Statute and fulfil their obligations, inter alia, in the area of cooperation, payment of contribution and implementation of decisions taken earlier. States and the international community should also bear in mind that international criminal justice is a learning process.

9. In relation to the Review Conference, it was noted that the Statute is a dynamic document which can be amended over time. Nonetheless, the Review Conference should not adopt modifications that are not based on sufficient practical experience; such experience, insofar as it related to Court, is not available at this juncture. Furthermore, modifications which may make it more difficult for States to become parties to the Statute should not be adopted. A careful balance bearing in mind these considerations should be struck at the Review Conference, while maintaining the culture of transparency and inclusiveness.

3. *Amendments and revision: provisions, timing, real needs and procedure - Rolf Fife, Ministry of Foreign Affairs, Norway*

1. The primary query should be what the Review Conference can do for the Court and for international criminal law. The process leading up to the Review Conference should be based on consensus-building and on the achievements of the Court.

2. The relevant provisions of the Rome Statute indicate that after seven years of its entry into force the procedure for amendments can commence; they also raise the possibility that additional review conferences could be held, so the first conference is not the only opportunity for amending the Statute. Article 124 of the Statute is the sole provision that would require an amendment at the Review Conference.

3. It was stressed that approximately 98% of the Rome Statute had been adopted, as a meticulously negotiated “package”, by consensus, a fact that had to be borne in mind when looking at possible amendments.

4. The Review Conference would also be taking place at a unique moment in time: that of the conclusion of completion strategies for ad hoc tribunals and Courts.

5. In the Final Act of the Rome Diplomatic Conference, the relevant resolution called for consideration at a Review Conference of terrorism, drugs trafficking and the crime of aggression.

6. One key word is the timing of the Review Conference. It would have to be convened in July 2009 by the Secretary-General of the United Nations, but the date of the Conference would be at a reasonable time after its formal convening.

7. Another key element is the “real needs”, because whatever is proposed should be helpful to the Court and international criminal justice. Thus, attempting to amend something that does not require modification should be avoided. All actors should therefore think of how the success of the Review Conference will be gauged, and which true needs merit attention.

8. Insofar as the potential issues subject for consideration at the Review Conference, it was noted that discussions are already on-going in different fora: (a) the crime of aggression, in the Special Working Group of the Assembly of States Parties; (b) the crime of terrorism, at the United Nations.

9. The preparatory work being carried out in those fora should provide the indispensable clarity as to whether a formula can be found which can gather the necessary consensus among States and thus preserve the effectiveness of the Court.

10. The draft Rules of Procedure are under consideration by the New York Working Group of the Bureau of the Assembly. The Conference would be open to all States, on the basis of the Rules of Procedure of the Assembly. Several administrative and budgetary matters, such as the venue and the duration of the Conference, were also under consideration in New York.

Among additional matters which could be subject to consideration at the Review Conference were mentioned: stock-taking; fragmentation of international criminal law; inter-relationship between the national and international levels and the necessary division of labour between the two, bearing in mind that the Court should be the last resort.

11. The point was also made that during these years, national legislations, including military codes, have been reviewed and this per se already constituted an important success flowing from the adoption of the Rome Statute.

4. *The object of the review mechanisms* - Otto Triffterer, Professor, University of Salzburg

1. Article 124 of the Rome Statute provides that the Secretary-General of the United Nations has to “convene” shortly after first July 2009 for a date within due time a “Review Conference” which “shall consider any amendments of the Statute”. The object of this Conference is to guarantee that seven years after getting into operation the Statute will receive a “check up” to control its clarity, its effectiveness and to discuss necessary or desirable amendments not only to the Statute itself, but also to its “secondary regulations”, as contained in the Rules of Procedure and Evidence (RPE) and the Elements of Crimes.

2. To achieve these manifold objects the Rome Conference has already regulated in different modalities issues to be placed or possibly placed on the agenda of this first Review Conference. The “transitional provision” of article 124 last sentence contains, for instance, the only expressly assigned issue for review by this Review Conference.

3. Several other issues demand more or less tacitly such a placement on the agenda. The Statute is for instance incomplete with regard to aggression, as demonstrated by article 5 paragraph 2. The Assembly of State Parties, therefore, has a mandate given by the Rome Conference, to consider “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 ... (and) with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute”. This mandate, listed under number 7, Annex 1, lit. F of the Final Act, therefore, ought to have the same priority as article 124 at the Review Conference. However, it is sufficient to define by now only a limited number of crimes against the peace and the condition that the Court may proceed with its investigation on relevant charges if the Security Council does not expressly impede by an absolute majority such an investigation within three months after receiving a corresponding note by the Court.

4. An amendment to the Statute is also required by article 8, paragraph 2 lit. b (xx), for which an annex is missing, defining which weapons cause “superfluous injury or unnecessary suffering or which are inherently indiscriminate”.

5. With regard to “terrorist acts and drug crimes” the mandate for the Review Conference is much weaker. With regard to aggression the Review Conference has to consider specific proposals – by whom ever – since the crime is already within the jurisdiction of the Court, though this jurisdiction can be exercised only after defining “strictly construed” the modalities; with regard to the other two mentioned crimes the Rome Conference, after “affirming” that the review mechanism of the Statute “allows for an expansion in the future” only proposes to “consider” these crimes “with a view to arriving at an acceptable definition and their inclusion into the list of crimes within the jurisdiction of the Court”, Final Act, Annex 1, E, second-last and last sentence.

6. These different wordings appear convincing, because of the indispensable and unchangeable basis for the International Criminal Court (ICC). According to this foundation the international community as a whole can establish criminal responsibility directly under international law only for those especially grave violations of its basic values like peace, security and well-being of the world. Legally protected values which primarily belong to the national level, like the internal security, can receive an additional protection by the international community as a whole only when they at least indirectly endanger the inherent values of the international community. Terrorist acts and drug offences do not (yet) establish such a threat to the international community as a whole.

7. As to whether the issues of the death penalty and trials *in absentia* should be put on the agenda, it was argued that there is no need for discussing either or, because the 1998 compromise package has been a satisfying solution as demonstrated by the abolition of the death penalty in Rwanda, and by the confirmed indictments against Milosevic, Karadžić and Mladić, which have created worldwide consciousness to obey international law and thus contributed to the prevention of the core crimes.

8. It was also posited that the object of the Review Conference should be enhancing the peace and security, as well as the well-being of the world. All states, therefore, should be cooperating with the Court because this obligation is a consequence of the international community having developed international criminal law and expressly defined and acknowledged broad parts of it through the Rome Statute.

9. Attention was also drawn to the fact that the political factors surrounding some situations, such as mutually escalating armed conflicts, made matters quite complicated, especially as regards to the differentiation between collateral damage and harm caused by war crimes.

10. It was finally pointed out that proposals for amendments to the Rome Statute or the Rules of Procedure and Evidence or Elements of Crimes should be as specific as possible to improve the general acceptability. In addition, the achievements attained in Rome in 1998 should not “be interpreted as limiting and prejudicing in any way” the future development of the new field of international criminal law and its direct enforcement model by the ICC (article 10).

11. The achievements now do not suffice, and it is for the new and the coming generations to improve upon them. In addition, we need to abolish hunger and poverty as the main causes, if we want to effectively contribute to the prevention of core crimes. This implies not only to increase the financial aid for the relevant countries but also to make accountable those who prevent on the spot this aid to be effective, or even those who destroy

basic food in rich countries in order to stabilize prices with financial means, sufficient to distribute this food in order to prevent children and adults from starvation.

5. *The role of non-governmental organizations in the lead-up to the Review Conference - William Pace, Convenor, Coalition for the International Criminal Court*

1. The Coalition for the International Criminal Court (CICC), which consists of over 2000 NGOs from almost all countries in the world and with a broad spectrum of mandates, wishes to deepen and enhance its informal partnership relationship with the International Criminal Court (ICC) and the Assembly of States Parties as the Rome Statute system evolves over the coming decades. The CICC has been one of the most successful global civil society human security campaigns, and has been very successful in finding mechanisms to facilitate cooperation between its large and diverse membership.

2. The primary means of operation for the CICC has been, in addition to ensuring cooperation amongst its membership, the strategy to work closely with like-minded governments to establish a fair, effective, and independent Court. This North-South NGO informal partnership with North-South like-minded governments (now Friends), has been described as a 'new diplomacy' model for developing progressive treaties and international organizations, and widely praised as instrumental in the adoption of the Rome Statute.

3. Looking at the Review Conference, the CICC is wrestling with most of the same questions as governments. Should the Review Conference consist solely of the consideration of amendments, including the definition of the crime of aggression? Or should it not have such a restricted scope? Some of its members are calling for the Review Conference to also include a general stocktaking. Other members hope the Review Conference could also be an opportunity for "benchmarking", that is, be an opportunity for the Assembly of States Parties to pursue goals towards advancing universal acceptance and compliance with the Rome Statute (i.e., ratification of the Statute, and of the Agreement on Privileges and Immunities, and governments committing to completing implementing legislation at the national level, etc.).

4. The CICC has established an issue team or caucus focusing exclusively on the Review Conference, which will provide reports, prepare proposals and updates to and through its worldwide network. A strategy meeting for NGOs leading up to the Review Conference, organized by the Dutch chapter of Amnesty International, took place in September 2006.

5. One of the main points of attention is the cooperation between the Court, States, NGOs and civil society. In the view of CICC the best manner to prevent the Review Conference from facing an unnecessary division is to prepare properly.

6. States Parties thus should consider holding formal preparatory meetings to supplement the informal arrangements already agreed to. These preparatory meetings could ensure ownership, transparency and support for the outcomes of the Review Conference. More formal preparatory processes would also reduce concerns that the Assembly of States Parties would be considering proposals inconsistent with the judicial independence of the ICC, and could reduce the danger of the political divisiveness at the Review Conference. The Review Conference could be an important landmark in consolidating support for the Court and strengthening all forms of cooperation. The Conference might also constitute an opportunity to spur ratification, implementing legislation, as well as to stimulate other cooperation goals of the Court.

7. The venue of the Conference is important, since it would have an influence on the results. The CICC favours a venue conducive to open discussions and independent from external political pressure. It should be borne in mind that the venue might have an impact on victims' communities, affected populations, the perception of the Court, its proceedings and the universality of the Statute.

8. The sooner the scope of the Conference can be agreed upon, the better. The dates for the Review Conference, its budget and rules of procedure need to be considered soon. Since it is essential that stakeholders have enough time to look at the proposals for amendments, consideration should be given to restrict the submission of such proposals to a certain period prior to the Review Conference, so as to avoid last-minute proposals. Regardless of the scope, the Conference should constitute an opportunity to prevent a regression from the spirit of the Rome Statute.

9. This unfortunate regression in the support for the Rome Statute and the Court is visible in many developments. One disturbing example is the discussion of a false dichotomy: peace versus justice. In reality, the dichotomy is peace versus impunity, a matter that was extensively and seriously discussed between 1994 and 1998. Additional symptoms of the regression are the fatigue and waning support for ad hoc and special tribunals. Some State Parties act as if they have fulfilled their obligations under the Rome Statute by simply paying their dues ; while many new governments and diplomats attach less importance to the Court. It is clear that in the current world political environment, the Rome Statute could not have been adopted.

10. Seeking informed support for the Rome Statute is a political and educational challenge, even in the most favourable political conditions. Particular efforts are required in addressing the intellectual and political elites from the media, parliaments, international organizations, relief organizations and judicial leaders.

11. The achievements of the last 12 years in establishing the International Criminal Court have been great, yet are but a start. The CICC wishes that the Review Conference process will reinforce and strengthen the historic promise of Rome, which is a promise not only to be honoured by those here today, but a promise to the millions of innocent children who will become victims if we fail.

Part III - The crime of aggression

Chair: Christian Wenaweser, Chairman of the Special Working Group on the Crime of Aggression

A. *The State responsibility for acts of aggression under the United Nations Charter: a review of cases* - Edoardo Greppi, Professor, University of Turin

1. Individual criminal responsibility for the crime of aggression is inextricably linked to the State act of aggression. The International Law Commission (ILC) viewed a United Nations Security Council (UNSC) determination to be a precondition. However, in the context of the International Criminal Court (ICC), the Council's power should not be considered exclusive, as the General Assembly or the International Court of Justice (ICJ) may also determine the existence of aggression. It is furthermore not disputed that the crime of aggression is a leadership crime. Whereas the Rome Statute of the ICC deals with individual crimes, the United Nations Charter addresses State behaviour. The Charter does, however, not define aggression. The starting point for a definition of the State act of aggression is the London Charter of 1945 and Control Council Law No. 10, which refer to "war of aggression" or "acts of aggressive war".

2. The Nuremberg Tribunal considered that aggressive war had already been a crime before the Nuremberg Charter, as evidenced by the Kellogg-Briand Pact. The renunciation of the right to war in the pact implied that war was illegal under international law, and that those who plan war are committing a crime.

3. Not every use of force constitutes war, and not every unlawful use of force (Article 2, paragraph 4 of the United Nations Charter) constitutes aggression. The drafters of the Charter left it to the Security Council to make this determination on a case by case basis. In 1974, the United Nations General Assembly (UNGA) adopted resolution 3314, which provides guidance to the Security Council in determining acts of aggression, but does not interfere with the Council's power to autonomously determine the nature of any situation. The Assembly also adopted resolutions concerning acts of aggression in situations involving Korea, Namibia, South Africa, the Middle East, and Bosnia and Herzegovina. The Security Council, however, usually avoids the term "aggression", or otherwise applies it with great inconsistency. The Council has used the word aggression in situations involving relatively little use of force, such as in relation to South Africa, Rhodesia, and Israel, but not the most obvious case of aggression since World War II, namely the invasion and subsequent occupation of Kuwait by Iraq in 1990. In other situations, such as in Hungary (Soviet invasion, 1956), Afghanistan (Soviet intervention, 1979), or Panama (US intervention, 1989), aggression was not established due to what was considered the consent of the respective governments. Alleged consent or invitations, however, have to be carefully analysed, particularly when they come from puppet governments.

4. The power of the Security Council to determine the existence of an act of aggression under Article 39 of the United Nations Charter is not of an exclusive nature. Such a determination is rather one of three pre-conditions for the Security Council to use its power to make recommendations or to decide on measures in accordance with Articles 41 and 42 to maintain or restore international peace and security. The power to determine the existence of an act of aggression is therefore only applicable in situations where the Council takes action to suppress aggression. Otherwise, exclusive determination would grant permanent members immunity, in serious violation of the principle of sovereign equality.

5. The Charter provisions on the right to self-defence (Article 51) are another key element in this discussion. Under Article 51 of the Charter, States are allowed to use individual or collective self-defence in case of aggression, which implies that States themselves are allowed to make the determination that an act of aggression has occurred. While Article 51 in its English version does not use the term “aggression”, but rather “armed attack”, it can be argued that these are equivalent. The French version of Article 51, which refers to “*agression armée*”, provides an argument in favor of this view, which is further strengthened by the practice of the ICJ in the *Nicaragua* case, the *Oil Platforms* case and the *Armed Activities* case (*Congo v. Uganda*).

6. Non-exclusivity is further underlined by the General Assembly’s role in the maintenance of international peace and security, in particular in situations where the Security Council is paralyzed (see UNGA resolution 377, “*Uniting for Peace*”). The ICJ has confirmed that the Security Council’s responsibility for the maintenance of international peace and security is merely primary, and not exclusive (*Certain Expenses of the United Nations*). Exclusive is only the Council’s power to decide coercive action against an aggressor.

7. It would be the ideal scenario if the Security Council would in future cases be able to determine the existence of an act of aggression, followed by a prosecution by the ICC. However, there could be cases where the Council would be paralyzed by the veto, and therefore alternative ways would need to be identified. The General Assembly could make the determination itself, using the “Uniting for Peace” formula, or the Assembly could submit the question to the ICJ which would give its assessment in form of an advisory opinion. Finally, the ICC itself could be left to rule on the question of a State act of aggression in the absence of a Security Council determination – or to do so at least in a preliminary way in a strictly legal perspective. A court such as the ICC is equipped to deal with questions of State responsibility, as has been shown by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its consideration of the *Tadic* case.

8. Finally, there is also the possibility of settling the question of Security Council exclusivity itself through an ICJ advisory opinion. The ICC Assembly of States Parties could request the United Nations General Assembly to seek an advisory opinion on this matter, in order to clarify which approach would be most compatible with the Charter.

B. *Individual criminal responsibility for the crime of aggression: a background perspective, from the Nuremberg trials to the consolidation of the subject matter international criminal jurisdiction - Muhammad Aziz Shukri, Professor of International Law, University of Damascus*

1. More than 60 years ago, the Nuremberg International Military Tribunal (IMT) held that the crime of aggression was the supreme international crime. While there was no agreed definition of what was meant by aggression, the validity of this conclusion was never refuted. The United Nations General Assembly (UNGA), in its very first meeting, unanimously affirmed both the Tribunal’s Charter and its judgments concerning crimes against peace. Armed aggression thus became an international crime.

2. The IMT Charter spelled out the elements of the crime against peace, which became tantamount to the crime of aggression: the planning, preparing, initiation or waging of a war of aggression or of a war in violation of international treaties, agreements or assurances. The IMT Charter also included different forms of participation in the crime, such as participation in a common plan or conspiracy for the accomplishment of such acts. These elements have since enlightened jurists and politicians in the search for a generally agreed upon definition of aggression.

3. The United Nations Charter is the constitution of international relations since World War II. Even though it authorized the Security Council (UNSC) under Chapter VII to determine the existence of an act of aggression, it did not establish what aggression means. Closely related are Article 39 and Article 2, paragraph 4, which emphatically denounce the threat or use of force, with only two exceptions: self-defense according to Article 51, and the use of force under the banner of the United Nations. Self-defense against an armed attack does not imply that the State has to wait for the first bomb to be dropped upon its territory. Particularly since the Cuban missile crisis, anticipatory self-defense is well accepted (see also the *Lotus* case). There are many concrete examples of armed attacks which trigger the right to self-defense, such as the United States rocketing of Libya in 1986 (following the Berlin disco bombing), the United States bombing of a Sudanese pharmaceutical factory in 1998, the attacks on Afghanistan in 2001, and the invasion of Iraq in 2003.

4. United Nations General Assembly (UNGA) resolution 2625 (*Declaration on Friendly Relations*) reaffirms that a war of aggression constitutes a crime against the peace for which there must be responsibility. The resolution stipulates that no State or group of States has the right to intervene in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. The resolution also provides a reply to the concept of intervention for humanitarian purposes.

5. While the search for a definition of aggression proved difficult after World War II, UNGA resolution 3314 (1974), after years of deliberation, constituted a breakthrough. Its definition of aggression has been recognized by jurisprudence and doctrine. In the *Nicaragua* case, the International Court of Justice (ICJ) found that resolution 3314 represents customary international law.

6. When the draft Statute of the International Criminal Court (ICC) was presented by the ILC in 1994, it included the crime of aggression under the jurisdiction of the Court. The 1996 Draft Code of Crimes against the Peace and Security of Mankind defined aggression as follows: "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."

7. Before the Rome Conference, two tendencies emerged. Some wanted to exclude aggression entirely, while others wanted to include aggression, even though those delegations did not agree on a wording for the definition. Some believed the definition could be short and generic, while others supported a list such as the one in article 3 of General Assembly resolution 3314. Furthermore, Germany submitted a generic definition, which attracted some support. Two days before the end of the conference, aggression disappeared from the draft Statute. Following a strong reaction by the Non-aligned Movement, however, the final draft included aggression as a crime under the jurisdiction of the Court.

8. The Preparatory Commission for the ICC continued the search for a definition of aggression. Two issues were particularly disputed. The first was the definition of the State act of aggression, as many delegations opposed using General Assembly resolution 3314 as the basis for the definition, despite the clear advantages of such a solution. The second issue was the role of the Security Council, which was the object of many proposals. It must be acknowledged that the Council has an important role to play under the Rome Statute, as evidenced by its power to stop investigations under article 16 of the Statute.

9. The new Chairman's paper considered by the Special Working Group on the Crime of Aggression (SWGCA), which includes elements of the crime, marks a certain progress, even

though it is not satisfactory yet. The Court should ask the Security Council before starting an investigation into a crime of aggression, but if the Council does not answer, the Court should be allowed to proceed. Involving the United Nations General Assembly, following the *Uniting for Peace* formula, or the ICJ through an advisory opinion would be other viable options, in case the Security Council fails its responsibility. Otherwise international humanitarian law will remain far from achieving its objective, as it will be very difficult to bring aggressors before the ICC.

C. *Policy issues under the United Nations Charter and the Rome Statute - David Scheffer, Professor, Northwestern University School of Law*

1. The crime of aggression in the context of the International Criminal Court (ICC) has now been discussed for at least 14 years. The International Law Commission (ILC) became actively seized with the matter in 1992. In 1994 it submitted its draft Statute for the International Criminal Court, which became the template for the United Nations discussions that led to the Rome Statute of the ICC in July 1998. The main questions, namely how to define the act of aggression and how to trigger the Court's jurisdiction, have been discussed for many years since Rome, and the work in the Assembly of States Parties will soon exhaust itself. The Review Conference in 2009, however, is an action-forcing event in the search for consensus.

2. It should be clarified that the United States did not oppose the inclusion of aggression in the Rome Statute. Nonetheless, there was no consensus in Rome on how to trigger the jurisdiction over the crime of aggression and how to define it.

3. The United Nations Security Council (UNSC) rarely employs the term "aggression", as far more frequently it has described wars of aggression with other United Nations terminology (threats to or breaches of international peace and security, unlawful use of force, etc.). It is unrealistic to assume that the Security Council would accept the dictate of the ICC that it should use the divisive word "aggression" in its resolutions. For example, the term "armed attack" under Article 51 of the United Nations Charter, which stipulates the inherent right to self-defence until such time as the Council reacts, can encompass an act of aggression. The Security Council is very familiar with such terms and, if it wishes, can use its United Nations Charter Article 39 authority to label an action as an act of aggression. Almost always, however, it will choose different terminology that is more commonly expressed in the United Nations Charter and which may or may not cover actual aggression. But in the realm of international criminal law there also is a clear role for judicial determinations of what category of crime - be it genocide, crimes against humanity, war crimes, or aggression - is occurring or has occurred.

4. A first proposal on the trigger mechanism is based on the Security Council's common approach to threats to international peace and security. Once the Security Council determines that a threat to or breach of peace and security has occurred as a result of the use of armed force, often by condemning it, that determination in a resolution (which need not be a Chapter VII resolution) should be sufficient to start a procedure that might trigger the ICC's jurisdiction to investigate persons for purposes of individual criminal culpability.

5. The proposal does not include uses of military force which fall outside aggression, even within the broader concept of self-defence, such as humanitarian interventions, small interventions to free nationals out of embassies abroad, or temporary counter-terrorism operations. Adding these would only lead to a very divisive debate. The proposed definition for aggression conforms to the gravity, duration, and context set forth by the International Court of Justice (ICJ) in the *Democratic Republic of the Congo v. Uganda* judgment (2005). It constitutes a compromise as it goes beyond "war of aggression", while excluding isolated

and pinprick attacks, but in a way that leaves the ICC with a significant range of criminal involvement in aggression to tackle.

6. The second, more conventional proposal would depend upon use of the term “aggression” and it offers three alternative ways to trigger the ICC’s consideration: First, the Security Council could make a determination that an act of aggression has been committed. Second, the Security Council could refer to the ICC Prosecutor a situation in which the crime of aggression appears to have been committed, and, prior to the initiation of the investigation, either the Security Council or the General Assembly or the ICJ has decided that an act of aggression has been committed. Third, the Security Council could refer to the ICC Prosecutor a situation and explicitly require for the initiation of the investigation the ICC’s judgment whether an act of aggression has been committed by the State concerned.

New article 9 of the Rome Statute

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles. 6, 7, 8 and 10. They shall be adopted [...].

New article 10 of the Rome Statute

OPTION I

Article 10

Rules of International Law/Crime of Aggression

1. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
2. The Court may exercise jurisdiction over the crime of aggression in the event:
 - a. the Security Council has determined that an act of aggression has been attempted or committed by one State against a second State, or
 - b. the Security Council has determined the existence of a threat to or breach of the peace as a result of the threat or use of armed force by one State against another State, and thereafter [the Court has determined that an act of aggression has been attempted or committed by the first State against the second State] [the International Court of Justice has delivered an advisory opinion, following the request of the Security Council or the General Assembly, or a judgment concluding that an act of aggression has been attempted or committed by the first State against the second State].
3. With respect to the crime of aggression, the Court may exercise jurisdiction over any person who is or has been in a position effectively to exercise control over or to direct the political or military actions (in whole or substantial part) of the State identified by the Security Council in the manner described in paragraph 2 as responsible for such act of aggression or such threat to or breach of the peace as the result of the threat or use of armed force.
4. For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation, or execution of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such significant magnitude and duration that it constitutes a grave violation of the prohibition on the use of force under Article 2(4) of the United Nations Charter, provided that any use of armed force undertaken pursuant to Security Council authorization shall be excluded from such definition.

OPTION II

Article 10

Rules of International Law/Crime of Aggression

1. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
2. The Court may exercise its jurisdiction over the crime of aggression if:
 - (a) The Security Council has made a determination that an act of aggression has been attempted or committed by one State against a second State, or
 - (b) The Security Council refers to the Prosecutor, in accordance with article 13, paragraph (b), a situation in which the crime of aggression appears to have been attempted or committed and, prior to the initiation of an investigation in accordance with article 53, the Security Council or the General Assembly has determined by resolution or the International Court of Justice has delivered a judgment or advisory opinion ruling that an act of aggression has been attempted or committed by one State against another State, or
 - (c) The Security Council refers to the Prosecutor, in accordance with article 13, paragraph (b), a situation in which the crime of aggression appears to have been attempted or committed and the Security Council requires in such resolution of referral, as a pre-condition to the initiation of an investigation in accordance with article 53, the decision of the Court that an act of aggression has been attempted or committed by one State against another State.
3. With respect to the crime of aggression, the Court may exercise jurisdiction over any person who is or has been in a position effectively to exercise control over or to direct the political or military actions (in whole or substantial part) of the State identified pursuant to paragraph 2 as responsible for such act of aggression.
4. For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation, or execution of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such significant magnitude and duration that it constitutes a grave violation of the prohibition on the use of force under Article 2(4) of the United Nations Charter, provided that any use of armed force undertaken pursuant to Security Council authorization shall be excluded from such definition.

New article 121(5) of the Rome Statute

Article 121 Amendments

5. Any amendment to articles 5, 6, 7, 8 and 10, paragraphs 2 to 4 of this Statute shall enter into force [...].

D. The elaboration of the definition and procedure for accountability of the leadership crime of aggression before the International Criminal Court

1. Christian Wenaweser, Ambassador, Liechtenstein

1. It is worthwhile recalling that the crime of aggression is already included in the Rome Statute. The Review Conference will thus not decide on its inclusion, but on proposals to allow the Court’s exercise of jurisdiction. The Special Working Group on the Crime of Aggression (SWGCA) was a rather secondary issue during the work of the Preparatory Commission, but it gained momentum in the last few years. This is highlighted by the

decision of the Assembly of States Parties to conclude the work of the SWGCA at least 12 months before the Review Conference.

2. While there are still many open questions regarding the Review Conference, it is clear that aggression will be its centerpiece. The Conference should be a positive event and solidify the position that the International Criminal Court (ICC) already enjoys. It will also represent a unique opportunity: either the Review Conference will lead to the inclusion of provisions on the crime of aggression in the Statute, or this will probably not happen ever after. The unique momentum is created by the mandate emanating from the Statute itself. There will simply not be a better or even “ideal” moment thereafter. It is therefore a bit misleading to say that the provisions on aggression could also be included at a later stage. Much rather, the Review Conference offers an opportunity that is unlikely to come back.

3. The Chairman’s paper submitted to the Assembly of States Parties in January 2007 constitutes the first update of the 2002 Coordinator’s paper, and it reflects the useful discussions held in inter-sessional meetings in Princeton in the last years. The paper does not attempt to provide a solution, but to guide the discussions. It reflects certain progress regarding the description of the individual conduct and the definition of the State act of aggression. The provisions on the pre-conditions for the exercise of jurisdiction, however, are the core problem. A solution that commands the strongest possible political support will certainly require new thinking on the central question of the role of the Security Council. The good momentum and the good spirit of the recent Assembly of States Parties meeting give reason to expect further progress at the next inter-sessional meeting in June 2007 in Princeton, which will be attended by a record number of participants.

2. Claus Kress, Professor, University of Cologne

1. The crime of aggression will receive greatest attention at the Review Conference, much more than for example drug crimes. The crime of aggression is a crime under general customary international law, as recently confirmed by the British House of Lords, and already one of the Rome Statute’s “core crimes”. While formally the Review will simply consider an amendment to the Statute, the Statute in fact calls for its own completion by finishing the job of fully transposing the customary *acquis* of international criminal law into the form of a treaty text.

2. The Special Working Group on the Crime of Aggression (SWGCA), through its intensive, thorough, and sincere work, has made major progress. No other crime in the Rome Statute has received greater attention in its formulation than the crime of aggression. The special structure of this crime has never been more fully explored and understood than now.

3. Regarding the position and the conduct of the individual perpetrator, there continues to be a very solid consensus on the absolute leadership nature of the crime of aggression as established in Nuremberg and Tokyo. The most recent debate has been about the possible interplay between the general principles of criminal law (Part 3 of the ICC Statute) and the definition of the crime. The dominant view is to deviate as little as possible from Part 3, even in respect of the forms of individual participation that are listed in article 25 (3) (a) to (d) of the ICC Statute. Much thought has gone into the formulation of the so-called “differentiated approach”, i.e. the legal recognition of *all different forms of individual participation* in the crime of aggression. After the last formal SWGCA meeting in January 2007, a solution seems close that would almost mirror language of the Nuremberg and Tokyo judgment.

4. The Group has also made significant progress regarding the definition of the *State* act of aggression. The new Coordinator’s text no longer confuses the *substantive* definition of the State act with the *procedural* issue of a possible role for the United Nations Security Council (UNSC) in the early stages of the proceedings. Furthermore, an overwhelming majority of

delegations wish to see the definition based on the annex United Nations General Assembly (UNGA) resolution 3314. However, that text cannot be referred to in its entirety, as it was meant to assist the Security Council in its application of Article 39 of the UN Charter. Adjustments are necessary to use this guide to draft a criminal law text to be applied by a judicial body; otherwise there is a risk of creating a conflict with fundamental principles of criminal law. This *caveat* applies, in particular, to articles 2 and 4 of the annex, as well as to one passage in the chapeau of articles 3.

5. There is now a substantial support for including a “qualifier”, thus limiting the definition of the State act to those instances of the use of armed force that, by their character, gravity, and scale, constitute a manifest violation of the United Nations Charter. The SWGCA seems fully aware of the reality of the present-day *jus contra bellum*: there is a grey area in the international legal framework, i.e. an area where reasonable international lawyers may legitimately disagree in their assessment of the *lex lata*, depending *inter alia* on how the more recent international practice is seen and weighed. This is fully in line with the overall thrust of the ICC Statute, which confines the Court’s jurisdiction to atrocious behaviour that indisputably violates general customary international law. International criminal law is ill-equipped to decide major controversies about the law on the use of force.

6. The role of the Security Council remains *the* political question regarding the crime of aggression, similar to the jurisdiction issue that was finally settled in the form of article 12 of the ICC Statute. Consensus on this issue can thus only emerge at the very end of the negotiations. It would therefore be mistaken to say that the crime of aggression should be placed on the first Review Conference’s agenda only if agreement has been reached before that conference begins. The contrary is true: only the Review Conference itself can provide the procedural framework and the necessary time to make the final choice.

7. Without speculating on what this final choice will look like, it must not be a rule that would subject international judicial proceedings for an alleged crime of aggression to the veto power of each of the permanent members of the Security Council. There is no legal requirement - especially not under Article 39 of the United Nations Charter - to vest the Council with such a role. More fundamentally, this position is based on the minimum requirements of legitimacy in international criminal justice. The political backing of the Security Council in aggression proceedings would be useful, including through a referral under article 13 (b) of the ICC Statute. However, to empower each permanent member of the Security Council to prevent the Court from exercising its jurisdiction over the crime of aggression would fly in the face of the essential aspiration of equal application of the law. France, the United Kingdom, Russia and the United States will recall that the noble promise to ensure equality before the law forms an integral part of their precious Nuremberg and Tokyo legacy.

8. Until the moment in time when the political leadership will finally assume its responsibility, the SWGCA should hopefully eliminate the options to involve the General Assembly or the International Court of Justice (ICJ). At the same time, the SWGCA should bring the key options in line with the different trigger mechanisms under the ICC Statute. In light of the well known practice of the Security Council (e.g., the Council’s failure to find an act of aggression even in the case of Saddam Hussein’s invasion of Kuwait) there would be extremely limited practical value in the Council’s power to refer a situation involving an alleged crime of aggression, if that would require the finding that an act of aggression under Article 39 of the United Nations Charter had occurred.

9. In conclusion, considering the advanced stage of the negotiations within the Special Working Group, there is ample reason to be optimistic and pessimism and scepticism voiced by some might, at times, be meant to operate as a self fulfilling prophecy. While future Review Conferences will consider in particular procedural amendments based on the practical

experience made by them, for the first Review Conference political leaders should build of the now existing momentum, and should not let pass the historic opportunity to complete the Statute in regard to the crime of aggression.

10. Two principles should guide the final decision-making. First, the substantial definition of the State act of aggression should stay within the legitimate limits of international criminal justice by not exceeding undisputable general customary international law. Second, a special procedural regime that includes a carefully articulated role for the Security Council may well be devised. Such a regime must not, however, defy fundamental principles of international criminal justice and must not, in particular, have the practical effect of placing the permanent members of the Council (and their allies and trade partners) beyond the reach of the law. Adherence to these two principles will require a spirit of compromise from almost all sides. In such a spirit, the Statute's most prominent lacuna can be closed by *consensus* before it turns into a legitimacy gap.

E. *National legislation on individual responsibility for conduct amounting to aggression* - Astrid Reisinger, Salzburg Law School on International Criminal Law

1. The International Law Commission (ILC) held that the crime of aggression would not be suitable for domestic prosecution, due to the requirement of a State act. Such domestic prosecutions would violate the principle that one State does not have jurisdiction over another, and would endanger peace and security. The 1996 Draft Code of Crimes against the Peace and Security of Mankind limited jurisdiction over the crime of aggression to an international criminal court, except for the prosecution of a State's own nationals.

2. The Rome Statute relies on the primary responsibility of States to prosecute. In this context, the Special Working Group on the Crime of Aggression (SGWCA) concluded that, once a provision on the crime of aggression was adopted, there would be no need to change article 17 and following of the Rome Statute.

3. Nevertheless, States face difficulties in prosecuting the crime of aggression. Such trials could be seen as victor's justice, in cases where nationals of other States are involved. Or, they could be seen as sham trials where a State prosecutes its own nationals. States might also be unable to exercise jurisdiction due to the "political question" doctrine applied by its courts. There might be practical problems, such as difficulties in gaining evidence from another State. Furthermore, the crime of aggression might not be implemented in domestic law.

4. The result of an analysis of the implementation of the crime of aggression in 90 national criminal codes provides that two groups of codes can be distinguished. Those implementing the crime of aggression as provided by customary international law, and those criminalizing conduct under national law protecting primarily domestic legal values that might include conduct falling under the definition of the crime of aggression. With respect to the latter group it could be asked whether the prosecution of aggression on the basis of such crimes would satisfy the principle of complementarity under the Rome Statute.

5. As for the first group, 25 out of 90 criminal codes analyzed have provisions implementing the crime of aggression or crimes against peace. Some refer to war of aggression, some simply to war or aggression and others to the beginning of an armed conflict. These crimes are generally found in chapters that deal with the protection of international legal values and also implement other crimes under international law.

6. Almost all of these codes apply a definition shaped after the precedent of the Nuremberg Charter, referring to the “planning, initiating, preparation or execution” of an act or war of aggression. Despite this terminology, which relates to different modes of participation, the general parts of the relevant criminal codes do indeed apply. The SWGCA also discussed the need to exclude the application of article 28, paragraph 3 of the Statute for the crime of aggression. Some codes go further, and also refer to “instigation”, “public incitement” and “propaganda” of a war of aggression.

7. The act of aggression itself is usually defined by simple reference to war of aggression or aggressive war. In one instance reference is made to armed conflict or military operations. In two cases (Estonia, Latvia), reference is also made to war in violation of international agreements and assurances. There is only one code in which the threat of aggression is included (Estonia). The problem of interpretation of these codes without a precise definition of aggression is usually addressed by reference to international law, in particular to United Nations General Assembly resolution 3314. Some commentators, however, point to problems with the principle of legality. Only one code (Croatia) provides for a definition of the act of State, using a generic definition, which incorporates some of the acts listed in resolution 3314.

8. The leadership element is usually not expressly contained in the definition in national law. Thus, this notion has to be interpreted in accordance with international law. Since the crime under customary international law contains the leadership element, it is likely that it would be implemented under domestic law as well. At least one code, however, does not limit the circle of possible perpetrators of the crime of aggression to leaders and organizers (Croatia).

9. In four instances States have implemented universal jurisdiction for the crime of aggression. Other States usually apply the classical forms of jurisdiction, such as the territoriality principle, or the active or passive personality principle.

10. The second group of crimes protects mainly national legal values: the existence of a State, its foreign relations, its independence and sovereignty. In some cases national provisions punish the preparation of a war of aggression (e.g. Paraguay, Germany) in which the State itself is supposed to participate as an aggressor. Other States criminalize conduct such as hostile acts against another State, suitable to cause the danger of war or armed intervention against itself. From the definitions it appears that such hostile acts are not intended to reach the threshold of the international definition of a crime of aggression. But, more severe cases are not excluded. The issue can be compared to the discussion with regard to genocide or crimes against humanity, where it can be questioned whether it is enough for a State under the principle of complementarity to prosecute acts amounting to a core crime, e.g. for murder. In most cases those hostile acts require specific intent to cause danger of war, and in some countries these acts are required to be carried out without the consent or against the will of the government. The last type of crime seems unlikely to serve as a basis for national prosecution of the crime of aggression, even if the conduct in question was serious enough. Since such conduct cannot be attributed to a State, it would fail the test of establishing an act of aggression, as required under the international definition of a crime of aggression.

11. In conclusion, it is noteworthy that there are a number of States that have implemented the crime of aggression in their legislation. The definitions are usually rudimentary, and national commentators often see them as not satisfactory under the principle of legality, while they are presumed to be interpreted in accordance with international law. The discussions in the SWGCA will have an impact on the interpretation of these national laws. The leadership element is not contained in national laws, but may apply via international law. Finally, there is little jurisdictional activity on the crime of aggression: no prosecution of a crime of aggression under these national laws has been reported.

F. *The principle of complementarity under the Rome Statute and its interplay with the crime of aggression* - Pål Wrangé, Counsellor, Foreign Ministry, Sweden

1. The principle of complementarity was not embraced by everyone when it entered the Rome Statute: many saw it as a way of weakening the Court. However, there is now broad agreement that the principle is a necessary and useful feature of the Statute. The principle of complementarity provides the connection between national and international jurisdictions. The most important effect of a future provision on the crime of aggression might not be prosecutions in The Hague, but prosecutions, and the threat of prosecutions, in domestic courts.

2. The Special Working Group on the Crime of Aggression (SWGCA) discussed the principle of complementarity with regard to the crime of aggression only informally during one meeting, and the general feeling was that there was no need for any special provisions on complementarity. However, the issue is not unproblematic.

3. Domestic prosecutions for the crime of aggression can be envisaged in three scenarios: (1) There is a provision on the crime of aggression and the International Criminal Court (ICC) is ready to exercise jurisdiction, but a domestic process is under way; (2) there is a provision on the crime of aggression that provides that the Court can exercise its jurisdiction only after a decision by the United Nations Security Council or some other body, and no such decision is forthcoming; (3) there is no provision in the Rome Statute.

4. Domestic institutions (judges, legislators) would face a number of problems under each of these scenarios, and several issues would come up: sovereignty or legal policy related bars, such as the act of State doctrine or the political questions doctrine; the question of universal jurisdiction or other grounds to prosecute a foreigner for the crime of aggression; the possibility that domestic courts would wait for a decision by the Security Council; and the question whether the crime is sufficiently clear in international law.

5. Scenario 1. The International Criminal Court is ready to exercise jurisdiction, but national authorities are seized of the case. The Court would have to consider whether the domestic proceedings would be an obstacle to admissibility, under the principle of complementarity. These issues would by and large be the same as with other crimes.

6. At the domestic level, there would be certain difficulties, such as the question of immunities of foreign leaders. Procedural immunity is enjoyed by some types of officials as long as they hold office, and it will prevent a State from prosecuting, even for international crimes (International Court of Justice (ICJ), *Arrest Warrant Case*). While immunity does not apply before the International Criminal Court, the renunciation of immunity *inter partes* in the Rome Statute probably does not have an effect on domestic prosecutions. Domestic jurisdictions might also apply national immunities protecting officials from prosecutions before their *own* courts. Such domestic immunity would however not be a valid excuse to not prosecute in cases falling under the Rome Statute.

7. The act of State doctrine might also be invoked to shield a leader from prosecution, based on the principle that one sovereign should not sit in judgment of another one (*par in parem imperium non habet*). The doctrine applies mainly to acts committed within the territory of the prosecuting State, but the decision to initiate an act of aggression would most likely be made in a foreign State, with effects abroad. In some jurisdictions it has also been held that the doctrine does not apply to violations of *jus cogens*. Furthermore, the political questions doctrine, or “executive privilege”, might be invoked.

8. Some arguments can be made against the application of these doctrines with respect to the crime of aggression. The assertion that the crime of aggression is the most politically charged crime might speak against national prosecutions. If, however, there would be an international decision (International Criminal Court, United Nations Security Council) that an act of aggression has occurred, domestic prosecutions would bear less of a burden. Recent cases furthermore suggest that the act of State doctrine should not be a bigger hurdle for aggression than for genocide, which is equally politically charged. Recent cases of genocide have a clear State nexus.

9. Scenario 2. The Court cannot exercise jurisdiction, because a required pre-condition - such as a decision by the Security Council or some other organ - has not been met. The issue of complementarity would not arise, since the Court would not be able to exercise jurisdiction. Instead, domestic courts might be "complementing" the Court.

10. The above mentioned issues on domestic prosecution would be relevant here too, such as immunities, the act of State doctrine and the political questions doctrine. In addition, the question of jurisdiction will be more prominent. Politically, the prosecution will be more controversial, and it is therefore more likely that legal arguments will be produced to challenge jurisdiction under this scenario, even though there is no legal difference between the first and the second scenario in this respect.

11. Article 8 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind limited jurisdiction over the crime of aggression to the International Criminal Court and the home State of the aggressor. However, article 8 does not build on existing State practice and hence does not seem to codify existing international law. In particular, States victims of aggression could base prosecutions on the principle of territoriality, or on the principle of security (jurisdiction over crimes that affect national security).

12. Many commentators believe that the crime of aggression already is an international crime with individual responsibility, and that courts therefore may judge a national of a foreign State for that crime, even under universal jurisdiction. National courts would probably invoke the Nuremberg precedent, but it remains unclear if universal jurisdiction exists.

13. Would the role of the United Nations Security Council be relevant for domestic jurisdictions under this scenario? Many States would probably not feel duty-bound under international law to wait for a decision by the Council. The Nuremberg precedent did not rely on the Security Council. However, some States have held that a prosecution for a crime of aggression requires a prior determination of the State act of aggression by the Council in accordance with Article 39 of the Charter. The (disappearing) view that the Security Council determination is part of the definition itself implies that the Council's role affects the substance of the crime. More recently, that role has generally been considered to be a procedural precondition. In any event, it would be difficult to argue that current international law requires a Security Council decision as a procedural precondition for States to prosecute the crime of aggression.

14. States might, however, unilaterally take a cautious approach, due to a perceived need of political legitimacy through the backing of the Council. The result of the discussion of scenario 2 would thus be that it is highly unlikely that domestic jurisdictions would feel prevented by international law from prosecuting the crime of aggression, but national actors might want to exercise restraint.

15. Scenario 3. The International Criminal Court can not act, for lack of a provision in the Statute. This corresponds to the current situation. Despite the lack of an agreed definition in the Rome Statute, the crime of aggression is indeed a crime under international law, as was

recently confirmed in a judgment by the House of Lords. Nevertheless, there is a need to clarify the definition of the crime, as years of negotiation have shown. Is every illegal use of force an act of aggression, or is there a certain threshold? Is only traditional military action included, or should the definition be open to other means, such as computer network attacks? Domestic legislators and judges could however safely proceed from the Nuremberg precedent, which covers the core of the crime. States might therefore feel free to prosecute. The same conclusion would apply in the scenario where the Rome Statute contains a provision on aggression, but the investigation would not yet have been triggered by the Security Council.

16. In conclusion, many of the problems associated with domestic prosecution of the crime of aggression are not unique to that crime. However, some of them are more acute, due to the strong link between the individual accused and the State. It is often questioned whether it would be prudent to incorporate the crime of aggression in national legislation, and indeed caution should be even greater in the domestic than in the international arena. The Security Council could provide political backing to domestic prosecutions, but would not be able to provide legal guidance. The only viable alternative is thus to let the International Criminal Court do the job. Controversial cases are sometimes better dealt with in an international court. And even though national prosecutions will be carried out professionally, oversight and legal guidance by the Court can be useful. As a consequence, it appears ever more important that States Parties agree on a definition of the crime of aggression, and on a provision allowing the Court to exercise jurisdiction. This would give the International Criminal Court an opportunity to perform its guiding role.

Part IV - The Experience of international criminal jurisdictions and their contribution to the development of international criminal law

A. Investigation on International Crimes

Chair: Carla del Ponte, Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia

1. Carla del Ponte, Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia

1. In the course of its fourteen years of existence, the International Criminal Tribunal for the former Yugoslavia (ICTY) has made important contributions to the development of international criminal justice and to the end of impunity. It has ensured that international criminal justice remains high on the agenda of the world's leaders.

2. As the ICTY is currently executing its completion strategy, its activities will be downsized in the coming years. Some fugitives, most notably Mr. Karadžić and General Mladić, remain at large. Yet even if they continue to be at large after 2010, they cannot escape justice and will still be tried at the ICTY. There are several challenges which the ICTY has faced in its activities so far.

3. *The complexity of international investigations.* The ICTY's investigations have been conducted in a very complex environment. There are certain similarities with investigations at the national level, such as similar investigative tools, but international investigations face unique challenges. No police or enforcement agent is at the disposal of the ICTY, and it works with a combination of common and civil law systems.

4. At the conception of the ICTY, very few tools were available from its Statute. The Statute stipulated what the ICTY could do, such as initiate investigations and collect evidence, but it was silent as to how those tasks were to be carried out. From the beginning, the ICTY has been heavily reliant on State cooperation, including from States who were hostile to its mandate.

5. When the ICTY was set up, war was still raging in the former Yugoslavia, which led to practical and operational difficulties. The ICTY was tasked with investigations on massive events over wide geographical areas and a host of actors: State officials, army officials, military police, paramilitary groups and armed militias. This led the ICTY to involve experts in the areas of military, political and criminal science. The experts are at the disposal of the ICTY, and present invaluable in-house expertise for the Tribunal.

6. *Engaging experiences and qualified personnel.* In its set-up phase the ICTY encountered difficulties to attract experienced and qualified personnel, particularly lawyers and investigators, and thus relied, during that phase, on gratis personnel seconded by States. The quality of an investigation is, to a large extent, contingent upon the quality of the investigators, who must also be chosen not just on their technical skills but also on the basis of their ability to respect the local customs. It also struggled with financial difficulties, and a growing pressure to perform evidence gathering expeditiously. The ICTY is currently staffed with competent and experienced personnel. However, as the Tribunal downsizes its activities, once again the ICTY may have to rely on seconded staff from States. One idea which merits attention is the establishment of a roster, to be maintained by the Secretariat, of experienced analysts, judges and lawyers to continue to be at the disposal of the ICTY.

7. *Collecting evidence.* For the ICTY, gathering evidence means that its procedures are executed after the facts of the crime. Prosecutors might not be welcomed by States to conduct the investigations. The investigations started at a long distance from the original crime scenes: information was collected from refugees, victims, witnesses, non-governmental organizations, relief organizations, States, and national and international media. However, it was vital for investigators to carry out their work on-site. For Bosnia, much information was collected from the multi-national North Atlantic Treaty Organisation (NATO) force. In Kosovo, investigators executed on-site exhumations. A lot of documentary evidence has also been collected: over 7 million items are currently in the ICTY's evidence management systems. Investments in evidence and intelligence systems are thus crucial.

8. *The protection of threatened witnesses.* Some witnesses come under serious threats, if they testify at the Tribunal. This is especially the case for inside witnesses. The ICTY uses pseudonyms, face and voice distortion, relocation and insertion into domestic witness protection programs to protect witnesses. However, as with many operations at the ICTY, this is heavily dependant on State cooperation. Witnesses may have criminal backgrounds, leading many States to be hesitant to include them in their domestic witness protection programs, despite the fact that such testimony might be vital for a case. The establishment of an international body in charge of a witness protection program for all international tribunals and courts, which could count on the assistance of States to execute the protection, would be most helpful in easing the burden faced by courts and tribunals in this field.

9. *The selection of suspects.* The prosecution of all crimes committed in the former Yugoslavia was clearly impossible for the ICTY. The jurisdiction of the Tribunal, according to United Nations Security Council resolution 1503, was to concentrate on those most responsible for the violations of international humanitarian law or those with the highest level of responsibility. Cases of lower ranking responsible persons would be transferred to national courts in Bosnia.

10. *Cooperation with the ICTY.* State cooperation is essential for the gathering of evidence and securing the custody of suspects for the ICTY. Unfortunately, State cooperation has not always been adequate. Under rule 7 bis of the Rules of Procedure and Evidence, the ICTY can refer a case of non-compliance to the Security Council and such a referral was last made in 2004. Several non-judicial measures to ensure the cooperation of States have proven more effective. Incentives for cooperation are offered in many forms. For instance, tracking teams are present in field offices to monitor a State's attempts to arrest a suspect. Milosevic was transferred to the ICTY in The Hague after substantial United States and European Union pressure. The European Union has stated that full cooperation with the ICTY is a condition for Serbian and Croatian membership in the Union. This has been a very strong incentive, and the European Union is thus urged to stand by its principled position.

11. Concluding, much has been achieved by the ICTY in the area of developing international criminal justice and ending impunity. Facing its challenges, the ICTY has been one of the stepping stones of international criminal justice. Its experience and knowledge should benefit future generations of international tribunals and courts, including the International Criminal Court, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia to end impunity throughout the world.

2. Hassan B. Jallow, Chief Prosecutor, International Criminal Tribunal for Rwanda

1. The importance of State cooperation was emphasized, particularly as regards the locations of suspects and witnesses. In the case of the International Criminal Tribunal for Rwanda (ICTR), there had been a considerable amount of success in that regard.

2. International criminal justice is a feasible option for the international community, but the work is still in progress. Experiences from the activities of ad hoc tribunals need to be identified and documented in order to improve the possibilities for the International Criminal Court to function efficiently.
3. The ICTR is in line with the targeted timings of its completion strategy.
4. The initial challenge of the investigation work at the ICTR was the lack of professional investigators. The employed staff did not have experience in investigatory work, thus they were learning as they worked.
5. The second main challenge was the lack of documentation in the cases and hence the necessity to base cases on oral evidence. The strong reliance on witnesses raised the following problems to be solved by the ICTR: practice of witness recording; handling witness intimidation cases; language issues; cultural sensitivity issues; practice of assisting witnesses and victims with welfare; protection of witnesses and their dependents; pre-trial delays; maintaining contact with witnesses until the start of the trials; international cooperation for witness protection, especially for insider witnesses and their dependants.
6. The international community had supported the ICTR in arresting about 60 fugitives and in bringing to the court over 2000 witnesses from more than 40 countries. States had supported the ICTR with the transportation and the security issues of all these individuals.
7. Regarding documentation evidence, States had been less willing to provide full support. In many cases the documentation disclosed to the ICTR was conditioned to information and investigation purposes without allowing it to be used in the trials.
8. There are still 18 fugitives, partly due to failure of States to cooperate with the ICTR, and partly due to the fact that the fugitives hide in territories outside of States' control or in "failed" States. Some will have their cases referred to a national jurisdiction. For those whose cases are not, arrangements will have to be made for their prosecution.
9. As oral evidence was the main source of evidence, establishing an efficient witness protection program had been crucial, and it was highlighted the need to ensure the continuous liaison with witnesses. In addition to maintaining a regular contact, the ICTR had been faced with the need to provide them some basic support. Besides protecting witnesses' lives, there was a need to consider health, especially as HIV/AIDS was a serious problem in many cases. Until 2005 such aid could only be provided to witnesses which had been identified as such and called to proceedings in trial. The program had since been extended to all witnesses but funding was not yet fully available for that purpose.
10. Cultural sensitivity was also an imperative in order to obtain information from witnesses. Especially in cases involving sexual violence offences, local elements had to be incorporated in the investigation process as communication with the witnesses was very sensitive. The gender perspective also had to be considered as most witnesses were women who also turned out to be victims as well.
11. The remaining challenge was to hold those in senior positions responsible. This is solely possible with a continued State cooperation, which should however also extend to the support for protecting inside witnesses, as well as their families and dependents. These inside witnesses are crucial for a successful prosecution against the senior decision makers.

3. Alfred Kwende, Investigation Unit, International Criminal Tribunal for Rwanda

1. Successful prosecutions depend on good investigations. The Investigations Unit of the International Criminal Tribunal for Rwanda (ICTR), based in Kigali, has faced several challenges in pursuing its mandate with regards to the 1994 genocide where over a million persons perished in a period of 100 days.

2. A lack of competent and experienced staff was one of the most important difficulties faced in the beginning. Experienced and qualified investigators were needed to interview witnesses and victims and to track down suspected perpetrators of the Rwandan genocide. The only investigators available required a substantial amount of on-the-job training, especially since those subject to recruitment had scant knowledge of how to deal with cases involving mass deaths. At the same time, the international community and the Tribunal in Arusha were expecting expeditious results.

3. During the investigations, Rwanda was still characterized by a high amount of political tension. High rank perpetrators often fled Rwanda after the 1994 genocide to Cameroon, Kenya and Zambia. Investigators often needed military escorts to conduct interviews with witnesses and victims. This often led to a feeling of intimidation, which did not help the investigations.

4. The investigations that were conducted in Rwanda were initially target-based, instead of crime-based. Information was gathered from non-governmental organisations and relief organizations that were on the ground during the genocide, which was executed by a host of actors with direct or indirect responsibility: government officials, armed groups, paramilitary groups, militias and private citizens.

5. Teams were employed to keep track of those most responsible for the planning and execution of the genocide. Investigations continue to be target-based, and targets are prioritized on the basis of the actual influence they had during the time of the genocide.

6. The Investigation Unit started working with guidelines and manuals for investigators, outlining basic instructions to carry out missions and interviews with witnesses and victims. Proper techniques were needed to uncover evidence that was buried deeply in the memories of victims, especially when it concerned sexual violence. Victims might have remarried, and bringing up sexual violence from during the time of the genocide was a sensitive subject. Physical evidence and documentary evidence was hard to come by. However, the ICTR is currently experiencing good cooperation with the Rwandan government to secure documentary evidence through formal channels.

7. As witnesses represent a precious source of knowledge for the ICTR, they should be treated accordingly, and the Investigation Unit has to perform a good system of witness management, assisting both court witnesses as well as potential witnesses who have not been identified for a specific trial. The ICTR maintains a database with the list of witnesses, including any problems, especially health related ones, which they may face, and it has contacts with witnesses on a quarterly basis. In the case of health conditions, victims and witnesses have, in recent years, received assistance from the Tribunal. Furthermore, the Investigation Unit has gone to great lengths to ensure the continued availability of witnesses for future proceedings.

8. As for the reliability of translators, the ICTR uses different ones for a second phase in order to ensure their effectiveness.

9. As regards the arrest of suspects, the cooperation of States is vital. The ICTR endeavours to be present so as to ensure that all the rules are followed and that the evidence is

duly collected for use at trial. In this connection, it is important to also ensure the security of informants.

4. Stephen Rapp, Chief Prosecutor, Special Court for Sierra Leone

1. *Differences between the Special Court for Sierra Leone and other ad hoc international tribunals.* The SCSL is a new hybrid model that started its work in 2002. The main differences from other ad hoc international tribunals include the following:

- The judges are appointed by the UN Secretary General and the President of Sierra Leone;
- Its funding comes from voluntary contributions made by national governments rather than UN mandated assessments. Although this has forced the SCSL to survive on a tight budget, it has had the advantage of relieving the SCSL of United Nations personnel rules, allowing it to accept persons seconded from national governments and to make greater use of short-term contracts;
- The SCSL mandate is to prosecute those bearing the “greatest responsibility.” This has limited the number of indictees. In 2003, the Prosecution achieved confirmation of indictments against all of the 13 persons charged at the SCSL, including Charles Taylor. This occurred before there was adequate judicial personnel onboard. In fact, it was not until 2005 that a second Trial Chamber was appointed.
- The SCSL is located at the place where the crimes were committed, and more than 60% of its staff is from Sierra Leone;
- The outreach program is carried out by 14 district officers around the entire country; in 2006 they conducted more than 500 meetings to explain the work of the SCSL to the public and provided information to civil society (NGOs) to be shared at thousands of places and events.

2. *SCSL indictments.* The report of the Sierra Leone Truth and Reconciliation Commission determined that most of the greatest human rights violations/crimes were committed by:

- Revolutionary United Front (RUF/Sankoh), the group that started the conflict with an invasion from Liberia in 1991 and remained active until 2002;
- Armed Forces Revolutionary Council (AFRC), a group of former soldiers of the Sierra Leone Army that took power in a *coup d’etat* in May 1997 and invited the RUF to rule with it in a *junta*. Following the overthrow of the junta in February 1998, the AFRC allied with the RUF in the bush in a brutal campaign to regain power;
- Civil Defence Forces (CDF), consisting mostly of *Kamajor* traditional hunters, they fought on the side of the elected government but allegedly committed atrocities against civilians.

3. The prosecution has issued 13 indictments against members of these groups. In each case only those with greater responsibility have been indicted.

4. *Other issues at stake.* One difficulty is that the victims speak a variety of local languages, yet the SCSL has the advantage of Sierra Leoneans on its staff who speak these languages. All of the cases have had to be tried in long and complex proceedings. The mandate has precluded prosecution of middle or lower level perpetrators who might have pleaded guilty or have been judged in shorter trials. Because of the Lomé amnesty, and inadequate national capacity, these individuals have largely escaped consequences for their conduct. Finally, witness protection is a challenge, since the SCSL has no Chapter VII powers, but through negotiation the SCSL is obtaining State cooperation in the protection of witnesses, both before and after their testimony.

5. Deborah Wilkinson, Deputy Chief Prosecutor, Department of Justice, United Nations Mission in Kosovo (UNMIK)

1. *Mandate of the United Nations Mission in Kosovo (UNMIK) international judges and international prosecutors.* UNMIK is different from other tribunals since it is not a special chamber, nor an independent tribunal. It is directly appointed to work in the regular courts in Kosovo and therefore does not have a limited jurisdiction.

2. UNMIK international judges (IJs) and international prosecutors (IPs) are appointed to serve within the national jurisdiction itself, the Kosovo courts administered by UNMIK.

3. The subject-matter jurisdiction of UNMIK IJs and IPs is not limited to crimes against international humanitarian law nor to crimes committed during any specific period of time. In general, IJs and IPs can be selected or assigned by the UNMIK Special Representative of the Secretary-General to any criminal case.

4. The selection criteria of criminal cases by UNMIK IJs and IPs generally include:

- Cases involving war crimes, terrorism, serious inter-ethnic violence, organized crime, and public corruption, and
- Any criminal case in which there are serious concerns that the national (Kosovo) judges and prosecutors lack the capacity or the will to handle the case effectively, fairly, and impartially.

5. UNMIK IJs and IPs can be appointed to either first instance (trial level) or second instance (appellate level) courts. Three UNMIK IJs are assigned to a separate chamber of the Supreme Court solely dedicated to handling civil litigation arising out of the privatization of socially owned property.

6. As a result of the *broad subject matter jurisdiction mandate*, UNMIK IJs and IPs have had less time and resources to devote exclusively to cases involving international crimes arising out of the 1998-1999 armed conflict in Kosovo.

7. The experience of UNMIK IJs and IPs in implementing and developing international humanitarian law illustrates the problems of how a jurisdictional mandate with no temporal or subject matter limitations can impede efforts to focus limited resources effectively on crimes committed during armed conflicts.

6. Chea Leang, National Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia

1. The Extraordinary Chambers in the Courts of Cambodia (ECCC) had become a reality after 6 years of negotiation between the United Nations and the Government of Cambodia, which had requested the United Nations for assistance in establishing the ECCC since the government did not have the capacity or the expertise to deal with cases of this nature.

2. The ECCC had learned from the experience of other similar institutions. Some of the key features of the ECCC were highlighted:

- It prosecutes the senior leaders and the most responsible perpetrators,
- It has jurisdiction over genocide, crimes against humanity, grave breaches, as well as over violations of certain regulations contained in the Cambodian Penal Code and other international instruments,

- The crimes over which it has jurisdiction are limited to those committed between 1975 and 1979,
- It applies Cambodian civil law along with international standards for the conduct of trials,
- There are two Co-Prosecutors and two Co-Investigating Judges, in both cases a Cambodian and an international one.

3. The challenges faced by the ECCC include:

- Collecting evidence for crimes committed 30 years ago,
- The limited budget, especially when compared with other international tribunals, and
- Its success relies on consensus between the two Co-Prosecutors and the two Co-Investigating Judges.

7. Toby Cadman, Counsel, Office of the Prosecutor, Bosnia and Herzegovina War Crimes Chamber

1. The panellist explained that the Bosnia and Herzegovina War Crimes Chamber is a national institution with international support from the International Criminal Tribunal for the former Yugoslavia (ICTY), funded by voluntary contributions. As regards its structure, reference was made to the constitution of chambers by two international judges and one national judge. The Special Department of War Crimes (which would be the Office of the Prosecutor in an ad-hoc tribunal), is divided in various regional teams (with the exception of a team that deals exclusively with Srebrenica) that are composed by legal advisors, analyst, investigators, etc.

2. Among the more important challenges faced were:

- The Chamber is effectively funded only until 2008,
- The Chamber applies national law, which is a mixture of common law and civil law traditions, a combination which complicates work,
- The lack of funding,
- The need for staff and expertise to deal with grave crimes,
- The need to improve the witness protection program, and
- The penitentiary system is not adequate to accommodate individuals sentenced by the Court.

3. Another key challenge is the development of effective criteria for case selection; the main criteria being cases related to the application of rule 11 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, i.e., low to mid-level perpetrators sent to Bosnia and Herzegovina War Crimes Chamber for prosecution by local courts.

8. Fatou Bensouda, Deputy Prosecutor, International Criminal Court

1. The Office of the Prosecutor had faced 4 major challenges in its almost 4 years conducting investigations.

2. *How to begin a case.* Requirements and considerations to be addressed include:

- Temporal and subject matter jurisdictions,
- The standard of gravity (article 53, paragraphs 1(b) and 2(b) of the Rome Statute),
- The nature of the crime,
- The moment it was committed, and its impact.

3. *How to conduct investigations into situations of on-going conflict.* There are many practical difficulties in relation to travel to the field, the security issue, both for witnesses and staff, constituting one of the main concerns. Furthermore, it is also difficult to approach witnesses without exposing them, and the office had to develop and adapt its practices and policies to the different situations and to frequent over-changing scenarios.

4. Additional difficulties are related to languages and legal terminology, requiring appropriately skilled translators and investigators. For example, in northern Uganda there are four different languages. Both the Democratic Republic of the Congo and Darfur have three each.

5. In order to address these logistical and security difficulties, the Office of the Prosecutor has developed a policy of selecting cases according to the situation and gravity, whereby it proceeds to investigate only the most serious cases for the most serious crimes, and with a focus on those individuals with the greater degree of responsibility.

6. *Expeditious cases approach.* It is important for the Office of the Prosecutor to have a “focus approach” on the cases, which includes reducing the number of witnesses called to testify. An immediate response system to protect witnesses has been developed.

7. *How to execute arrest warrants.* The Court has no police force nor enforcement powers of its own. States Parties to the Rome Statute are obliged to co-operate with the Court.

9. Alice Zago, Investigator, International Criminal Court

1. The Prosecution had created protocols to outline the procedure for investigations in order to comply with the legal obligations stemming from the Statute, including vis-à-vis the Defence, especially in the phase leading up to the trial.

2. It was noted that article 54, paragraph 1 of the Rome Statute imposes on the Prosecutor the obligation to establish the truth and in so doing to investigate incriminating and exonerating circumstances equally, and later ensure that all evidentiary material collected in this sense is efficiently disclosed to the defence.

3. The various measures taken during the investigations at different levels (pre-interview, interview, and post-interview) include background information, psychological assessment of witnesses, gender and age of interviewer, implementation of security protocol and maintaining permanent contact with witnesses.

10. Enhancing State-to-State and State-to-International Organisations cooperation - Nicola Piacente, Prosecutor, District Anti Mafia Direction, Milan

1. The 1999 United Nations Convention on Transnational Organized Crime is the first international act dealing with the liability of non-State actors, such as corporations and other non-State entities, for international crimes. In addition, there is a set of other acts such as the European Union framework documents on trafficking in human beings, drug trafficking and other crimes connected to the jurisdiction of international courts (both permanent or ad hoc).

2. Investigations against these legal entities require professional skills. The prosecution of crimes committed by these entities covers a variety of aspects and there is often a financial dimension of the investigation. A successful investigation calls for the usage of investigative instruments provided by both domestic and international conventions, such as the 1990 Convention on Money Laundering.

3. Different liabilities under United Nations Conventions provide that:
 - Entities are responsible if they are involved in the perpetuation of crimes,
 - Humans are responsible if the crimes have been committed for the benefit of legal persons
4. Extradition is one important unsolved problem. There are no rules established on how two States should deal with extradition of legal persons found in one State but whose headquarters is in a different country. Bilateral cooperation is thus the only solution.
5. There is increasing awareness of the need for international prosecution officers to look at the liabilities of legal persons in order to determine complicity. However, despite the great efforts by the International Criminal Tribunal for the former Yugoslavia to freeze the assets of the offenders, this is an action which is not incorporated in the Statute of the Tribunal. Nonetheless, the International Criminal Court has a more sophisticated set of tools at its disposal to freeze criminals' or suspects' assets.
6. Concerning the State-to-International Organisations cooperation, the main lacuna in the effective exercise of jurisdiction of international courts is the ex-complementary jurisdiction with reference to other international courts.

B. International Prosecutions

Chair: Hassan B. Jallow, International Criminal Tribunal for Rwanda

1. Hassan B. Jallow, Chief Prosecutor, International Criminal Tribunal for Rwanda

1. In international prosecutions, the most important questions for the Prosecutor concern the issues of indictments, witnesses and accused. Without a consistent strategy, the Prosecutor runs the risk of inconsistencies in trials and the problems resulting from the lack of coordination. The enormous amount of evidence and documents needs to be managed as to ensure that it can be accessed in an expeditious and orderly manner.
2. In order to expedite justice, the scope of a case can be limited to a single crime, a more limited geographical focus, or a smaller number of accused.
3. To allow more expeditious proceedings, the initial decision to prosecute multi-accused cases before the International Criminal Tribunal for Rwanda (ICTR) was later changed in favour of single-accused cases.
4. Despite the fact that the jurisprudence of the Tribunal clearly shows that genocide took place in Rwanda in 1994, this fact has been disputed by all but two of the defence teams.

2. Silvana Arbia, Senior Trial Attorney, International Criminal Tribunal for Rwanda

1. The focus of international prosecutions lies on crimes which have a special international status. Universally accepted standard for these crimes are needed. No statutory limitation is possible, neither is immunity or amnesty. Immunity can not be granted even to heads of State for international crimes.
2. International prosecution is a concurrent process, meaning that an international tribunal will never have exclusive jurisdiction over a crime. Its jurisdiction is always co-

existent with the jurisdiction of one or more national courts. In the referral or transfer of cases from international tribunals to national courts, the cooperation of States is essential. Nonetheless, despite the referral or transfer of a case to national courts the responsibility of the international tribunals to ensure that no case remains unpunished still remains because impunity can never result from such a transfer. In the case of a referral or a transfer, the international tribunal needs to ensure that the intended receiving State is both willing and able to prosecute the case. Furthermore, the national State can receive assistance from the international tribunal to prosecute a certain case.

3. One of the problems with extradition of accused from European Union Member States to Rwanda is the death penalty, applicable under the Rwandan legal system. Many European States are not willing to extradite if the death penalty is applicable to a suspect. Thus, if the international tribunal would not have existed to prosecute these individuals, they would have remained unpunished, since Rwanda would have been unable to conduct their trials.

4. The identification of cases to be prosecuted remains an important matter. The Trial and Appeals Chambers of the International Criminal Tribunal for Rwanda (ICTR) have, at various instances, confirmed the discretion of the Prosecutor as an independent organ of the Court in deciding which cases will be prosecuted at the ICTR. The Office of the Prosecutor has identified five criteria for the selection of cases to be prosecuted, and included these criteria in a public document, thus ensuring that discretion can be exerted publicly. These criteria are:

- Seriousness of the case,
- Extent of responsibility of the accused,
- Gravity of the offence,
- Interaction or connection of the case with ongoing proceedings, and
- Possibility of transfer or referral of the case to national courts.

5. In terms of the completion strategy, the ICTR defines which cases need international prosecution and which cases can be transferred. The former cases should be accelerated to meet the deadlines of the completion strategy. The strategy consists of two actions: the completion of ongoing cases, and the referral of cases to national courts.

6. A close review of the indictment, by a special committee so entrusted, before it is issued is essential to the proceedings of the case. An omission of a crime in the indictment can affect the work of the Prosecutor. The case, including all evidence, needs to be ready for trial by the time the indictment is issued. A case can be transferred, but will remain under the responsibility of the Prosecutor, who can also revoke the transfer and return the case to the Tribunal.

3. Stephen Rapp, Chief Prosecutor, Special Court for Sierra Leone

1. In his prior experience at the ICTR, he was part of the transition from multi-accused to single-accused cases undertaken to expedite trials. He noted that in the single accused cases there was a preference for focusing on a limited number of crimes and crime scenes.

2. However, at the international level there will always be cases that cannot appropriately be limited to only a few incidents. Cases involving high level political leadership, accused of participation in a joint criminal enterprise over widespread areas or lengthy periods will necessarily involve extensive trials. A fuller presentation may show a pattern of conduct in an historical context that is necessary to prove the leader's criminal responsibility or it may be required to meet the legitimate expectations of large victimized populations. Two illustrative cases are those of Saddam Hussein and Slobodan Milosevic.

3. In the case of Saddam Hussein, which is controversial for various reasons, the first indictment was limited to one crime which was relatively easy to prove: the killings of civilians that he ordered at the village of *al-Dujail* in retaliation for a failed assassination attempt. He was convicted and sentenced to death by the Iraqi Special Tribunal, and executed soon afterwards. This was a very expeditious form of justice, but many have expressed regrets that he will not stand trial for his other alleged crimes, particularly the *Anfal* campaign against the Kurds or the suppression of the Shi'ite *intifada*. This example shows how limiting the scope or extent of a trial can shorten proceedings but fail important expectations.

4. Slobodan Milosevic, on the other hand, was ordered to stand trial on three joined indictments, consisting of 66 counts. Unfortunately, he passed away after more than four years of trial and before judgment could be passed as to any of his actions. Justice was clearly not done in this case. Therefore, as to major leaders the goal should be trials that are as compact as possible without ignoring the larger effects of their conduct. By contrast the trials of lower level individuals can focus on limited but representative conduct.

5. The SCSL was mandated to prosecute those bearing the "greatest responsibility" for the serious violations of humanitarian law committed in Sierra Leone after November 1996. There have been no small trials and no pleas of guilty. In the view of the Prosecution, the Sierra Leone atrocities were part of widespread campaigns of terror designed to drive the civilian population into submission. The horrific consequences of these campaigns resulted in tens of thousands of killed, maimed, and enslaved victims across Sierra Leone, as well as associated victimization in Liberia. The SCSL has prosecuted some crimes for the first time at the international level, such as the conscription of children under 15, forced marriage and sexual enslavement. Within weeks, the SCSL will be delivering historic judgments as to these crimes.

6. One of the challenges the SCSL has faced is the complexity of command and control in the groups committing the crimes. The Sierra Leone conflict was characterized by shifting alliances and unclear chains of authority. Low ranking officers sometimes rose to positions of effective control over hundreds of combatants. Other actors were involved in planning or assisting campaigns that resulted in brutal crimes being committed at places and times distant from the actors. The jurisprudence of the ICTY and ICTR has been helpful in establishing criminal responsibility in such situations.

7. The SCSL has used different approaches in establishing responsibility including the basic and extended forms of "joint criminal enterprise." All of its trials have been rather large, involving many documents and witnesses. Though the Charles Taylor trial will involve only a single accused, it will be complex because he was a rebel leader and then President of the neighbouring Republic of Liberia, who may never have set foot in Sierra Leone. The Prosecution hopes to shorten the trial by presenting much of the victim testimony in writing. This is possible under the SCSL rules because such testimony does not go to the direct acts of the accused. The case will turn on the linkage between Taylor and those who directly committed the crimes. The Prosecution will call upon insider witnesses and experts to prove Taylor's planning, ordering, instigating, aiding and abetting of the crimes committed in Sierra Leone. Of course these linkage witnesses will have to appear in person and be subject to extensive examination. The trial will be a great challenge for the Special Court, and is scheduled to start on 4 June 2007 in the courtroom of the ICC in The Hague, where Taylor has been transferred for security reasons.

4. Fatou Bensouda, Deputy Prosecutor, International Criminal Court

1. One of the main challenges faced by the International Criminal Court (ICC) in terms of judicial activity was the issue of disclosure. Article 54, paragraph 3(e) of the Rome Statute

on protected material allows an information provider to submit document to the prosecution on condition of confidentiality and solely for the purpose of generating new evidence.

2. There are three categories of evidence for the prosecution:

- Incriminatory evidence,
- Potentially exculpatory evidence, and
- Evidence according to rule 77 of the Rules of Procedure and Evidence on inspection of materials that are material to the defence or were obtained from or belonged to the accused.

3. In the *Lubanga* case, there was an initial decision at the confirmation hearing that all materials had to be disclosed to the Registry and the Pre-Trial Chamber had to be fully informed about the disclosure. A joint motion was filed by the prosecution and the defence regarding this disclosure which led eventually to an amendment of the disclosure regime. As a result, whereas disclosure is inter partes, the participants have to, in addition to electronic inter partes disclosure, file the originals of the incriminatory materials with the Registry. For materials falling under rule 77, a pre-inspection system was established which in practice resulted in the same procedure as for the disclosure of potentially exculpatory materials inter partes. Furthermore, the Pre-Trial Chamber had ordered the prosecution to disclose the majority of the potentially exculpatory materials prior to the confirmation hearing. The approach of “quality versus quantity” was accepted, by both the Pre-Trial Chamber and the defence.

4. Rules 81(2) and 81 (4) on restrictions of disclosure allow the prosecution not to reveal the course of the on-going investigation to the defence and to secure the witnesses. Twenty-eight out of forty statements relied on it at the confirmation hearing in the *Lubanga* case: the defence appealed and the appeal was accepted to consider only a few statements.

5. Important challenges to be reassessed are the use of witnesses, particularly as regards their protection, as well as the possible reduction of the number of statements used in trial.

5. Deborah Wilkinson, Deputy Prosecutor, Department of Justice, United Nations Mission in Kosovo (UNMIK)

1. In the immediate aftermath of the Kosovo conflict, during the late summer and fall of 1999, Kosovo Albanian judges and prosecutors initiated investigations and prosecutions of a number of Kosovo Serbian defendants charging them with genocide and war crimes. Human rights monitors reported concerns with these prosecutions because of weak evidence, inappropriate charging, and the perception of ethnic bias of Kosovo Albanian judges and prosecutors against Kosovo Serbian defendants.

2. In early 2000 UNMIK passed Regulation 2000/6, allowing for the appointment of international judges (IJs) and international prosecutors (IPs), and authorizing them to select criminal cases previously handled by national judges and prosecutors.

3. UNMIK IJs and IPs have handled approximately twenty five cases involving war crimes arising out of the armed conflict in 1998-1999. Among the key cases, which involve both Kosovo Serbian and Kosovo Albanian defendants, the following three merit special attention.

4. *Miroslav Vuckovic* was arrested, investigated, and charged in fall 1999 by Kosovo Albanian prosecutors and judges on charges of genocide:

- UNMIK appointed an international judge to sit on the trial panel of the *Vuckovic* case, together with a Kosovo Albanian professional judge and three lay judges (also

Kosovo Albanian). Vuckovic was convicted of genocide by the trial panel (Mitrovicë/Mitrovica District Court, verdict dated 18 January 2001),

- On appeal, handled by an IP and an appellate panel composed of IJs, the Supreme Court of Kosovo reversed the trial court on the basis that there was insufficient evidence of the defendant's intent to destroy an ethnic group in whole or in part, and that therefore the crime of genocide was not established. The Supreme Court instructed the lower court that the criminal acts should be qualified as War Crimes Against Civilian Population instead (Supreme Court of Kosovo Judgment, dated 31 August 2001),

- On re-trial before a panel of two IJs and one national (Kosovo Albanian) judge, *Vuckovic* was convicted of War Crimes Against the Civilian Population, in violation of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) article 142 (Mitrovicë/Mitrovica District Court, verdict P – K 48/2001, dated 25 October 2002),

- On appeal, a panel composed of three IJs reversed the decision based on what the Supreme Court described as an incorrect and incomplete evaluation of evidence, because of witness credibility issues. Kosovo Albanian witnesses' testimony demonstrated, according to the Supreme Court, a "pattern of increasing inculcation" of the defendant that called for more careful scrutiny by the trial court (Kosovo Supreme Court judgment AP – KZ 186/2003, 15 July 2004, page 12). In dicta, the Supreme Court also stated that War Crimes Against the Civilian Population, CC SFRY article 142, must include a violation of a ratified international treaty, and that "any developments in international humanitarian customary law to support war crimes prosecutions instead of prosecution for ordinary crimes cannot be considered as applicable in the domestic courts of Kosovo ... [I]n the application of article 142 CC SFRY it would not be legitimate to resort to international customary law in such an area as primarily defining prohibited conduct, defining the basis of individual criminal responsibility and punishment [sic]" (Kosovo Supreme Court judgment AP – KZ 186/2003, 15 July 2004, page 24),

- The re-trial in the *Vuckovic* case is scheduled to begin in the summer of 2007.

5. The first prosecution of Kosovo Liberation Army (KLA) soldiers for war crimes handled by UNMIK IJs and Ips was the case of *Latif Gashi, Nazif Mehmeti, Naim Kadriiu, and Rrustem Mustafa*, two KLA commanders and two KLA officers who were involved in maintaining detention centers for holding and torturing Kosovo Albanian civilians in the "Llap" zone between August 1998 and May 1999:

- The trial Court convicted all four defendants of War Crimes Against Civilian Population, CC SFRY article 142 (District Court of Prishtinë/Priština, P – K 425/2001, 16 July 2003);

- On appeal, the Supreme Court of Kosovo reversed the decision on the basis that the crimes of illegal detention of civilians did not constitute a war crime under CC SFRY article 142 as, following the rationale set out in the *Vuckovic* dicta, international customary humanitarian law did not apply,

- The re-trial of the case has been scheduled for the summer of 2007.

6. Other recent war crimes prosecutions handled by Kosovo courts involve the maintenance of detention camps by the KLA in 1998-1999, in which Kosovo Albanian and Kosovo Serbian civilians were imprisoned, tortured, and killed (case of *Ejup Rujeva* and others, verdict issued June 2005; case of *Selim Krasniqi* and other, verdict issued August 2006).

6. William Smith, Deputy International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia

1. The trend to prosecute locally the perpetrators of violations of international criminal law is clearly materialised with the Extraordinary Chambers in the Courts of Cambodia (ECCC). In the coming months the Co-Prosecutors will file their introductory submissions, a sort of 'pre-indictment'. Multiple accused trials are expected as a mean to economise time and money throughout the proceedings. Following this submission the Co-Prosecutors expect various defence motions.

Although the ECCC is not yet fully operational, there are some points and lessons learned from the other international tribunals which were considered to be extremely useful:

- It is important to allocate an important amount of the budget to information managers and analysts,
- The abundant jurisprudence of all the international tribunal will assist the ECCC to adjudicate their cases,
- By working together, Cambodians and international staff convey the important message that the ECCC is not an alien court but Cambodian with international support,
- It is vital to recruit staff with teaching abilities so that they can transfer their knowledge to others,
- Interns are very important, both Cambodian and international,
- An appropriate document management system is needed with bilingual tools (Khmer and English/French),
- Maximise the NGOs' input, especially when related to the witness support programs and collection of documents,
- It is crucial to engage the government of Cambodia, since the hybrid system relies heavily on consensus,
- One more year of funding is required, in light of the fact that the first 9 months of life of the ECCC were spent trying to agree on the internal rules.

7. Toby Cadman, Counsel, Office of the Prosecutor Bosnia and Herzegovina

1. The local jurisdiction did sentence 40 accused and is investigating another 202 cases. The respective case files were submitted to the International Criminal Tribunal for the former Yugoslavia (ICTY) for review so as to establish if they were suitable for prosecution. Reference was also made to two of the most important cases referred under rule 11 *bis*, the *Stankovic* and the *Jankovic* cases.

2. One of the difficulties in prosecuting cases referred under rule 11 *bis* was that, sometimes, many years have elapsed between the time in which the Office of the Prosecutor at the ICTY contacted the witnesses and the date in which the local court gets the case for prosecution. Accordingly, many witnesses have changed their mind about appearing in Court or they have just changed address. Sometimes it was very hard to convince the witness to testify.

3. Among the prosecutorial standards applied in the Office of the Prosecutor are: the selection of the best evidence for trial, and trying to get a plea agreement and providing immunity for insider witnesses (especially with regards to the witnesses in Srebrenica).

8. *Human Rights Law compliance in international criminal procedure* - Francesco Crisafulli, Councillor, Permanent Mission of Italy to the Council of Europe

1. During the negotiations of the Rome Statute, the outcome of the discussions on the right of the defendant to be present at trial was that trials *in absentia* were not allowed. Some delegations had the perception that trials *in absentia* were inadmissible or a “a shame”.

2. Although the legal systems in many States do not allow for trials *in absentia*, it was affirmed that such trials are not inevitably against human rights (European Court of Human Rights - ECHR, *Ali Maleki vs Italy*). The ECHR case law on the subject has developed during many years, mostly through cases brought against Italy.

3. According to the ECHR case-law, the defendant can waive his/her right to be present in Court, provided that such waiver, although implicit, is informed and unequivocal.

4. The real problem, therefore, arises if the defendant cannot be presumed to be aware of the existence of the prosecution, because he/she has not received a formal notification. This may happen, in particular, when the defendant is absconding.

5. Therefore:

(a) If the defendant has been given proper and actual notice of the proceedings, his/her absence may be held to amount to a waiver of his/her right to be present in Court. Trial *in absentia* is then allowed, provided that the defendant is represented by a lawyer who must be fully entitled to speak in his/her name and submit arguments for his/her defence, and the sentence is safe and can be enforced,

(b) If it is not possible to assume that the defendant had actual knowledge of the trial, the defendant must be entitled to a fresh assessment of his/her guilt by a judge who must have previously heard him/her in person, in accordance with the rights of the defence.

6. Suspects whom the international criminal courts deal with are people who can easily abscond for long periods, thanks to power, money, help from large and organized groups, and possibly even from States. In this respect, similarities could be seen with the Italian experience, where Mafia fugitives may abscond for long periods of time without even having to leave the country, as the boss *Bernardo Provenzano* did for over 40 years.

7. A practical argument which has to be considered is whether it is worthwhile to prosecute somebody *in absentia*. Is this effective justice, since it might prove impossible to ever enforce the sentence? Enforcement is crucial in domestic criminal justice, but the aims of international criminal justice are not confined to the sole punishment of the individuals. International criminal justice has also a strong pedagogical aspect as well as a political one, in that it strives to contribute to a difficult and painful process of pacification, and these aims may be achieved by public trials even though the sentences remain unexecuted.

Part V - International Case Law

Chair: Carmel Agius, Presiding Judge, ICTY

A. Genocide

1. Susanne Malmstrom, Legal Officer, International Criminal Tribunal for the former Yugoslavia

1. Pursuant to article 4 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, the Tribunal has jurisdiction to prosecute individuals for genocide. The list of acts and the definition is taken directly from the 1948 Genocide Convention and thus reflects international customary law.

2. Proving genocide before the ICTY has not been easy, both in the objective and subjective elements of the crime.

Article 4 of the Statute includes five acts constituting the *actus reus* of genocide:

- Killing of members of the group. The jurisprudence of the ICTY not only speaks of the act of killing, but also of the *omission* to prevent killings,
- Causing serious bodily or mental harm to members of the group. According to the Appeals Chamber, this includes torture, inhumane or degrading treatment, sexual violence including rape and harm that damages health or causes serious injury. Harm need not be irreparable or permanent but needs to be serious,
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. The Trial Chamber has found that the situation in certain detention camps met the requirements of this act,
- Imposing measures intended to prevent births within the group,
- Forcibly transferring children of the group to another group.

3. The ICTY has no case law on the last two acts. With regard to forcible transfer, the ICTY has decided that the act by itself cannot be an *actus reus* of genocide, but that can be considered in the overall factual assessment, or a factor when inferring genocidal intent.

4. In terms of *mens reus*, genocide, differently from crimes against humanity, requires the specific intent/*dolus specialis* to destroy, in whole or in part, a national, ethnical, racial or religious group. The case law of the Tribunal accepts that, in the absence of direct evidence, specific genocidal intent may be inferred. The existence of a plan or policy of destruction can facilitate a prosecution for genocide, but it is not a legal ingredient. Intent can only be inferred when it is the only reasonable inference available on the basis of the existing evidence.

5. The group needs to be defined positively and not negatively (e.g., non-Serbs). The phrase “in part” refers to the intent to destroy a distinct part of the group and carries the substantiality requirement: the intent must be to destroy a substantial part of the targeted group. The destruction should be of a nature as to affect the entirety of the group, depending on the numeric size of the targeted group, the prominence of the victims within the group, the area of the perpetrators activities and control. Furthermore, the intent may be limited to a geographically limited area where authority and control can be exercised (such as the Bosnian Serb forces which had authority over Srebrenica). The phrase “as such” refers to the intent to destroy the group as a separate and distinct entity. The ultimate goal is the destruction of the group, although this necessarily requires the commission of crimes against its members.

6. In total, the ICTY has had ten indictments in which genocide was charged. In *Milosevic*, the Trial Chamber found that there was a case to answer with regard to genocide.

In *Blagojevic*, the Appeals Chamber found that genocide had occurred, but overturned the Trial Chamber's finding with regard to *Blagojevic's* guilt and acquitted him. In two cases, the Trial Chamber found that the accused had no case to answer with regard to the genocide charges. In another three cases, Trial Chambers found that genocide had not occurred. In another three cases the accused were charged with genocide but the charges were dropped following a plea bargain agreement. In the *Krstic* case, the Trial Chamber found him guilty of genocide, yet the Appeals Chamber decided that although genocide had taken place, the intent could not be attributable to him. The Appeals Chamber found that the Bosnian Serb Army's main staff had genocidal intent, and that *Krstic* knew of that intent and permitted resources of units under his control to facilitate the killings, yet he was not convicted as a perpetrator of genocide, but for aiding and abetting the crime.

7. This means that an accused may be held liable for genocide without the prosecution proving that he or she has the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group.

8. In conclusion, the ICTY has not found that any of the accused has had the necessary genocidal intent, but held them accountable for genocide based on knowledge of the genocidal intent of others, who are not yet tried or are unidentified.

2. Silvana Arbia, Senior Trial Attorney, International Criminal Tribunal for Rwanda

1. Genocide is very difficult to prosecute. Even when the word "genocide" is used by media, States and the United Nations, this does not mean that the Prosecutor will be successful in ensuring conviction for genocide before the International Criminal Tribunal for Rwanda (ICTR). Genocide can be subdivided into several punishable acts, such as incitement, aiding and abetting, conspiracy, attempt, etc.

2. The first ICTR indictment for conspiracy for genocide mentioned 29 accused, but has not been confirmed. The *Akayesu* case was the first in which a judgment for genocide was passed, and has served as a landmark case for other ICTR proceedings. It defined the *actus* and *mens reus*, and made genocide a basic adjudicated point of law.

3. The *Akayesu* case also established the background of the Rwandan genocide. The permanent distinction between the three ethnic Rwandan groups was established by the Belgian authorities in the 1930s when they forced Rwandans to carry an identity card with an indication of their ethnicity. This bureaucratic act facilitated the extremist ideologies and the genocide.

4. Also, *Akayesu* set a historical precedent for rape as a genocidal act. Rape is considered as serious bodily and mental harm, but also as a measure to prevent births in a group. However, due to the difficulties in proving genocide, the indictments have been handled in a pragmatic manner, meaning that rape was sometimes qualified as a crime against humanity instead of a genocidal act. It is easier to prove a crime against humanity, since no *dolus specialis* has to be proved.

5. Another alternative to proving genocidal intent is to indict an accused for conspiracy to commit genocide. The requisite special intent can then be inferred, which was also established in *Akayesu*. Such an inference can be made based on the following criteria:

- (a) The general context of the crime;
- (b) The scale of atrocities;
- (c) The nature of the atrocities;

- (d) Whether the crime constitutes a deliberate and systematic attempt to destroy a certain group;
- (e) The general political doctrine behind the crime;
- (f) The repetition of the acts which the perpetrator considers to be directed against a certain group, and
- (g) The commission of similar crimes.

6. In *Akayesu*, the Trial Chamber considered “that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act”.

7. A recent Appeals Chamber judicial notice regarding genocide entails that the Prosecutor no longer had to prove that genocide took place in Rwanda in 1994, thus greatly facilitating the work of the Prosecutor and of the ICTR. However, in all cases concerning genocide, *actus reus* and *mens reus* still have to be proven by the Prosecutor. The judicial notice has also allowed a greater number of victims to come forward.

8. The government policy behind the Rwandan genocide has been proven through the confession rendered by the accused in the *Kambanda* case.

9. Another salient aspect of the prosecution of genocide at the ICTR was the direct and public incitement to genocide, including through the use of propaganda to involve the general civilian population in the genocide. Direct and public incitement to genocide is a crime even without the need to prove the execution of the genocide. On this count, several convictions for direct and public incitement were achieved by taking into account general considerations about the Rwandan culture, as the use of certain indirect terms to denote killing.

B. Crimes against humanity

1. Don Taylor, Associate Legal Officer, International Criminal Tribunal for the former Yugoslavia

1. With respect to the crime of genocide, crimes against humanity suffer an “image problem”:

- Often unknown in the individual consciousness and in legal practice, and
- Theoretical hierarchy, because they are perceived as a lesser crime than the crime of genocide.

2. The Chamber held that “part of what transforms a crime into a crime against humanity, is that the individual act under accuse fits within a greater framework of crimes”.

3. As regards the crimes against humanity committed in the former Yugoslavia, the list of offences was set out in article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), which provides for the following general elements:

- There must be an attack. Initially there must be an armed conflict, which sets a jurisdictional limit on the activities of the tribunal. A geographical and temporal link between the acts occurred and the armed conflict is necessary,
- The acts of the perpetrator must be part of the attack. The attack must be on civilian population and part of a series of act,
- The attack must be directed against a civilian population. It's not completely clear how to define civilian population, which should however be the primary object of the attack. The definition should be liberally construed, with the burden of proof resting on the prosecution,
- The attack must be widespread or systematic,
- Knowledge of the perpetrator. However, it is not necessary to prove that the accused knew all the details of the attack, thus motives are irrelevant.

4. *Persecution.* The specific requirement of racial, religious or political grounds is what characterize persecution with respect to the other crimes against humanity. The case law definition is found in the *Deronjic* Appeal Judgement, 20 July 2005, paragraph 109:

“[A]n act or omission which:

1. discriminated in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and
2. was carried out deliberately with the intention to discriminate on one of the listed grounds specifically race, religion or politics (the *mens rea*)”

2. Silvana Arbia, Senior trial attorney, International Criminal Tribunal for Rwanda

1. A fundamental difference in the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute concerns the contexts that qualify as crimes against humanity, crimes that otherwise could be common crimes. In article 3 of the ICTR Statute, crimes are considered to be crimes against humanity if they are “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”. The element of “discriminatory grounds” is not present in the definition of crimes against humanity in article 5 of the ICTY Statute.

2. In the *Akayesu* judgment, the Trial Chamber found that the intent to discriminate was an essential element for crimes against humanity. The Appeal Chamber ruled that the Trial Chamber committed an error of law in those findings, stating that article 3 of the ICTR Statute does not require that all crimes against humanity be committed with a discriminatory intent, as such intent is required only for persecution.

3. The acts enumerated in the article 3 of the ICTR Statute are not an exhaustive list. Other acts can be included under the listing “other inhumane acts” in article 3 of ICTR Statute, if the elements of these acts meet the requirements listed in the description in the final chapeau of article 3. In the leading *Akayesu* ICTR case law, the Trial Chamber found “Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met”.

4. With regard to the non exhaustive list, it must also be observed that while for the other international crimes provided in the ICTR Statute, respectively genocide and war crimes, they refer to specific international conventions (being genocide defined on the basis of the Convention for Prevention and Punishment of Genocide, and war crimes with specific reference to the Geneva Conventions and to Additional Protocol II), there is no specific treaty

or conventional source for the definition and qualification of the crimes against humanity's elements.

5. In *Kayishema* and *Ruzindana*, the Trial Chamber found that "other inhumane acts" include those crimes against humanity that are not otherwise specified in article 3, but are of comparable seriousness and gravity to the other enumerated acts. Also, in *Akayesu* the Trial Chamber held that sexual violence falls within the scope of "other inhumane acts".

6. Also, in the *Kayisheam* and *Ruzindana* judgement the Trial Chamber reached the important conclusion that a third party can suffer serious mental harm by witnessing inhuman acts committed on other individuals, particularly against family members or friends.

3. Antonette Issa, Appeals Counsel, International Criminal Tribunal for the former Yugoslavia

1. Crimes against humanity were defined as: serious attacks on human dignity or a grave humiliation/degradation of human beings; prohibited and punishable in war or peace; not isolated or sporadic events.

2. It was stressed the importance of the legacy of cases such as the *Krstic* and the *Stakic* judgments, which dealt with the elements of the crime of extermination, particularly the "no requirement of":

- A vast scheme of collective murder, or
- Knowledge of the crime,
- Intention to kill a certain number of people.

3. In addition, with regard to the "general" mens rea, the accused must know of the attack on the civilian population and that his acts comprise part of the attack, or at least take the risk his acts are part of the attack.

4. If one compares the crime of extermination with genocide, one might find that the offender need not to have intended to destroy the group or part of the group to which the victims belong. The victims need not to share national, ethnic, racial or religious characteristics. Under article 5 (b) of the Statute, the actus reus of extermination can consist of an act or an omission.

5. With regards to the crime of enslavement (article 5 (c)), parallels were drawn between enslavement and sexual crimes and forced labour, referring to the *Kunarac* and the *Kovac* cases, and to the *Krnjelac* judgment.

6. Furthermore, reference was made to some of the factors that the International Criminal Tribunal for the former Yugoslavia (ICTY) had used in assessing the crime:

- Control of someone's movement,
- Control of physical environment,
- Psychological control,
- Measures taken to prevent or deter escape,
- Force, threat of force or coercion,
- Duration,
- Assertion of exclusivity,
- Subjection to cruel treatment and abuse,
- Control of sexuality, and
- Forced labour (*Kunarac* Trial Judgment).

7. Finally, it was stressed that under customary international law “deportation” is the forced displacement of individuals beyond internationally recognised state borders, while “forcible transfer” may consist of forced displacement within a State’s borders (*Brdjanin* judgment).

4. Amelie Zinzius, Senior Legal Officer, Appeals Chamber Special Court for Sierra Leone

1. It was emphasised that under crimes against humanity, the “other inhumane acts” are to be considered a residual clause. Particular focus was on a few particularities of the various sexual crimes in international criminal law: forced prostitution, sexual aggression, forced marriage, rape, sexual slavery and other forms of sexual violence.

2. Reference was made to a pending case before the Trial Chamber in which the judges would have to decide regarding the count of “forced marriage” as a crime against humanity. In this regard, while for the crime of persecution the element of ethnicity (or another ground) was required, it was not for “forced marriage”. In addition, for “forced marriage” no link between the crime and an armed conflict was needed.

5. *Protection of civilians in armed conflict: development of international humanitarian law, from the perspective of war crimes to crimes against humanity, Anne-Marie La Rosa, International Committee of the Red Cross, Advisory Service on International Humanitarian Law*

1. The panellist referred to the judicial elements of the protection of civilians in armed conflicts. After a brief historic overview of the development of international humanitarian law covering this issue, she focused on some of the gaps in the Rome Statute.

2. Regarding the Statute’s categorization of war crimes in four groups, it was noted that:

- The interpretation of notions defining the categories and the various elements of crimes is highly dependent on the context. For this reason it is very important to clearly define notions as “military targets” and “civilians”, as to leave little space for interpretation,
- Certain crimes under International Humanitarian Law are not included in the war crimes provision, e.g. the unjustified delay in the repatriation of prisoners, and others applicable in the context of non-international armed conflicts.

C. War Crimes

1. Motoo Noguchi, Professor, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI)

1. *International Criminal Court.* Japan has always been a strong supporter of the International Criminal Court, but has not been a State-Party for more than eight years. However, Japan finally acceded the Rome Statute on 27 April 2007. The reason for the delay could include the following three factors.

2. Firstly, a careful examination of the domestic legal system had to be made in order to ensure the conformity of the Rome Statute with it, including with the Constitution. Consequently, an extensive analysis of technical legal issues was required. As it is the general practice in Japan that relevant draft laws for the implementation of a treaty are tabled to the Diet for its consideration together with the ratification Bill itself, it took some time to prepare

them, as to ensure the cooperation with the Court that is required to State Parties under the Statute.

3. Secondly, a campaign of awareness raising for relevant sectors of society and the general public had to take place, in order to promote the understanding on the role and functions of the Court, and strengthen political support necessary for the ratification.

4. Thirdly, the requisite financial resources had to be allocated to the national budget so that Japan could make its assessed contributions to the Court. This was particularly significant in the case of Japan because of the large amount of money required. Japan's contribution could have accounted for approximately 29 per cent of the Court's budget as a result of simple calculation, but the Assembly of States Parties decided that 22 per cent, which is the United Nations ceiling for a contribution from one country, would apply. It is expected that Japan will become a new State Party by the fall this year.

5. *The Extraordinary Chambers in the Courts of Cambodia (ECCC)*. The Court is finalizing its internal rules of procedure. Although the proceedings will fundamentally be based on Cambodian domestic laws, special rules are needed, including for the following reasons.

6. Firstly, the ECCC has a specific mandate, structure and jurisdiction, which is foreign to the existing Cambodian domestic laws applied to ordinary criminal cases. There is a need to have specific rules to address this specificity, as well as to ensure compliance with relevant international standards. Secondly, as Cambodia currently has two different sets of the code of criminal procedure, with a new one to be adopted soon, there is a need to clarify the governing procedures to be applied to this Court.

7. Ownership of the proceedings is given to the Cambodian judges, staff, and people. The international judges and staff are there to give their assistance to Cambodian people, but are not supposed to control the proceedings. The success of the Court depends on the will of the Cambodian people to do justice on their own, with the assistance of the international community.

2. Guido Acquaviva, Legal Officer, International Criminal Tribunal for the former Yugoslavia

1. War crimes are punishable under articles 2 and 3 of the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute. Article 3, according to the Appeals Chamber, is a so-called residual clause, as it provides a non-exhaustive list of crimes, thus ensuring that no crime is taken away from the jurisdiction of the ICTY.

2. War crimes have a necessary link to the existence of an international or non-international armed conflict. The crime, however, need not to be part of the conflict. Article 2 applies only in international armed conflicts, whereas article 3 can be applied to international and non-international armed conflicts, as confirmed by the practice of domestic and international tribunals, as well as by military manuals.

3. In the case of the shelling of Dubrovnik, *Jokic* and *Strugar* were convicted for the destruction of cultural property under article 3 (d) of the Statute. In the *Strugar* judgment, it was unclear whether the shelling of Dubrovnik took place during an international or non-international armed conflict, but article 3 applied in both cases. The destruction of cultural property is criminal if:

- (a) It has caused damage to property which constitutes the cultural or spiritual heritage of peoples;

- (b) The damaged property was not used for military purposes at the time when the acts of hostility took place, and
- (c) The act was carried out with the intent to damage the property in question.

The *Strugar* judgment confirmed that the special protection of cultural property remains applicable even if there are military activities or military installations in the immediate vicinity of the cultural property.

4. *Galic* was convicted for his responsibility in a campaign of terror against the civilian population of Sarajevo during the 23 month siege of that city. The charges under article 3 were attacks against the civilian population and a campaign of terror as a war crime, as opposed to a crime against humanity. This is customary international law, but also codified in Additional Protocol I to the Geneva Conventions. Terror as a war crime is defined as acts or threats of violence wilfully directed against civilians with the primary purpose of spreading terror. The Prosecutor proved it by evidence of the campaign of attacks of shelling and sniping, the thousands of casualties and wounded, and the absence of military necessity. The campaign sought to spread terror and thus pressurize the civilian population. Such crimes are punishable both during international and non-international armed conflict.

3. Alice Zago, Investigator, International Criminal Court

1. The case law of the International Criminal Court (ICC) has dealt with some very interesting matters such as the international character of armed conflicts (Democratic Republic of Congo situation), and the crime of conscripting and enlisting of children under the age of fifteen years into armed forces or groups.

2. The Pre-Trial Chamber adopted the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadic* case criteria to analyse the nature of the conflict, evidencing how the Court makes appropriate use of the existing jurisprudence. However, the other Pre-Trial Chamber took a different approach adopting the reasoning of the International Court of Justice (ICJ) in the Democratic Republic of Congo v. Uganda case.

3. Another groundbreaking issue was the definition of “national armed forces” which is not limited to the “governmental” forces.

4. Antoinette Issa, Appeals Counsel, International Criminal Tribunal for the former Yugoslavia

1. *The Galić Appeal Judgment from the International Criminal Tribunal for the former Yugoslavia (ICTY)*. Major General of Bosnian Serb Army (VRS) *Stanisav Galić* was accused of having conducted, between September 1992 and August 1994, a campaign of sniping and shelling attacks on the civilian population of Sarajevo, causing death and injury to civilians, with the primary purpose of spreading terror among the civilian population.

2. According to the Trial Chamber judgment, which sentenced *Galić* to 20 years imprisonment :

- Civilians were deliberately attacked in a widespread or systematic campaign,
- The campaign against civilians was intended primarily to terrorize the civilian population,
- *Galić*, through his orders, and by other means of facilitation and encouragement, conducted the campaign of attacks. He did so with the primary aim to spread terror among the civilian population of Sarajevo.

3. Under his seventh ground of appeal, *Galić* argued that:
- The ICTY had no jurisdiction as “there exist no international crime of terror”,
 - The Trial Chamber erred in considering treaty law to be sufficient to give jurisdiction to the Tribunal,
 - The Trial Chamber erred in finding that the 22 May 1992 Agreement was binding upon the parties to the conflict,
 - The Trial Chamber erred with respect to the elements of the crime,
 - The Prosecution had not proved that the acts of “sniping” and “shelling” were carried out with the primary purpose of spreading terror among the civilian population.

4. The *actus reus* and *mens rea* of the crime of terror were discussed. The question before the Appeals Chamber was whether or not *Galić* intended to inflict terror, and it concluded that it was the case. The sniping and shelling in Sarajevo fell within the scope of “acts of violence” contemplated under the definition of the crime of acts or threats of violence, the primary purpose of which is to spread terror among the civilian population. The Appeals Chamber dismissed *Galić’s* appeal that the Trial Chamber did not prove that he had the requisite intent to commit the crime. As a result, *Galić’s* appeal was ultimately rejected entirely and he was sentenced to life imprisonment, from the 20 years he originally received from the Trial Chamber.

5. *Future challenges.* Articulating the elements of the crime of unlawful attacks is a difficult task. Formulation of the elements of unlawful attacks by the *Galić* Trial Chamber (paragraph 56) does not clearly answer the relationship between various types of unlawful attacks: direct, indiscriminate and disproportionate.

6. The Trial Chamber approach had been more cautious than the Appeal Chamber one. The two main contributions to the development of International Humanitarian Law from the *Galić* case were:

- The element of indiscriminate and disproportionate attacks against civilians may also count as direct attack on civilians,
- The Appeals Chamber confirmation that the Trial Chamber had found the elements of the crime of terror, and that treaty provisions could be a source of law for tribunals.

5. Amelie Zinzius, Senior Legal Officer, Appeals Chamber, Special Court for Sierra Leone

1. War crimes must have been committed during an armed conflict. Traditional distinction in the scheme of the 1949 Geneva conventions between international conflicts and more restricted law applicable in domestic conflicts was equivalent to the historical distinction between domestic and international war.

2. The Appeals Chamber dismissed the ground that the Sierra Leone conflict, as an international conflict, did not fall under the Court’s jurisdiction, and, in line with International Criminal Tribunal for the former Yugoslavia (ICTY) decisions, held that the international conflict could not impede the activity of the Court since they have become parts of customary law.

3. The Appeals Chamber examined the crime of enlisting/conscripting children in armed conflict, included in Rome Statute. This offence is wider than the original report of statute (abduction and forced recruitment). The crime of child recruitment was defined by the Special Court for Sierra Leone (SCSL) as a war crime. The Convention on the Rights of the Child, ratified by all but 6 States at the time, contains provisions on the recruitment of child soldiers.

The Appeals Chamber concluded that States had committed themselves to prohibit the use of child soldiers already in the mid 1980s.

4. On individual criminal responsibility, the Appeals Chamber found that there was sufficient State practice to prove that recruitment was a criminal offence by the time the SCSL started its practice in the 1990s.

5. As regards the crime of pillaging, the perpetrator must have intended to deprive the owner of private property for private or personal use. Trial Chamber II referred to the ICTY judgment in the *Celebici* case (systematic seizure of property). Whether the destruction of civilian property by burning would constitute pillaging is still up for final decision.

6. Tarik Abdulhak, Senior Advisor to the Registrar of the Court of Bosnia and Herzegovina

1. The War Crimes Chamber (WCC), established in close cooperation with international donors and the International Criminal Tribunal for the former Yugoslavia (ICTY), operates as a permanent section of the State Court with a 5-year transitional period involving international support. There is a special Registry supporting both the Court and the Prosecutor's Office. The panellist provided an outline of the Court's fixed chamber structure, both in the Criminal and Appellate Divisions of the Court. At the moment, each war crimes chamber operates with a presiding national judge, and two international judges as members.

2. The Chambers apply Bosnian procedural and substantive law. Some of the rules, systems and procedures which focus specifically on war crimes cases are inspired by the work of the international tribunals.

3. International involvement in the work of the Court will gradually be withdrawn after a transition process, and over a 5-year period the State will take full managerial and financial responsibility for the institution.

4. The Court adjudicates on four categories of war crime cases:

(a) Cases with confirmed indictments transferred from the ICTY under rule 11*bis* of the ICTY Rules of Procedure and Evidence (5 transfers completed to date, with 2 currently pending),

(b) Investigations transferred to the Court of Bosnia and Herzegovina (BiH) Prosecutor's Office by the Office of the Prosecutor of the ICTY,

(c) Cases taken over from lower courts in BiH,

(d) New investigations commenced by the State Prosecutor's Office.

5. Bosnia and Herzegovina was the first country in the region to whom the Tribunal transferred its proceedings. The Court has delivered 12 verdicts to date, including 4 cases finally determined (one of which is the first case transferred to Bosnia under rule 11*bis*). The Court's active cases include 16 proceedings in trial, or preparation for trial, involving 37 accused. As of 15 May 2007, 58 individuals were in pre-trial or trial custody ordered in cases before the War Crimes Section.

6. Main challenges which arose in the context of rule 11*bis* transfers to BiH were:

- Unavailability of the ICTY Prosecutor's file to the BiH Prosecutor prior to a final decision on transfer,

- Potential problems and delays in the transfer of defence files and defence preparation (e.g. the defence counsel who represented the accused before the ICTY may not wish to follow the case even though Bosnian legislation makes this possible),
- Unavailability of ICTY transcripts and evidence in the language of the State Court/accused,
- Issues relating to witness protection (need for the Court to be properly informed about all standing orders so that full compliance can be ensured; need for a mechanism for orders to be varied in some cases),
- Lack of a procedure that would enable the Court of BiH to directly address the ICTY in relation to general orders and evidence that may be required in specific cases,
- Length of custody prior to transfer of accused to BiH, which the State Court is bound to take into account in considering the overall reasonableness of the length an accused is held in custody,
- Other issues (e.g., unavailability of medical files in the national language).

7. ICTY assistance may be of great importance to other war crimes trials taking place before national courts (i.e., not only those transferred by the ICTY). National courts in the former Yugoslavia are likely to require ICTY assistance in a number of areas in the years to come, and there is a need to work on rules and procedures that can provide a simple and reliable mode of access to the ICTY for these courts. These areas include:

- Access to evidence, information and records prior to, and following closure of the Tribunal,
- Witness protection measures, in particular the need for a mechanism which can ensure that orders made by the ICTY can be modified in cases of legitimate need,
- Access to accused who are serving sentences, as accused who have been convicted by the ICTY and are serving their sentences in other countries are not easily accessible for the State Court,
- Residual issues upon closure of the Tribunal (e.g., custody of evidence and files, certification, access, etc.).

7. Melika Busatlic, War Crimes Chamber of Sarajevo, Legal Officer

1. The establishment of the War Crimes Chamber (WCC) is the first attempt to establish a mixed national/international war crimes body. The WCC applies the substantive criminal law of the Court of Bosnia and Herzegovina (BiH), taking into account the European Convention on Human Rights, which prevails on the national law.

2. The jurisdiction of the Court of BiH includes genocide, war crimes and crimes against humanity, but difficulties were faced as regards the application of substantive law, given the time of the perpetration of offences, in particular during the first cases brought before the Court, the *Radovan Stankovic* and *Maktouf* cases.

3. *Stankovic* was charged and sentenced in November 2006 of having committed crimes against humanity in violation of article 172 of the Criminal Code of Bosnia and Herzegovina, while *Maktouf* was accused of having committed war crimes against civilians, as provided for by Art 173 of the Criminal Code. In both cases the Court found that despite the different qualification of the offence in the national criminal code at the time of the perpetration, the principles of legality and individual criminal responsibility were respected, due to the customary nature of crimes against humanity (*Stankovic*), and being the protection of civilians and hostages (*Maktouf*) granted under *jus cogens*, as repeatedly affirmed in international treaties and jurisprudence, far beyond the time of the actual perpetration of crimes.

4. The law on transfer of cases from the International Criminal Tribunal for the former Yugoslavia (ICTY) to the Court of Bosnia and Herzegovina provides for the possibility to accept as proven facts established by legally binding decisions in proceeding before the ICTY, but does not set out criteria to be met in order for certain facts to be considered adjudicated. It has so far been accepted the practice of taking judicial note of adjudicated facts under rule 94 of the ICTY Rules of Procedure and Evidence, provided that the fact is distinct, concrete and identifiable, restricted to factual findings and does not include legal characterisation, is not contested at trial and forms part of a judgement which has either not been appealed or has been settled on appeal or contested at trial and now forms part of a judgement which is under appeal but falls within issues which are not in dispute on appeal.

8. *The role of non-governmental organizations in documenting war crimes, Niccolò Figà Talamanca, No Peace Without Justice (NPWJ)*

1. Recent work by NGO's had evidenced the crucial role that they could play in assisting international criminal justice institutions. An example had been the work carried out by No Peace Without Justice (NPWJ), documenting the war crimes committed during 1999 in Kosovo. NPWJ had begun such work interviewing witnesses in Albania. A protocol was developed in partnership with the International Criminal Tribunal for the former Yugoslavia (ICTY) which allowed a team of 130 persons, including numerous local individuals, to systematically interview around 5000 witnesses. The database compiled was then provided to the ICTY. There was regular contact between NPWJ and ICTY investigators, who were assisted by being able to narrow their search via the identification of witnesses. The protocol also allowed for referring certain witnesses directly to the ICTY, particularly when NPWJ did not possess the requisite expertise, for example in the case of victims of sexual violence. A special protocol was also applied for specific information about mass graves.

2. Given the magnitude of the crimes committed in some conflicts, international criminal justice institutions may not necessarily be able to identify all witnesses, so a key role for NGOs to play is to do some pre-screening of potential witnesses.

3. NGOs can also document the events of the conflict, the patterns of conduct, chain of command, etc. This work can thus have two purposes: serve as background information (as in the case of the Special Court for Sierra Leone (SCSL)) and constitute a form of accountability, through engaging the population and providing them a framework to convey their suffering. Main advantages for NGOs to carry out such work are that they can deploy quickly and in large numbers, have local contacts and lower operational costs.

4. Some of the lessons learned include: giving primary consideration to the well-being of witnesses; providing them with a system of referrals for other types of support, such as food or shelter; abstain from interviewing vulnerable witnesses unless the NGO has the expertise required; ensuring data security; obtaining informed consent which includes passing on the information to an accountability mechanism thus avoiding, inter alia, having the witnesses being re-traumatized by additional visits; conducting outreach to promote the work of the institution; and ensuring the well-being of staff.

9. *International obligations on war crimes and their implementation: the practice of States, Anne-Marie La Rosa, Advisory Service on International Humanitarian Law International Committee of the Red Cross*

1. The ICRC has supported the establishment of international and internationalized tribunals. It was also active in the establishment of the ICC.

2. The ICRC considers that the ICC Statute is an excellent instrument for states in order to help them to comply with their obligations to implement IHL obligations and provide for

the repression of war crimes. It therefore uses in its technical assistance activities and has found that it was very useful to initiate the dialogue in this regard.

3. However, supporting the ICC does not mean that the ICRC will testify and participate in judicial proceedings. The Rules of Procedures and Evidence of the ICC provide expressly that ICRC personnel cannot testify.

4. The speaker presented an overview of the implementation of the ICC provisions related to war crimes and general principles of international criminal law.

5. It was also noted that the ICC should be put back into its general perspective. States should also take the opportunity of implementing all their IHL obligations when modifying their legislation to incorporate the ICC statute at the domestic level.

Annex I
List of Participants

Contents/ Tables des matières / Indice

	<i>Page</i>
Inauguration Ceremony	70
List of States / Liste des États / Lista degli Stati	72
Intergovernmental organizations / Organisations intergouvernementales / Organizzazioni intergovernative	80
Civil Society / Société Civile / Società Civile:	82
- Lawyers / Avocats/ Avvocati	82
- Non-governmental organizations / Organisations non gouvernementales / Organizzazioni non governative	83
- Research Institutes / Instituts de Recherche / Istituti di Ricerca	85
- Universities / Universités / Università	86
- Master of Laws, UNICRI and the University of Turin, Faculty of Law	88
Judiciary / Magistrats / Magistrati	90
Armed Forces / Forces Armées / Forze Armate	92
Conference Secretariat	93

Inauguration ceremony

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Ministère de la Justice*

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Ms Magdalena DIMOVA
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Ministère de la Justice

Mr Moustafa IDRISOU BIYAO KOLOU
Juriste, Attaché d'Administration,
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**UNITED KINGDOM OF GREAT BRITAIN
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UNITED REPUBLIC OF TANZANIA

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Foreign Service Officer
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Ministry of Justice and Constitutional Affairs

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Mr Jose Manuel CASAL VAZQUEZ
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Secretary of the Management Board

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Cambodian Co-Prosecutor

Mr William SMITH
Deputy International Co-Prosecutor

Mr Sophy KONG
Interpreter

INTERNATIONAL CRIMINAL COURT

Mr Rene BLATTMANN
Vice President, Judge

Ms Fatou BENSOUDA
Deputy Prosecutor for Prosecutions

Ms Maria WARREN
Chef de Cabinet, Office of the Prosecutor

Mr Bruno CATHALA
Registrar

Mr Didier PREIRA
Head of the Division of Victims and Counsel

Ms Alice ZAGO
Legal Officer, Office of the Prosecutor

Ms Martina FUCHS
*Associate Legal Officer, Immediate Office of the
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Mr Renan VILLACIS
*Director of the Secretariat of the Assembly of
States Parties*

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Mr Fausto POCAR
President, Judge

Mr Carmel AGIUS
Presiding Judge

Ms Carla DEL PONTE
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Mr David TOLBERT
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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Mr Willian PACE
Convenor
Unites States of America

Mr Noah WEISBORD
CICC Delegate, Harvard Law School SJD Candidate
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Mr Pouria ASKARY
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IRANIAN COALITION FOR THE ICC

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Mr Niccolò FIGÀ-TALAMANCA

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Paris Lodron University, Salzburg, Austria

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University of Alger

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Master of Laws jointly organized by UNICRI and the Faculty of Law of the University of Turin

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LLM Student

Mr Giovanni ANNICCHINO
LLM Student

Mr Daniel BARLETT
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Mr René BETANCOURT
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Judge, Ufficio del Ruolo e del Massimario,
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Ms Raffaella FALCONE
Judge for Sentence Enforcement
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Mr L. Luca FERRERO
Judge, Court of Justice Turin
Italy

Mr Francesco FLORIT
Judge, Tribunal, Udine
Italy

Mr Antonio MADEO
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Ms Teresa MAGNO
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Mr Leonardo NATALE
Real Admiral
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Mr Giuseppe CAIAFA
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Mr Francesco D'AMBRUOSO
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Mr Luca NOTARGIACOMO
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Annex II

Conference program

Monday, 14 May

Congress Centre “Lingotto” (former FIAT factory)

08.30 – 09.00

Registration of participants

Presiding

Roberto Bellelli, President of the Military Tribunal of Turin

09.00 – 10.00

Opening ceremony

1. Welcome address & presentation : President **Roberto Bellelli**
2. Opening Remarks :
 - (i) Ministry of Foreign Affairs, Under Secretary of State, **Senator Gianni Vernetti**,
 - (ii) Region Piedmont, Deputy President, **Sergio Deorsola**,
 - (iii) Province of Turin, Deputy President, **Aurora Tesio**,
 - (iv) City of Turin, Deputy Mayor, **Michele Dell’Utri**,
 - (v) UNICRI, Officer-in-Charge, **Doris Buddenberg**,
 - (vi) ICTY, President **Fausto Pocar**,
 - (vii) ICTR, President **Erik Møse**,
 - (viii) ICC, Vice-President **René Blattmann**,
 - (ix) ECCC, Co-Prosecutor, **Chea Leang**,
 - (xi) SCSL, Senior Legal Officer, **Amelie Zinzius**,
 - (xii) Ministry of Justice, Under Secretary of State, Senator **Alberto Maritati**.

10.00 – 10.30

Coffee break

10.30 – 13.00

The foundation of International Criminal Justice

- (i) *International and mixed jurisdictions* : means and achievements of mechanisms established by States and the U.N. - **Paola Gaeta**, Professor, University of Florence,
- (ii) *The experience of the ad hoc Tribunals and their completion strategies* - **Fausto Pocar**, President, ICTY; **Erik Møse**, President, ICTR; **Amelie Zinzius**, Senior Legal Officer, SCSL,
- (iii) *National jurisdictions and international assistance* : rule of law and Defence perspectives - **Chris Engels**, Director of the Criminal Defence Section, Court of Bosnia and Herzegovina,
- (iv) *The establishment of a permanent international Court* : scope and role of the ICC - **René Blattmann**, Vice-President, ICC,

Discussion

13.00 – 14.45

Lunch break

14.45 – 16.15 *Promoting International Criminal Justice*

- (i) First achievements of the ICC and its opportunities : *Organization, operations and professional perspectives in the ICC* - **Bruno Cathala**, Registrar, ICC,
- (ii) *Implementing legislation of the Rome Statute* : Regional experiences - **Allieu Kanu**, Ambassador, Sierra Leone,
- (iii) *The role of NGOs in the operational phase of international criminal justice* - **Alison Smith**, No Peace Without Justice,
- (iv) Defence and Victims issues:
 - a. *Defence and Victims basic issues and representation* - **Didier Preira**, Head of the Division of Victims and Counsel, ICC,
 - b. *Victims' assistance in the field* - **Mariana Peña**, FIDH
 - c. *The role of the representative bodies of counsel and legal associations* - **Fabio Galiani**, Counsel, International Criminal Bar,

Discussion

16.15 – 16.30 Coffee Break

16.30 – 18.30 *The Review Conference of the Rome Statute*

- (i) *The Rome Statute process, from its adoption to the Assembly of States Parties* - **Umberto Leanza**, Professor, University of Rome,
- (ii) *From the Rome Conference to the Review Conference* : the principle of universality, or achieving momentum and consensus - **Jürg Lindenmann**, Ministry of Foreign Affairs, Switzerland,
- (iii) *Amendments and revision* : provisions, timing, real needs and procedure - **Rolf Fife**, Ambassador, Norway,
- (iv) *The object of the review mechanisms* - **Otto Triffterer**, Professor, University of Salzburg :
 - a. Statute, Elements of crimes and Rules of Procedure and Evidence,
 - b. Improving Cooperation with the Court : mechanisms to implement obligations,
- (v) *The role of NGOs in the lead-up to the review conference* - **William Pace**, CICC,

Discussion

19.30 Welcome Dinner at the *Castello del Valentino*

Tuesday, 15 May

09.00 – 13.00 “Castello del Valentino”

The Legacy of the International Tribunals

Off-site meeting of the Presidencies, OTPs and Registrars

09.30 – 11.00 Congress Centre of the Region Piedmont

The crime of aggression

Chair : **Christian Wenaweser**, Chairman of the Special Working Group on the Crime of Aggression

- (i) *The State responsibility for acts of aggression under the UN Charter* : a review of cases - **Edoardo Greppi**, Professor, University of Turin,

- (ii) *Individual criminal responsibility for the crime of aggression* : a background perspective, from the Nuremberg trials to the consolidation of the subject matter international criminal jurisdiction - **Mohamed Aziz Shukri**, Professor, University of Damascus ,

Discussion

11.00 - 11.30 Coffee break

11.30 - 13.30

- (iii) *Policy issues under the UN Charter and the Rome Statute* - **David Scheffer**, Professor, Northwestern University School of Law,
(iv) *The elaboration of the definition and procedure for accountability of the leadership crime of aggression before the ICC* - **Christian Wenaweser**, Ambassador, Liechtenstein and **Claus Kress**, Professor, University of Köln,

Discussion

13.30 - 15.30 Lunch at the “*Scuola di Applicazione* and the Army Institute of Military Studies”

15.30 – 17.30

- (v) *National legislation on individual responsibility for conduct amounting to aggression* - **Astrid Reisinger Coracini**, Salzburg Law School on International Criminal Law,
(vi) *The principle of complementarity under the Rome Statute and its interplay with the crime of aggression* - **Pal Wrangé**, Counsellor, Foreign Ministry, Sweden,

Discussion

19.00 – 20.00 Visit to the *Mole Antonelliana* and Museum of Cinema

20.30 – 22.30 Dinner at the Officers Club of the Army

Wednesday, 16 May

*The experience of international criminal jurisdictions
and their contribution to the development of International Criminal Law*

Investigation on International Crimes

Chair : **Carla Del Ponte**, Chief Prosecutor of the ICTY

- 09.00 – 10.30 (i) **Carla Del Ponte**, Chief Prosecutor - ICTY,
(ii) **Hassan B. Jallow**, Chief Prosecutor & **Alfred Kwende**,
Investigation Unit - ICTR,

Discussion

10.30 – 10.45 Coffee break

- 10.45 – 12.40 (iii) **Stephen Rapp**, Chief Prosecutor - SCSL,
(iv) **Deborah Wilkinson**, Deputy Chief Prosecutor, Department of
Justice - UNMIK,
(v) **Chea Leang**, National Co-Prosecutor - ECCC,
(vi) **Toby Cadman**, Counsel - OTP of Bosnia and Herzegovina,
(vii) **Fatou Bensouda**, Deputy Prosecutor & **Alice Zago**, Investigator
- ICC,

- Discussion
- 12.40 – 13.30 (viii) *Enhancing State-to-State and State-to-International Organisations cooperation*, **Nicola Piacente** - Deputy Prosecutor, District Anti-Mafia Direction, Milan,
- Discussion
- 13.30 – 15.00 Lunch break
International prosecutions
Chair : **Hassan B. Jallow**, Chief Prosecutor of the ICTR
- 15.00 – 16.30 (ix) **Hassan B. Jallow**, Chief Prosecutor & **Silvana Arbia**, Senior Trial Attorney - ICTR,
(x) **Stephen Rapp**, Chief Prosecutor - SCSL,
(xi) **Fatou Bensouda**, Deputy Prosecutor & **Alice Zago**, Investigator - ICC,
Discussion
- 16.30 – 16.45 Coffee break
- 16.45 – 17.40 (xiii) **Deborah Wilkinson**, Deputy Chief Prosecutor, Department of Justice - UNMIK,
(xiv) **William Smith**, Deputy International Co-Prosecutor - ECCC,
(xv) **Toby Cadman**, Counsel - OTP Bosnia and Herzegovina,
- Discussion
- 17.40 – 18.10 (xvi) *Human Rights Law compliance in international criminal procedure* - **Francesco Crisafulli**, Counsellor - Permanent Mission of Italy to the Council of Europe,
- Discussion
- 19.30 – 22.30 Concert, followed by dinner at the Officers Club of the Army

Thursday, 17 May

- International case-law (I)
Chair : **Carmel Agius**, Judge - ICTY
- 09.00 – 10.45 Genocide :
(i) **Susanne Malmstrom**, Legal Officer - ICTY,
(ii) **Silvana Arbia**, Senior Trial Attorney - ICTR,
- Discussion
- 10.45 – 11.00 Coffee Break
- 11.00 – 13.00 Crimes against humanity :
(iii) **Don Taylor**, Associate Legal Officer - ICTY,
(iv) **Silvana Arbia**, Senior Trial Attorney - ICTR,
- Discussion
- 13.00 – 15.00 Lunch break

- 15.00 – 17.00 Crimes against humanity
(vi) **Antoinette Issa**, Appeals Counsel - ICTY,
(vii) **Amelie Zinzius**, Senior Legal Officer, Appeals Chamber - SCSL,
Discussion
- 17.00 – 17.15 Coffee Break
- 17.15 – 18.00 (ix) *Protection of civilians in armed conflicts* : Development of IHL, from the perspective of war crimes to crimes against humanity, Dr. **Anne-Marie La Rosa**, Advisory Service on International Humanitarian Law - ICRC,
Discussion
- 18.00 – 19.00 Visit at the Medieval Village
- 20.00 – 22.30 Dinner at the Officers Club of the Army

Friday, 18 May

International case-law (II)

Chair : **Carmel Agius**, Judge - ICTY

- 09.00 – 10.30 (a) War crimes :
(i) **Mooto Noguchi**, Professor - UNAFEI,
(ii) **Guido Acquaviva**, Legal Officer - ICTY,
(iii) **Alice Zago**, Investigator - ICC,
Discussion
- 10.30 – 11.45 Coffee Break
- 10.45 – 13.00 (iv) **Antoinette Issa**, Appeals Counsel - ICTY/OTP,
(v) **Amelie Zinzius**, Senior Legal Officer, Appeals Chamber - SCSL,
(vi) **Tarik Abdulhak**, Senior Adviser to the Registrar of Bosnia and Herzegovina,
(vii) **Melika Busatlic**, Legal Officer - War Crimes Chamber of Sarajevo,
Discussion
- 13.00 – 14.45 Lunch break
- 14.45 – 16.15 (a) War crimes
(viii) *The Role of NGOs in documenting war crimes* - **Niccolò Figà Talamanca**, No Peace Without Justice,
(ix) *International obligations on war crimes and their implementation: the practice of States* - Dr. **Anne-Marie La Rosa**, Advisory Service on International Humanitarian Law - ICRC,

	Discussion
16.15 – 16.30	Conclusions
17.00 – 18.00	Visit at the Medieval Village
20.00 – 22.30	Dinner at the Officers Club of the Army

Annex III

Inauguration Ceremony

[to be inserted]

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