

# VICTIMS' GUIDE TO THE INTERNATIONAL CRIMINAL COURT



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

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

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

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court [...]"

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Preamble to the Statute  
of the International Criminal Court,  
Rome, 1998 (excerpts).

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CRIMINAL COURT

"Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered."

*United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principle 4.*

# INTRODUCTION

Labelled for decades as "utopian" the concept of creating a court of universal jurisdiction vested with the authority to punish even the most heinous of crimes against humanity was initiated in 1874 by Gustave Moynier, one of the founders of the Red Cross. It was not until more than a century later that the concept of a viable international criminal justice system started to become a reality.

On 11 April 2002, over 60 States had ratified the Statute of the International Criminal Court (ICC). According to the Statute's provisions, the Treaty entered into effect on 1 July 2002, triggering the establishment of a criminal justice system on a worldwide scale whose mission would be to punish the most heinous of all crimes: war crimes, crimes against humanity, and genocide.

According to Kofi Annan, Secretary-General of the United Nations, the establishment of the ICC constitutes "...a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law." Only time will tell to what degree this optimism is justified.

The Court will need to simultaneously surmount many obstacles. It will have to: deal with the resolute opposition of the United States, China, and a few other countries, demonstrate that it will not be exercising its jurisdiction solely on behalf of the weakest of the international community, as well as ensure that international opinion - despite all of its cultural complexities - will recognize this unprecedented form of international justice.

As far as the latter aspect is concerned, the ICC's founders introduced radical innovations. They assigned victims a key role, mindful that international justice will not prevail unless victims are willing participants in this effort to restore an order shattered by horrendously grave crimes. It will be up to the new Court to effectively handle the challenges that reality may bring.





# WHAT THE COURT DOES

The establishment of the ICC entails some revolutionary aspects in terms of international criminal law, particularly for victims:

**From now on, victims will play a key role in the international justice system.** It is this entirely unprecedented dimension that we will focus upon in the following pages.

Historically, international law has been limited to governing relations between the States. Victims as persons have consequently been denied both their right of speech, and their right to seek redress. In the Statutes of the International Criminal Tribunals for the former Yugoslavia (ICTY), and for Rwanda (ICTR), victims were virtually ignored. In the English-speaking world-type procedures practised by these two Tribunals, the victims are - in the words of Claude Jorda, President of the ICTY - "like a ping-pong ball", hit back and forth between the Prosecutor and the defence counsel as they are questioned and cross-examined. Victims have not yet been assigned any rightful place in the process. They are entitled neither to compensation, nor to reparation, other than to the restitution of their stolen property.

Victims exist only as witnesses, typically appearing on behalf of the prosecution. The fact that it is impossible for victims to bring a civil action can have unfortunate results. During the ICTY trial of former Serbian President Slobodan Milosevic, some victims summoned to appear as witnesses were being so closely led in their testimony by the Prosecutor in his attempt to strengthen his case that the witnesses did not even have an opportunity to relate their ordeal in detail, before being subjected to a barrage of cross-examination questions by the accused in person, as he was acting as his own, and sole, counsel. If one of the ultimate aims of international justice is to restore victims' dignity, this objective has obviously still not been reached - far from it.

The ICTY and the ICTR served as experimental laboratories for the International Criminal Court. Scarcely four to five years passed between the drafting of the Statutes of these two UN *ad hoc* Tribunals and that of the Statute of the International Criminal Court. But the importance attributed to the role of victims, and to their rights, has radically changed. **Victims are all but entitled to bring a civil action: they may induce the Prosecutor to open an investigation. To do so, they**

need only write a letter to the following address, to the attention of the Prosecutor, describing their situation, and enclosing whatever evidence they may possess:

International Criminal Court  
174 Maanweg  
2516 AB The Hague  
The Netherlands

Moreover, victims have the right to testify before the Court and participate in the proceedings from the start of the investigation. Their legal representatives may consult documents in Court records, demand further investigation, express their opinion as to the admissibility of the charges and the Court's jurisdiction, and question the accused either directly or via the presiding judge. During trials, victims may take the stand and are entitled to seek prompt reparations, etc.

Contrary to the practice followed by the UN's Tribunals for the former Yugoslavia and for Rwanda, victims are thus no longer being treated as mere instruments of the prosecution. Article 68 (3) of the Statute fully recognizes the right of the Court to determine what contribution the victims may make to the criminal procedure: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court [...]." This recognition is without precedent in international law. It can be accounted for by the lobbying efforts undertaken by human rights organizations in Rome and by the support that they received, not only from "progressive" nations in terms of international criminal law, but also from the majority of traditional continental States that recognise the "civil action" concept in their national laws - a concept totally foreign to Common Law (under the English-speaking judicial system).

But beyond the political mechanism that made this possible, if international justice strives to "reunite" societies divided by war, it can no longer afford to overlook the decisive role of those who consider themselves victims are called upon to play in the framework of countries' reconstruction. The goal of international justice is not so much to punish in proportion to their seriousness "crimes which men can neither punish nor forgive", to quote essayist Hannah Arendt, but through the ritual of a trial to identify the individuals responsible for such crimes,

so as to lift the suspicion of collective guilt, while at the same time thwarting the revisionism and impunity that could produce further acts of hatred and violence. This breakthrough can also be explained by the development of international relations characterised mainly by the now-acknowledged role of Non-Governmental Organizations (NGOs) and the decisive role assigned to victims in the mind of the public. This dual change itself is the product of various factors: the strengthening of individualism, the pressure groups that victims are forming, the media coverage given to such conflicts that make people's sufferings more real and more immediate, and sometimes even the political exploitation of "victims" by organizations to strengthen the political legitimacy of their cause.

## **A. Important information**

### **The ICC's jurisdiction is not retroactive**

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The ICC will not be authorised to bring legal proceedings against the alleged perpetrators of crimes committed prior to 1 July 2002, the date on which the Rome Statute entered into effect. Similarly, the ICC will have jurisdiction in respect to a State only for crimes committed after the date on which it became a party to the Statute, unless it has declared its recognition of the ICC's jurisdiction in respect of a crime committed prior to the date on which it became a Party to the Treaty.

#### **No decision has been made on the issue of continuous crime.**

The Court's jurisdiction entered into effect only as of 1 July 2002, upon ratification of the Statute by the States Parties. But what would be the procedure if a certain criminal act were to begin prior to the ICC's jurisdiction and continue thereafter? Despite passionate debate among legal experts in Rome, there are two possible interpretations of the Statute, and, as of today's date, this issue has still not been decided.

The broadest interpretation asserts that the ICC must have jurisdiction over crimes committed prior to the effective date of the Statute, were such crimes ever to continue after that date. The restrictive interpretation holds, on the other hand, that the principle of non-retroactivity is absolute, even in a case of continuing crime. Ultimately, it will be up to the judges to make a decision based on their own reading of the Statute.

## What criminals can the Court prosecute?

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On 1 January 2003, 87 countries from all over the world, with different judicial systems, ratified the Rome Statute. Thirty other States are currently involved in the ratification process. The Assembly of States Parties is expected to include some 100 members by the end of the year 2003.

### The ICC may prosecute:

1. Alleged perpetrators of crimes committed on the territory of a State that has ratified the Rome Statute.
2. Alleged perpetrators of crimes committed by a national of a State that has ratified the Rome Statute.
3. Alleged perpetrators of crimes committed by a State that has declared its acknowledgement of the Court's jurisdiction, even if it has not signed the Rome Statute.
4. Alleged perpetrators of crimes that endanger, or adversely affect, international peace and security. In accordance with Chapter VII of the United Nations Charter, the Security Council may refer cases before the Court. The Security Council availed itself of this very provision when it established the International Criminal Tribunals for the former Yugoslavia, and for Rwanda. It is, however, evident that the five permanent members of the Security Council (China, the United States, France, Great Britain, and Russia) retain their right of veto and that they will not hesitate to use it in order to defend their interests.



## **Nonetheless, under certain conditions, the ICC may prosecute American, Chinese and Russian soldiers.**

Under the assumption that, tomorrow, some American, Chinese or Russian soldiers - or nationals of any other country that has not ratified the ICC Statute - were to commit crimes that fall within the jurisdiction of the Court, they could be prosecuted, tried and sentenced by the International Criminal Court, provided that such crimes had been committed on the territory of a State Party to the ICC Statute.

## **What crimes can the International Criminal Court prosecute?**

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According to Article 5 of its Statute, the Court is competent to try the most serious crimes affecting the international community as a whole. It is therefore qualified to prosecute the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, which are also called "international crimes".

## **Crimes that fall within the ICC's jurisdiction are not subject to the statute of limitations**

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The length of time that may have passed since a crime was committed cannot prevent prosecution, by the ICC, of the alleged perpetrators of war crimes, crimes against humanity, and genocide. However, despite its brevity, Article 29 of the Statute raises a problem: **"The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."** Many States (including France, by virtue of the Order of 26 December 1964) have recognized, under their national laws, the statute of limitations of acts of genocide and crimes against humanity, this principle having been derived from the provisions of the Statute of the International Military Tribunal at Nuremberg and from the UN Security Council's Resolution of 13 February 1946. However, in many countries - including France - war crimes are subject to the statute of limitations, as these States have neither signed nor ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968. Unless these countries decide to modify their penal code to admit such ineligibility, the ICC is qualified to prosecute the perpetrator of a war crime, even if such crime were subject to the statute of limitations under national laws.

## The ICC and national courts have complementary scopes of jurisdiction

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The establishment of the International Criminal Court will drastically improve international justice, but will even more greatly enhance national justice systems, **for it is these that will be required, first and foremost, to punish international crimes. Contrary to the principles governing the International Tribunals for the former Yugoslavia, and for Rwanda, the ICC is thus not designed to take the place of national courts, but on the contrary, to make them work more effectively. The International Criminal Court is thus said to have "complementary jurisdiction"**.

The Court must therefore hold exemplary trials in which it will punish **the highest-ranking political and military leaders** for "international" crimes only when national courts have failed to do so, either because the national Prosecutors lacked the opportunity, or the desire, to prosecute certain of their nationals, or because the judicial system in such countries collapsed during an internal conflict. The ICC will therefore intervene as the Court of last resort.

Hence, by virtue of Article 17 of the Statute, the ICC must declare a case to be inadmissible if a State having jurisdiction in such a case:

1. has already opened an investigation
2. has initiated a court action
3. has decided not to prosecute
4. if the person named in the complaint has already been sentenced for the same act
5. if the case is not sufficiently serious.

Nonetheless, derogations may be granted if it is determined that the State is genuinely unwilling, or unable, to carry out the investigation, or the prosecution, or if the State waives such options. Article 17, paragraph 2, specifies several factors that can be used to determine the willingness of a State to prosecute, and paragraph 3 specifies how to determine the inability of a State to prosecute. The aim of these provisions is to ensure that the ICC is not held hostage by the bad faith of a State and/or by mock criminal proceedings:

## Article 17

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

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.
- (b) There has been an unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person concerned to justice.
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

If the ICC fulfils its mandate, its dissuasive capacity will far exceed the number of limited cases that it will be trying.

**The Court's objectives are thus to meet the following requirements:**

**a) Deter** "ethnic cleansing" and other potential perpetrators of mass crimes from taking any action, by making them aware that they will no longer be able to count on guaranteed impunity. Historically, such impunity has been systematic, as summarised by the following cynical saying: "When a murderer kills two people, he goes to jail; when he kills 200, they put him in an asylum; but when he kills 20,000, he is invited to a peace conference." Clear standards and repressive mechanisms are therefore essential to create some sort of deter

rent effect. But the idea that a court might - by its mere existence - eliminate crime is a utopian vision. However, just because the ICC's capacity to prevent crime is necessarily limited does not mean that it should be discounted.

**b) Encourage** national courts to initiate legal action, prosecute and punish the perpetrators of grave crimes. This is, without a doubt, one of the most crucial indirect effects of the ICC's creation. For, whenever political conditions allow, it is national justice systems that are best-suited to sentence criminals and to enable a society to reflect upon the reasons that led to the erosion of its essential moral values, making it temporarily acceptable to a portion of the population for such abominable crimes to be committed.

**c) Render justice** to victims, and to their families, by first establishing the truth behind the atrocities committed. The purpose of this process, which both acknowledges the crimes committed and punishes their perpetrators, is to help societies torn apart by civil war to overcome their strife and live side-by-side in peace.

## **The non bis in idem principle**

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According to which a person cannot be tried twice for the same crime, is presented in Article 20 of the Statute. It is a fundamental principle of law also found in Articles 10 and 9 of the ICTY and ICTR Statutes. If a person has been convicted or acquitted by the Court, that person cannot be retried for the same crimes by the Court or by any other tribunal. Article 20 (3) specifies that the Court may, however, exercise jurisdiction over a person who has already been tried by another court for the same conduct if it has been proven that the previous proceedings were a mock trial designed to exonerate the person from being held accountable for his or her criminal responsibility:

**Article 20 (3): "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:**

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;  
OR
- (b) Otherwise were not conducted independently or impartially, in accordance with the norms of due process recognized by international law, and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

## **The ICC's jurisdiction applies to any persons who have participated in the crime**

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Because international crimes usually implicate several persons, Article 25 of the Statute stipulates that the ICC has jurisdiction not only over any person who has physically committed a crime provided for under the Statute, but also over any persons who have intentionally ordered the execution of such crimes, incited other persons to commit them, or supplied the means by which to commit them.

### **Article 25 of the Statute provides:**

- "1. The Court shall have jurisdiction over **natural persons** pursuant to this Statute.
- 2. **A person who commits a crime that falls within the jurisdiction of the Court shall be individually responsible** and liable for punishment in accordance with this Statute.
- 3. In accordance with this Statute, **a person shall be criminally responsible and liable for punishment** for a crime within the jurisdiction of the Court if that person:
  - (a) **Commits such a crime**, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
  - (b) **Orders, solicits or induces** the commission of such a crime which in fact occurs or is attempted;

- (c) For the purpose of facilitating the commission of such a crime, **aids, abets or otherwise assists** in its commission or its attempted commission, including providing the means for its commission;
  - (d) **In any other way contributes** to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    - i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
    - ii) Be made in the knowledge of the intention of the group to commit the crime.
  - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law."

## **Absence of immunity in ICC trials**

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No alleged criminal - even a head of state or minister - may invoke immunity to avoid any proceedings initiated by the ICC. Article 27 of the Statute is very clear on this subject: **"This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a**

**Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."**

This provision is important because it goes against a recent decision of the International Court of Justice, which upheld the immunity enjoyed by incumbent leaders brought before foreign national courts. Based upon this Article 27, and within the context of the complementary relationship between the Court and national courts, the Criminal Court should be entitled to try heads of state or ministers who have committed, or are accomplices in the commission of, crimes that fall within the Court's jurisdiction. It is evident that the credibility of such a court will depend upon its determination not to allow the powerful leaders of this world to go unpunished.

## **Exemption from criminal responsibility**

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### **Obeying orders**

The fact that a crime was committed by order of a government or of a superior does not exempt the perpetrator from criminal responsibility.

Article 33 of the Statute indeed provides: **"The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility [...]."**

Article 33 does, however, provide that the alleged perpetrator may be relieved of responsibility for a crime if the latter was under **"a legal obligation to obey orders"**, and did not know that **"the order was unlawful"**, and **"the order was**

**not manifestly unlawful".** These three criteria are cumulative and may only be invoked by the perpetrators of war crimes, since Article 33 (2) specifies that **"orders to commit genocide or crimes against humanity are manifestly unlawful"**.

Consequently, this article makes it more difficult to prosecute perpetrators of war crimes before the International Criminal Court, contrary to the harsher provisions set forth in the ICTY and ICTR Statutes, which do not provide for any exemption from responsibility on the basis of obeying orders: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires" (Article 7 [4] of the ICTY Statute and Article 6 [4] of the ICTR Statute).

Many national laws recognize obeying orders as grounds for defence (Germany, Switzerland, and Italy, for example) and thus, as far as this issue is concerned, comply with the provisions of Article 33. However, the States Parties will, if necessary, eventually have to amend their national laws so that this means of defence cannot be evoked for crimes against humanity and genocide.

### **Other grounds for excluding from criminal responsibility**

An alleged perpetrator of international crimes may also be relieved of his criminal responsibility if it is impossible to prove that he intended to commit the crime and that he knew that he was committing a crime (Article 30 of the Rome Statute). Furthermore, Article 31 of the Statute also provides the accused person with a full range of very specific grounds of defence that may be invoked in order to avoid being convicted. If self-defence and constraint are the traditional means of protecting the defendant's rights, the possibility of excluding criminal responsibility because of "a state of intoxication" that deprives the perpetrator of the crime from having the "capacity to appreciate the unlawfulness or nature of his or her conduct" is disputable because it is ill-defined. It might have been preferable to allow the judge to determine whether this sort of criteria constitutes a potential cause of "mitigating circumstances".

## Article 31 - Grounds for excluding criminal responsibility

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

- (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
- (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
- (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

Such a threat may either be:

- i) Made by other persons; or
  - ii) Constituted by other circumstances beyond that person's control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
  3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."

## **CCI judges cannot impose the death penalty**

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Certain States (Trinidad and Tobago, Jordan, Egypt, Singapore, and Malaysia) have vainly attempted to introduce the death penalty in respect of those punishments that can be imposed by the Court. The Nuremberg and Tokyo Tribunals had provided for this and applied it. However, the Criminal Court did not retain it. Even when the ICTY was created in 1993, the States that were imposing the death penalty under their national laws (such as China and the United States) were not in favour of its inclusion in the ICTY Statute and, later, in that of the ICTR. Article 77 of the Statute provides that the Court may impose a prison sentence on a convicted person that may not exceed 30 years. Or it may impose a "term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person". The Court may also add to that prison term a fine or "forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties". The latter reference concerns cases in which a third party, while totally uninvolved in the crime committed, would nonetheless benefit from the crime, having had full knowledge of the criminal origin of that benefit. A bona fide third party is, a contrario, one which was not only never involved in the crime, but also had no knowledge whatsoever of the criminal origins of its proceeds.

## An itinerant court

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The seat of the ICC is in a 15-plus storey white building with tinted windows located at 174 Maanweg in The Hague. Since 2003, interior work projects, ranging from computer programming to the design of the courtroom, were still being actively carried out in a building that was, itself, in the final stage of construction.

The ICC Statute expressly stipulates that the Court may travel in order to try a case near the site where the crimes were committed. This provision has major implications:

- Any justice system that is perceived as abstract and remote by people most immediately concerned loses part of its effectiveness. On the other hand, the impact of justice rendered is that much more powerful when proceedings are held as close as possible to the sites where the acts of violence were committed. The evident intent of those who virtually conceived the work of the ICC is therefore that the Court be free to move its proceedings to America, Africa, Asia or Europe as required by existing circumstances and conditions, so that unbiased justice may be rendered. In practice, the decision as to whether or not displace the Court will be made by the judges.

- Their decision will also have a financial impact. The ICC's funds are not unlimited. Its budget should be maintained at "around" 100 million euros per year. But trans-



porting hundreds of witnesses is an expensive undertaking. In the year 2002 alone, solely within the context of the Milosevic trial, 600 witnesses travelled from the former Yugoslavia to the Hague at an average cost of 1,650 euros per person.

## Operation

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The Court's official languages are the same as those of the United Nations; i.e.: English, Arabic, Chinese, Spanish, French and Russian. Most of the Court's decisions are therefore translated into six languages. Its working languages are English and French. However, the Presidency may, at the request of the Prosecutor, or of the defence, authorize the use of an official language as a working language when such language is understood by the majority of persons involved in a particular case. In addition, it is the Court that provides translation and interpreting services.

The core staff of the ICC consists of some 300 people. For every additional trial, 300 more employees must be hired on a temporary basis to work solely on that case. In the minds of the Court founders, no trials were supposed to take longer than six months. With its 3.2 million pages of documents in court records examined over several years of proceedings that proved to be endless - not only for the accused but for the judges and public opinion - **the Milosevic trial** conducted by the International Criminal Tribunal for the former Yugoslavia served as a counter-example.

## What can the ICC do about terrorism?

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Acts of terrorism do not fall within the jurisdiction of the ICC unless they are considered to be crimes against humanity. In the opinion of many experts, the attack against the World Trade Centre might fit this definition. It is entirely possible that, on the occasion of the first Review Conference of the Statute, in 2009, that trying the crime of terrorism may be added to the Court's powers, presuming that the States have agreed upon a common definition of the term.

## **What about current developments in the Near East?**

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Is the Near East directly concerned by the implementation of the ICC? The answer is a 90% "No". In fact, to date, only Jordan has ratified the treaty instituting the new Court. Neither Israel nor Egypt, Syria, Iraq, Libya, nor Lebanon have adhered to the ICC Statute. As for the Palestinian Authority, it is not yet recognized as a State in its own right and therefore cannot be a party to the ICC Statute. It would therefore require a Security Council Resolution to refer any Palestinian matter to the Court.

Some legal experts contend that Jordan governed the West Bank from 1948 to 1967 and that although the Hashemite kingdom of Jordan may have formally relinquished all claims to the West Bank, it could denounce crimes that may have been committed by the State of Israel. But the prevailing opinion among jurists tends to be that Jordan has never formally enjoyed any sovereignty over the West Bank and therefore cannot avail itself of the ICC. However, if Jordanian, Israeli, or other nations' soldiers were to commit crimes in Jordan, or if Jordanian soldiers were to commit violent acts outside of their territory, the ICC would then have jurisdiction.

## **B. Obstacles confronting the ICC**

### **The dilemma: peace v. justice**

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Are peace and justice reconcilable? And if such is not the case, which of the two must prevail? Article 16 of the Statute of the International Criminal Court provides that the pursuit of peace may temporarily take precedence over the exercise of justice. It is the UN Security Council's responsibility to assess each situation. If it so finds, all investigations and proceedings will be suspended for one year. The Security Council may also extend such trial suspension period.

Article 16 states:

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

This provision is not present in the Statutes of the two Tribunals for the former Yugoslavia, and for Rwanda. The three successive chief Prosecutors who have headed these tribunals have, time after time, defended the concept that "there can be no genuine peace without justice". Both views are worth discussing.

Some people consider that the existence of the ICTY torpedoed the efforts and attempts at mediation undertaken by the international community during the conflict in the former Yugoslavia. The moral resolution sought by the international justice system thus produced exactly the opposite result. It prolonged the war, thus increasing the number of victims.

In addressing that point of view, Richard Goldstone, the Chief Prosecutor of the Tribunal for the former Yugoslavia, replied: "There are times and circumstances when the relation between peace and justice is so profound, so inextricably interwoven, that a negotiated peace that fails to meet the demands of justice is worth scarcely more than the paper that the peace agreement is written on. In many cases, such a superficial and deceptive peace is tantamount to preparing for a stealthy return to war, which will secretly resurface with an even crueller aspect and an even more unimaginable brutality. A peace that is entered into by wily criminals to serve their own selfish ends, while they spurn all of the rules, and all of the fundamental standards of international law, can be neither true, nor lasting." [Non-official translation].

Notwithstanding these assurances, it must be acknowledged that after the signing of the Dayton Peace Agreements, it took four years for President Milosevic to be indicted. Why didn't this happen while the war in Bosnia was raging?

The Prosecutors have always contended that they did not have the evidence at the time. But did they do everything they could to obtain it? Did they assign, at the time, sufficient staff to complete the task of putting together an indictment? Furthermore, would they have been prepared to sabotage a peace settlement, even if it were woefully inadequate? These questions remain unanswered and reveal the dilemma: what is the point of practising international justice if we admit from the start that it may be paralysed in the name of a peace agreement signed with war criminals, and has every chance of turning out to be precarious? Or, on the contrary, what is the point of practising international justice if, in the name of the purity of its principles, it cannot be set aside to end bloodshed? In the situation of the horrifying civil war that was raging in Sierra Leone, the international community changed tactics on several occasions - which proves how difficult it is to achieve a satisfactory solution.

NGOs have vigorously contested Article 16, which elevates politics above the judiciary. Some of them have stressed the contradictory position of the international community, which, on the one hand, claims that punishing abominable crimes is part of peacekeeping, yet, on the other hand, contends that this very repression can, under certain circumstances, adversely affect the pursuit of peace.

In any event the precise terms of Article 16 oblige the Court Prosecutor to suspend investigations. This is a dangerous provision, because experience has shown that time is on the side of the butchers who can take



advantage of this delay to destroy or eliminate any evidence of their crimes. Without necessarily disputing the philosophy behind the wording of Article 16, it is regrettable that the ICC's investigators cannot take some measures of their own to protect evidence that otherwise may well disappear.

When the UN Security Council gives the Prosecutor a green light to commence the investigations and proceedings, the latter will be forced to rely upon the evidence that may have been gathered and preserved by the NGOs, if all other clues have been destroyed. This solution is scarcely satisfactory, since the NGOs may not possess all of the necessary skills to act as the ICC's informal and provisional "sub-contractors". Moreover, it is not sound policy that the exercise of international justice should depend upon the goodwill of a few NGOs.

## Seven-year impunity for war crimes

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On the eve of the closing date of the Rome conference, France proposed that the Statute include a provision (now Article 124) that would allow a State to refuse the jurisdiction of the Court with respect to war crimes for a period of seven years following ratification.

Indeed, Article 124 states: "[...] **a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time [...].**"

This provision, made to reassure military personnel, triggered extremely virulent reactions among the NGOs. The International Federation of Human Rights (FIDH) interpreted it as "a license to kill for seven years", while other observers object to what they called "international justice à la carte".

Article 124 was one of the demands made by the French Ministry of Defence and by the Elysée. President Jacques Chirac clearly expressed his views in a letter dated 15 February 1999, addressed to the Coalition française pour la CPI [French Coalition for an International Criminal Court]:

**"The definition of war crimes may encompass isolated acts. Complaints without merit, tainted by ulterior political motives could then more easily target personnel of countries that, like our own, are involved in several external theatres of operations - particularly within the context of peacekeeping operations. [...]"** [Non-official translation].

The NGOs dispute the judicial merits of this approach. They stress that Article 8 primarily concerns the Court's jurisdiction on war crimes, especially those committed on a large scale. They recall that the ICC can only have jurisdiction if the States themselves fail to punish such war crimes. Finally, the NGOs add that the task of the Pre-Trial Chamber "as of the preliminary investigation phase, is to review the case files of the Prosecutor [...]". It must imperatively approve the opening of any procedure initiated by the Prosecutor (Articles 18, 53 and 57 of the Statute). The risk of judicial proceedings tainted by ulterior political motives is therefore null and void, according to the NGOs, since all possible precautions against them have already been taken.

The fate of Article 124 will be decided during the 2009 Review Conference of the Statute. States will be given an opportunity to repeal this provision or, on the contrary, to extend it, or make it permanent at the risk of seriously maiming the exercise of international justice. One reassuring aspect is that, so far, only France and Colombia have reserved the right to avail themselves of this provision of the Statute.

## **The undermining action of the United States**

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On 31 December 2000, President Bill Clinton reluctantly signed the ICC Statute, even though he did not really want to submit it to Congress for ratification. His objective was to weaken the fledgling Court from within. His

attempt was hardly a success. His successor, President George W. Bush, demonstrated a far more radical hostility toward the ICC - hostility that was strengthened within the context of the post-September 11 anti-terrorist campaign. In an act without precedent in the annals of international relations, President Bush withdrew the US signature from a Treaty - In this case, the ICC Statute - on 6 May 2002. Ari Fleischer, the White House spokesman, explained that "the ICC is fundamentally flawed because it puts American servicemen and women at fundamental risk of being tried by an entity that is beyond America's reach, beyond America's laws, and can subject American civilian and military to arbitrary standards of justice".

US authorities also waged a veritable diplomatic war against the Security Council, when they did not hesitate to resort to blackmail by threatening that they would not renew the SFOR mandate (NATO's Stabilisation Force) in Bosnia-Herzegovina if their soldiers deployed in this former Yugoslavian republic could not obtain immunity before the ICC.

They also launched a worldwide campaign - that Human Rights Watch even termed a "jihad" - to dissuade countries tempted to ratify the Treaty instituting the ICC by threatening to cut off their military aid. Finally, they exercised economic and political pressure so that the States would agree, by means of a bilateral treaty, not to extradite American nationals to appear before the ICC. They were somewhat successful: more than 20 countries complied with American demands, among these:



Afghanistan, Djibouti, The Gambia, Georgia, India, Israel, Mauritania, Romania, Nepal, Sri Lanka, Tajikistan and the Federated States of Micronesia.

Furthermore, the U.S. Congress passed a hard-line law, The American Service-Members Protection Act. This law stipulates not only that the United States will no longer participate in UN peacekeeping operations if U.S. soldiers are not immune from possible prosecution by the ICC, but also that Washington may henceforth use force to free Americans implicated in an ICC judicial procedure. Europeans have ironically nicknamed the latter provision "The Hague Invasion Clause", as the Court's headquarters are located in that city.

No one knows at present what consequences this hostility by the American super-power will have on the work of the ICC. The experience of the International Criminal Tribunal for the former Yugoslavia has shown that if international justice is to achieve even a minimum of efficiency, it desperately needs the support of governments - particularly those of the most powerful States in the world.

## Cooperation of the States with the ICC

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Article 86 of the Statute makes it mandatory for States Parties to co-operate fully with the Court. As no police force was created under the Treaty of Rome, it is the duty of the States to enforce the Court's decisions in respect of its investigations, proceedings, and the execution of its sentences. The extent of the ICC's effectiveness thus depends upon each State's ability and willingness to co-operate, as in fact no binding mechanism was implemented.

Article 87, which deals with requests for cooperation, stipulates that if a State should fail to collaborate with the Court's request for cooperation, the latter may refer the matter to the Assembly of States Parties, or to the Security Council (in cases where it was the Council that referred the matter to the Court). The Assembly does not, however, have any coercive power by which to oblige recalcitrant States to cooperate. If the Court requests the cooperation of a State that is not a Party to the Statute, the State may enter into an *ad hoc* arrangement to set the terms for its cooperation. However, in the absence of any such arrangement, the Court is totally without recourse in obtaining the cooperation of a State that is not a Party to the Statute.

## C. Challenges that the ICC will have to meet

The greatest challenge awaiting the new Court will be to prove that it is neither a political organ, nor an instrument of selective justice, nor even the embodiment of some form of judicial neo-imperialism. Even at the risk of dashing the hopes placed in the ICC, the Court must not become a system of justice for the powerful that would prosecute only pariah States and the weakest governments.



However, such a risk is real. Subjugated to the political and financial support of the most powerful States, the office of the Prosecutor will rely on the cooperation of the international community to prepare its indictments. Furthermore, the strongest countries - those with vast intelligence services, including spy satellites and sophisticated phone-tapping devices - will make decisions based upon their best interests and their willingness to transmit evidence to the ICC Prosecutor. The International Criminal Tribunal for the former Yugoslavia is a revealing example: Slobodan Milosevic was not indicted until May 1999, because until the war broke out in Kosovo, Western countries were reluctant to transmit the evidence that would have made it possible to indict the man still perceived as the guarantor of stability in the Balkans.

To what extent, furthermore, will the ICC manage to surmount America's fierce hostility, not to mention the more discreet opposition of Russia and China?

The future Court will also have to confront the political, judicial and moral challenge of prosecuting perpetrators of war crimes, whilst leaving others who may have committed much worse acts of violence unpunished merely because their crimes were beyond the Court's scope of jurisdiction.

Last but not least, the Court will need to demonstrate its ability to address populations and societies traumatised by the effects of mass crimes without appearing to be a disembodied form of justice rendered in some tranquil Dutch city far removed from the world's tumultuous reality.



**CRIMES THAT FALL  
WITHIN THE  
JURISDICTION  
OF THE COURT**

The ICC Statute mentions four crimes: the crime of aggression, the crime of genocide, crimes against humanity, and war crimes. At future Review Conferences - the first is scheduled for 2009 - this list of crimes may be amended. If the States so wish, and if they manage to agree upon its definition, which so far seems unlikely, they may add the crime of "terrorism". This has been discussed in Rome, but the States have so far proved incapable of agreeing upon a common definition.

## A. The crime of aggression

Article 5 of the Court Statute mentions "the crime of aggression" as falling within the jurisdiction of the ICC. But the crime of aggression is, by its very nature, the most political and therefore the most difficult to legally define. It could make it possible, in the name of international law, to describe certain States as "aggressors". A few States, such as Cuba and Iraq, have strived, in vain, to impose their definition of this crime. Ultimately, without an agreement in Rome on the definition of a "crime of aggression", these "aggressor" States cannot, at present, be prosecuted, let alone punished, by the ICC.

A work group is still trying to find a suitable wording for "crime of aggression" that the various States will accept. If a definition were to be found, it could then be incorporated into the Statute during the first Review Conference.

## B. The crime of genocide

"Genocide is the crime of all crimes."

*The Prosecutor v. Jean Kambanda, the former Prime Minister of Rwanda, 4 September 1998.*



## **Definition of the term "genocide" (Article 6 of the ICC Statute)**

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

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

Article 6 of the Rome Statute reasserts the definition provided by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.

Jurist Rafael Lemkin coined the term "genocide", which he derived from the Greek term *genos*, signifying "race, nation, tribe", and the Latin suffix *cide*, which refers to "the act of killing". The term encompasses a certain number of acts committed with the intent of destroying, in whole or in part, certain groups of human beings. This very intent to eradicate certain groups of people is what distinguishes genocide from other mass crimes.

Any member of a national, ethnic, racial or religious group may be targeted for genocide. The term "ethnic" includes linguistic and cultural groups.

### **Decisive factor: the intent to destroy**

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Perpetrators of genocide need not have succeeded in destroying a significant part of a group in order to be tried and sentenced under this charge. It is their intention to destroy the members of a group, possibly on a citywide or region-wide scale, that defines the nature of this crime.

## **A Head of State, as well as the soldier carrying out his orders, may be liable for punishment**

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Any persons who in any way have facilitated the destruction of all or part of a group may be tried for the commission of a "crime of genocide". This applies not only to those who plan it, and to the "brains" behind it, but also to the soldiers who merely obeyed such orders.



Article 25 (3) (c) specifies that anyone who "for the purpose of facilitating the commission of such a crime, **aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission**" is "**individually responsible**" and **guilty of having committed a crime of genocide**.

Any person, including the most subordinate "facilitator" who participates in the commission of a crime of genocide will be deemed liable for punishment. In theory, the ICC mandate may be exercised against all of these persons, even if it is anticipated that The Hague Court may principally punish the highest-ranking political and military leaders, leaving the national courts the task of judging the intermediary and subordinate facilitators.

## **Hate-propaganda media are also liable for punishment**

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Article 25 (3) (e) specifies that "**In respect of the crime of genocide**", any person who "**directly and publicly incites others to commit genocide**" is "**criminally responsible and liable**", and may be found guilty of the crime of genocide.

This provision is based upon one contained in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Sadly, as is shown by the conduct of certain media, this article is relevant today - notably for *Radio Télévision Libre des Mille Collines (RTLM)* that had incited listeners to exterminate the Tutsis during the genocide committed in 1994. The International Criminal Tribunal for Rwanda tried several individuals who collaborated with *Radio Mille Collines*, including Georges Ruggiu (a Belgian national). From January to July 1994, Ruggiu hosted shows that incited people to murder, or to cause the Tutsis serious bodily or mental harm. Such shows also constituted acts of persecution against the Tutsis and some Hutus and Belgian citizens. Late in June 1999, Ruggiu admitted his crimes. One year later, he was sentenced to 12 years in prison. However, Félicien Kabuga, the most senior official of *RTLM* - who was tried by the ICTR - is still free. He is considered to be the extremist Interahamwe militants' principal financier and backer.

## **None of the following is, by and of itself, subject to prosecution:**

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**Cultural genocide**, which concerns acts committed with the intention of preventing a group from using their language, practising their religion, or having cultural activities, is not included in the definition of the crime of genocide retained by the ICC Statute, unless such acts are committed in connection with acts prohibited under Article 6.

**Ecocide**, or acts committed with the intention of destroying a particular region by attacking the environment, is not included in the definition of genocide.

**Political genocide** is not mentioned in Article 6 of the ICC Statute, nor, moreover, in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. At the time, the Soviet Union vigorously opposed its inclusion in the definition. For this reason, when the Khmer Rouge murdered

hundreds of thousands of their fellow countrymen, it could not be considered as "genocide". It is perfectly possible, however, due to changes that have occurred in our post-Cold War world, that the Convention on the Crime of Genocide may one day be amended to include any act committed with the intent to destroy all or part of a given group for political reasons.

## C. Crimes against humanity

The concept of crimes against humanity first appeared in the middle of the 19th century. But it was not until the drafting of the Statute of the International Military Tribunal at Nuremberg that this concept was incorporated in international criminal law to signify any inhuman act, such as murder, extermination, enslavement, or deportation, committed against civilian populations. However, the judges did not make much use of it. Henri Donnedieu de Vabres, the only French judge who presided at the Nuremberg trials, said: "the concept of crimes against humanity got into the law through the back door, only to vanish into thin air in the rulings." [Non-official translation].

The ICTY and the ICTR, in turn, included crimes against humanity in their respective Statutes, and made abundant use of it in their rulings. But it was not until the Rome Statute of the ICC was adopted that the exact definition of crimes against humanity was actually determined - after intense and arduous debate - and was included, for the first time, in an international treaty.

**A "crime against humanity" includes three distinct features**, mentioned in Article 7 of the ICC Statute:

1. It must have been committed **"as part of a widespread or systematic attack"**. The term "attack" is not limited solely to its military definition, but may include laws and administrative measures such as the deportation or forcible transfer of a population.

2. The attacks must be directed **"against any civilian population"** that has been intentionally targeted. The presence of a few soldiers among the civilian population is not sufficient to deprive the latter of its civilian character.
3. The crimes must have been committed **"pursuant to or in furtherance of a State or organizational policy"**. Therefore, perpetrators of crimes against humanity may be agents of the State, or persons acting under its orders, such as death squads. Crimes against humanity may also be committed by rebel groups.

## What acts constitute crimes against humanity?

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Article 7 (1) of the Statute lists eleven categories of acts likely to constitute crimes against humanity. Article 7 (2) defines several of these acts, and is the result of an attempt by the United States to adopt restrictive definitions in order to limit as much as possible the Court's scope of jurisdiction.

The following acts are considered to be crimes against humanity when committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack":

1. **Murder.**
2. **Extermination.** Article 7 (2) (b) specifies that: "'extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."
3. **Enslavement.** Article 7 (2) (c) specifies that: "'enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

4. **Deportation or forcible transfer of population.** Article 7 (2) (d) specifies that: "'deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."
5. **Imprisonment or other severe deprivation of physical liberty** in violation of fundamental rules of international law.
6. **Torture.** Article 7 (2) (e) specifies that: "'torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."
7. **Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.** Article 7 (2) (f) specifies that: "'forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy."
8. **The "persecution" of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds,** or other grounds universally recognized as impermissible under international law, in connection with any crime within the jurisdiction of the Court. Article 7 (2) (g) specifies that: "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity [...]."

- 9. Apartheid.** Article 7 (2) (h) specifies that: "'The crime of apartheid' means inhumane acts of a character similar to those [...] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."
- 10. Enforced disappearance of persons.** Article 7 (2) (i) specifies that the "'enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."
- 11. Other inhumane acts of a similar character** intentionally causing great suffering, or serious injury to body or to mental or physical health.

## Observations

There need not be a war for a crime against humanity to exist. The drafters of the Statute are silent as to the environment in which such crimes are committed. Therefore, as indicated by the combined case law of the two Tribunals for the former Yugoslavia, and for Rwanda, crimes against humanity may be committed in times of peace, as well as in times of war.

The scope of persecutions that may be considered as crimes against humanity is now broader than it was previously. Indeed, grounds relating to sexual discrimination have now been added to the national, ethnic, and cultural grounds of persecution. However, in order for the ICC to try authors of persecutions, these must be committed "in connection" with other acts constituting a crime against humanity, or with any crime that falls within the jurisdiction of the Court. Thus, contrary to the ICTY and the ICTR case law, persecution alone is not considered to be a crime against humanity.

Enforced disappearance of persons is recognized for the first time as a crime against humanity.

The drafters of the ICC Statute, not wishing to limit the list of acts constituting crimes against humanity, added the category "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". This provision will allow the Court to prosecute, where applicable, crimes against humanity that have not as yet been listed.

## **D. War crimes**

War crimes have been punished by national courts since the Middle Ages. The first general codification of war crimes appeared in the Leiber Code proclaimed by President Abraham Lincoln in 1863, during the American Civil War. Since then, war crimes have been defined in various international treaties, particularly in the Geneva Conventions. The ICC Statute, however, constitutes a major step forward, as war crimes may now be punished, regardless of whether they occur in the context of an international, or of an internal conflict, even though the Court does distinguish between the two. Unlike crimes against humanity, war crimes need not be systematically perpetrated in line with an overall policy but may constitute an isolated and sole act, such as the murder of a few POWs.

### **The Court's threshold of jurisdiction**

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At what point is the Court qualified to prosecute a war crime? For example, if several prisoners are killed in an isolated act - which constitutes a war crime - does this fall within the Court's jurisdiction?

The answer is: yes, all crimes considered to be war crimes fall within the jurisdiction of the ICC - even if the ICC's Statute specifies that it must, in particular, prosecute crimes that are committed on a large scale.

The first lines of Article 8 explicitly state:

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

## **1) War crimes committed within the context of an international conflict**

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Article 8 (2) of the ICC Statute distinguishes two categories of war crimes:

**For the purpose of this Statute, 'war crimes' means: Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons or property protected under Geneva Conventions:**

- i) Wilful killing;
- ii) Torture or inhuman treatment, including biological experiments;
- iii) Wilfully causing great suffering, or serious injury to body or health;
- iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- vii) Unlawful deportation or transfer or unlawful confinement;
- viii) Taking of hostages.

The Court is also competent to try "**other serious violations of the laws and customs applicable in international armed conflict**" [...], namely, any of the following acts:

**Intentionally directing attacks:**

- [...] against the civilian population as such or against individual civilians not taking direct part in hostilities;
- [...] against civilian objects, that is, objects which are not military objectives;
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission [...].

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

**As well as:**

- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- Making improper use of a flag of truce, or of the flag or of the military insignia and uniform of the enemy or of the United Nations [...]; The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies [...];
- Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical [...] treatment [...];
- Killing or wounding treacherously individuals belonging to the hostile nation or army;
- Declaring that no quarter will be given;

- Destroying [...] the enemy's property [...];
- Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent service before the commencement of the war;
- Pillaging a town or place, even when taken by assault;
- Employing poison or poisoned weapons;
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- Employing bullets which expand or flatten easily in the human body [...];
- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering [...];
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy [...], enforced sterilization, or any other form of sexual violence [...];
- Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

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

The International Committee of the Red Cross (ICRC) continues to deplore the fact that certain war crimes have been deliberately excluded from this list. For example, no provision has been made to punish delay in the repatriation of prisoners of war, or of civilians. The provision on the use of weapons designed to cause superfluous injuries, unnecessary suffering, or to inflict indiscriminate harm (Article 8 [2] [b] [xx]), was severely restricted in comparison with the Geneva Conventions. For example, nuclear, biological and blinding laser weapons, as well as anti-personnel mines (despite the entry into force of the Ottawa Treaty) are not prohibited.

## **2) War crimes within the context of an internal conflict**

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Certain States - India, Indonesia, Iran, Nigeria, and Pakistan - had objected, in Rome, to the fact that the International Criminal Court should have jurisdiction in cases involving war crimes committed within the context of internal conflicts. Fortunately, their objection did not prevail. War crimes committed during internal conflicts also fall within the ICC's jurisdiction. This decision, evidenced by the second part of Article 8 of the Statute, sanctions a body of case law that already firmly reflected the position taken in the Tadic judgment rendered by the International Criminal Tribunal for the former Yugoslavia.

### **Definition of the term "internal armed conflict"**

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The definition of an internal armed conflict, as set forth in Article 8 of the ICC Statute, "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". On the other hand, the Court is competent in respect of war crimes story

of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups" (Article 8 [2] [f] of the Statute).

## **Definition of war crimes committed within the context of an internal conflict**

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Article 8 of the Statute lists three categories of war crimes that may be committed within the context of an internal conflict:

- 1. "Violations of article 3 common to the four Geneva Conventions of 12 August 1949 committed against persons taking no active part in the hostilities (civilians, wounded soldiers, prisoners, and those who have laid down their arms):** [...] murder [...], mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment; taking of hostages; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable."
- 2. Other serious violations of international humanitarian law include:** "Intentionally directing attacks against the civilian population [...], against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission [...]; [...] against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals [...]; pillaging a town or place, even when taken by assault; committing rape [...] or any other form of sexual violence [...]; conscripting or enlisting children under the age of fifteen years into armed forces [...]; ordering the displacement of the civilian population [...]."

### **3. Acts traditionally considered as war crimes in the contexts of internal conflicts:**

"Killing or wounding treacherously a combatant adversary; declaring that no quarter will be given; subjecting persons [...] to physical mutilation or to medical or scientific experiments [...]; destroying or seizing the property of an adversary [...]."

Here, too, the ICRC has been deploring the absence of certain breaches, such as: intentionally starving the civilian population; using certain weapons; intentionally causing widespread, long-term and severe damage to the natural environment; enslavement; the execution of minors or pregnant women, etc.



**CRIMES THAT  
PARTICULARLY  
TARGET WOMEN  
AND CHILDREN**

"All too often, conflict happens in societies that can least afford it, takes its toll on those who least deserve it, and hits hardest those least equipped to defend themselves. Civilians have become the main targets of warfare. From rape and displacement to the denial of the right to food and medicines, women bear more than their fair share of the burden."

*Statement made by UN Secretary-General Kofi Annan, on 6 March 2000, on the occasion of the United Nations Day for Women's Rights and International Peace.*

## **A. Crimes against women**

Discrimination and violence against women are a daily reality. The vulnerability of women is heightened in times of armed conflict. The Statute of the International Criminal Court set out a certain number of rules in an effort to protect women and to ensure that those who become victims of serious crimes can appeal to international justice. To this end, the International Criminal Court included within its rules the jurisprudence of the International Tribunal for Rwanda, which broadened the definition of "rape".

Attacks against women may be considered as war crimes, crimes against humanity, or even acts of genocide, depending upon the context and the widespread and systematic nature of the acts.

### **Sexual violence as a crime of war**

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The drafters of the ICC Statute based their model on the International Criminal Tribunal for Rwanda. It was the ICTR that first included rape, enforced prostitution and any indecent assault on the list of war crimes. The four Geneva Conventions of 12 August 1949 - the foundation of international humanitarian law - made no mention of sexual violence.

Article 8 (2) (b) (xxii), of the ICC Statute specifies that "[...] rape, sexual slavery, enforced prostitution, forced pregnancy [...], enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" are war crimes if perpetrated within the context of a internal, or international, conflict.

## **Sexual violence as a crime against humanity**

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Article 7 (1) (g) of the ICC Statute asserts that **"Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity constitute crimes against humanity when committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."**

The definition of such acts largely overlaps with that of acts of sexual violence considered as war crimes. The difference between the two therefore depends upon **the widespread or systematic nature** of such practices.

Article 7 also asserts that enslavement includes trafficking in women. The latter constitutes a crime against humanity, as does persecution of any identifiable group or collectivity on the grounds of gender (Article 7 [1] [h]), if committed in connection with any other crime that falls within the jurisdiction of the Court.

### **Evolution of law**

The Statute of the International Military Tribunal at Nuremberg had not specifically ruled that rape and other acts of sexual violence potentially constituted a crime against humanity. In the ICTY and ICTR Statutes, rape and other acts of sexual violence are equated for the first time with crimes against humanity if they occur within the context of a widespread or systematic attack.

The ICC has broadened this definition to encompass sexual slavery, forced pregnancy, enforced prostitution or enforced sterilisation. This expansion of the definition of crimes against humanity is part of the recent efforts to protect more effectively all persons - particularly women - against acts of sexual violence during armed conflicts. The NGOs were the architects of this provision, although they met with little opposition from most of the States. It should be noted, however, that the Vatican and certain Arab countries have been extremely reluctant to incorporate forced pregnancy among the crimes listed in the ICC Statute.

The ICC Statute was drawn from the case law of the two international Criminal Tribunals. In their decision of 20 October 1995 on the Nikolic case, the ICTY judges ruled that the legal qualification of crimes against humanity was applicable to acts of sexual assault equated with acts of torture, even when no rape had occurred. On 11 July 1996, upon examining the Karadzic and Mladic cases, the Chamber ruled that among other ethnic cleansing methods, acts of sexual violence deserved special attention due to their systematic nature and the suffering that they inflicted upon the population.

## **Sexual violence as an act of genocide**

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The ICC Statute reasserted the provisions contained in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Women are not included in the four categories mentioned (national, ethnic, racial or religious). However, on 2 September 1998, in a ruling of historic importance in the Akayesu case, the judges of the International Criminal Tribunal for Rwanda concluded that rape constituted a crime of genocide if its purpose was to destroy a protected group by causing serious injury to the physical and mental well being of the members of that group. The ICC upheld the precedent set by the ICTR judges.

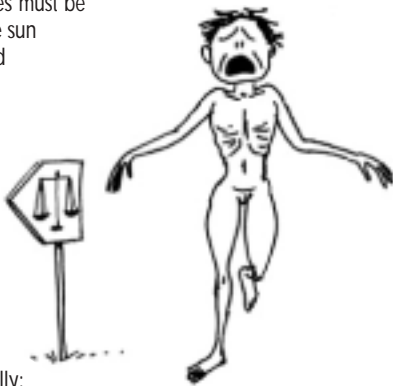
For the first time, a judgment was consequently rendered by an international court for a crime of genocide and, simultaneously, rape was deemed to constitute a crime against humanity, as well as a means to perpetuate genocide. Indeed, the ICTR ruled that rape could be used to prevent births within a particular group - an act tantamount to genocide. Article 6 [d] of the Statute stipulates that an act of genocide may be committed by "imposing measures intended to prevent births within the group". For in societies in which ethnicity is determined by the identity of the father, the rape of a woman and her subsequent pregnancy may prevent her from giving birth to a child who belongs to her own ethnic group.

## B. Crimes against children

"[...] UNICEF is so insistent on the need to fight atrocities against children [...] including rape as a weapon of war, by deploying a permanent and fully-empowered international criminal Court. The purveyors of genocide and ethnic cleansing, and other unspeakable crimes must be made to understand that as surely as the sun rises, they will be called to account, and that impunity will not stand."

*Address by Carol Bellamy, Executive Director of UNICEF, at the Opening Plenary of The Hague Appeal for Peace of 12 May 1999.*

Obviously, children can also be victims of war crimes, crimes against humanity or acts of genocide. Nonetheless, the Statute mentions three crimes that target them specifically: genocide by the forcible transfer of children the



crime against humanity which consists of trafficking in children, and the enlistment, or use of, children within the context of an armed conflict.

## **Genocide by the forcible transfer of children**

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The definition of genocide contained in Article 6 of the ICC Statute includes the statement: **"forcibly transferring children of the group to another group" when such an act is "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such"**.

## **Trafficking in children as a crime against humanity**

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The definition of "enslavement" as a crime against humanity, as stated in Article 7 (2) (c) recognises that children are even more likely to be victims of this crime: **"'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."**

## **The enlistment of children as a war crime**

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For the first time in international criminal law, **"conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities"** (Article 8, (2) (e) (vii), during an internal or international conflict, is considered to be a war crime.

This is one of the most innovative provisions of the Statute. Deciding on the minimum age for conscription was a focal point of controversy. The NGOs insisted that this limit should be set at eighteen years of age, but in view of the reluctance of many states - including the United States - the age limit was set at fifteen years.

# **IV**

## **THE PARTICIPATION OF VICTIMS IN TRIALS**

**"There can be no peace without justice, no justice without law, and no meaningful law without a Court to decide what is just and lawful under any given circumstance."**

*Benjamin B. Ferencz, a former Prosecutor of the Nuremberg Court.*

## **What is a "victim"?**

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In the ICC's opinion, who constitutes a victim? This controversial issue inspired lively debate in Rome. Everyone present realised that deciding upon this definition would raise major symbolic and political, as well as legal and financial, challenges.

Should "victims" solely be understood to mean "natural persons", or should the category also include humanitarian organizations, and perhaps even legal entities (national state-owned and private companies, as well as multinationals)?

The definition ultimately retained was somewhat restrictive. It was decided that it is essentially persons who may be victims - whether they are physically assaulted themselves, or are relatives of murdered individuals. As such, they may take part in court proceedings both before and during a trial and may be eligible for redress. Organizations involved in charitable, humanitarian, educational, or cultural work may also be considered as "victims" if they have suffered direct damage.

## **Disagreement over a definition**

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During the Statute negotiations in Rome, there were, on the one side, those who wanted to impose a restrictive concept - limited as in the ICTY Statute **"to any natural person against whom an offence may have been committed that falls within the jurisdiction of the Tribunal"**. On the other side were those who advocated an expanded definition, which would conform to the

precedent set by Security Council Resolution 687/91, which reaffirms that Iraq "[...] is liable under international law for any direct loss or damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". According to the latter definition, consequential business losses incurred by foreign companies and sums committed to assist refugees are being taken into account. Apparently, some Israeli flower exporters, and even some cinema owners, may have received compensation for losses they incurred in the Gulf War.

Finally, Rule 85 of the ICC's Rules of Procedure and Evidence provides a clear definition.

Rules 85 reads as follows:

- "a. 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;**
- b. Victims may include organization or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."**

## **A. Pre-trial phase**

### **Victims may induce the Prosecutor to initiate an investigation**

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No one is in a better position than victims and NGOs to know the realities behind mass crimes, or the alleged identity of their perpetrators.

The UN High Commissioner for Human Rights estimates that 90% of the information on massive human rights violations emanates from NGOs, who are themselves in direct contact with the victims.

**It was therefore essential that the victims be the central focus of the ICC's activities at all stages of the proceedings.**

Article 15 of the ICC Statute explicitly stipulates that the Prosecutor may open an investigation on the basis of information provided by the victims or the NGOs. This power vested in the Prosecutor represents considerable progress. Victims may file complaints and relevant evidence with the Office of the Prosecutor. Such elements may convince the Prosecutor to initiate an investigation. The Prosecutor may also seek out and gather information from government or non-governmental organizations. Both in terms of the ultimate purpose, and of the implementation method of international justice, there is thus an acknowledged convergence of interests between the Prosecutor and the victims.



### **Article 15:**

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence."

This article therefore refers to the preliminary phase of an investigation. Victims and witnesses may request an audience with the Prosecutor. This does not yet signify that the complaint is admissible, nor that it falls within the jurisdiction of the Court. Article 15 (4), in fact, specifies that the Court will make the final determination by virtue of Article 17 (see above: "The ICC and national courts have complementary scopes of jurisdiction.")

The Prosecutor must obtain the authorization of the Pre-Trial Chamber before initiating an investigation. The Pre-Trial Chamber is usually composed of three judges, but may also rule with a single judge, under the conditions set forth in Articles 39 (b) (iii) and 57 (2) (b). The mandate of the Pre-Trial

Chamber is to supervise the work of the Prosecutor and ensure that the latter does not initiate investigations without reasonable grounds, or exceed his mandate.

If the Prosecutor plans to initiate an investigation and request authorization to do so from the Pre-Trial Chamber, he must also inform the victims, either individually or collectively. He may also inform them through the relevant victim assistance organizations or through their counsel. The victims may also make written representations to the Pre-Trial Chamber to assert their views and to induce it to grant their authorization. The Chamber may then request additional information from the victims, as well as from the Prosecutor. It may also hold a hearing. The Pre-Trial Chamber then authorizes, or refuses to authorize, the investigation to proceed by means of a justified decision that it conveys to the victims who have expressed their views (Rule 50J). If the authorization is denied, the Prosecutor may issue a new request "based on new facts or evidence regarding the same situation". It is therefore in the victim's best interest to submit to the Prosecutor any new facts or evidence regarding the same situation, since nothing precludes the latter from considering them (Article 15 [6]).

## **Victims cannot refer matters directly to the Court**

The right to submit evidence of the commission of a crime to the ICC Prosecutor does not mean that victims may refer matters directly to the Court. The option to bring a civil action does, however, exist under certain judicial systems, notably under French law (Article 85 of the French Code of Criminal Procedure): victims may institute proceedings by bringing a legal action before the senior examining judge, even if the Prosecutor is opposed to such proceedings. According to the ICC Statute, in principle, only the Prosecutor may initiate an investigation.

The Pre-Trial Chamber may, however, under certain conditions, order the Prosecutor to initiate an investigation, particularly at the victims' request,

when the Prosecutor has refused to do so because, in his estimation, an investigation would not serve "the interests of justice". In order to reach this decision, the Prosecutor must take into account the seriousness of the crime, as well as the interests of the victims. The Prosecutor will notify the victims of this decision (Rule 92 of the Rules of Procedure and Evidence). The victims may make representations before the Pre-Trial Chamber in order to induce the latter to order the Prosecutor to open an inquiry. The most interesting case - which is not clearly resolved in the statute - is one in which the Prosecutor refuses to take any action: in certain situations, the victims may lodge a complaint concerning the Prosecutor's refusal. But what would occur if the Prosecutor were to fail to respond? At this point, it should be recalled that the Pre-Trial Chamber was created to review the actions of the Prosecutor, particularly those relating to the initiation of investigations. In this respect, the Pre-Trial Chamber is invested with extensive powers, and it is no exaggeration to recall that Article 15 of the statute would never have been adopted without the existence of some sort of control over all of the Prosecutor's actions, whether positive or negative. It is thus entirely feasible that victims may one day raise before the Pre-Trial Chamber the issue of the Prosecutor's inaction and the Pre-Trial Chamber's power to review both the Prosecutor's action, or lack thereof. The Prosecutor's power to initiate an investigation before the ICC is not an exclusive power, though it has priority over all the others, inasmuch as the Prosecutor is the first person to decide what action should be taken concerning the information received. But he is not alone in making this determination and is subject - particularly at the request of the victims - to the supervisory power of the Pre-Trial Chamber.

## **Informing victims**

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The Prosecutor may decide not to initiate an investigation if he considers that the information that was provided to him is insufficient, or fails to constitute a sound basis for such an investigation. He must then promptly so inform those persons who have provided the information to him, giving them the reasons for his refusal. Such notification must indicate the possibility of forwarding "new facts or evidence regarding the same situation" (Rule 49 of

the Rules of Procedure and Evidence) to the Prosecutor. If, after the investigation, the Prosecutor decides not to proceed, he must inform the Pre-Trial Chamber and the State that referred the matter to him - or, where applicable, the Security Council, if the latter referred the matter to him - of his decision and of his reasons.

## **B. The participation of victims in trials**

### **Revolutionary aspects: new rights**

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**There are two revolutionary aspects to the ICC judicial system of benefit to victims that were adopted only through arduous effort during the Rome Statute negotiations: the participation of victims in trials and their right to seek reparation.**

The victims' counsel, or legal representative, may submit his observations to the Court under the conditions set forth by the Chamber concerned. He may therefore request further investigation, object to the manner in which the latter was conducted, issue an opinion as to whether the case falls within the jurisdiction of the Court and on the admissibility of the complaint... all of which are taken into account by the Pre-Trial Chamber judges in forming their opinion and subsequently by the Trial Chamber. The legal representative may also intervene in the proceedings to make the victim's concerns known to the Court, and to stress their views to the Chamber in respect of all capital issues, whether related to the terms of sentence, the awarding of reparations, the post-trial proceedings (primarily appeals) and hearings held to rule upon a reduction of sentence, a review of the case, or the release of the accused.

Article 68, paragraph 3, reads as follows: **"Where the personal interests of the victims are affected, the Court shall permit their view and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."**

## **Notifying victims and their legal representatives**

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In order to allow victims and their representatives to apply for participation in the proceedings, the latter are notified "in a timely manner" by the Registrar "of the date of hearings and any postponements thereof, and the date of delivery of the decision" (Rule 92 [5] [a]). Notifications are usually made in writing. When written notification is not possible, the Registrar must make this notification "in any other form as appropriate" (Rule 92 [7]). In doing so, he may seek the cooperation of States Parties and the assistance of intergovernmental organizations (Rule 92 [8]).

## **Victims may make statements before the Court**

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Article 68 (3) testifies to the unprecedented significance being attributed to victims. This provision assigns a role to victims that is no longer likely to be confused with that of witnesses. Rule 89 of the Rules of Procedure and Evidence sets forth the procedure that should be followed by victims who wish to present their views and concerns during a hearing. Victims are to submit a written application to the Registrar, who in turn transmits it to the relevant Chamber. The latter then specifies the manner in which the victims are expected to participate in the proceedings. The Chamber can therefore allow the victims to make "opening and closing statements" (Rule 89 [1]) before the Court. If the Chamber decides to reject the victim's application, nothing precludes the latter from filing a new application later in the proceedings (Rule 89 [2]).

## The victims' legal representative may question the accused

Rule 91 of the Rules of Procedure and Evidence describes in detail the participation of legal representatives in the proceedings:

"1. A Chamber may modify a previous ruling under Rule 89.

**2. A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber** and any modification thereof given under Rules 89 and 90. **This shall include participation in hearings** unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defence shall be allowed to reply to any oral or written observation by the legal representative for victims.

**3. a) When a legal representative attends and participates in accordance with this rule, and wishes to question a witness**, including questioning under Rules 67 and 68, **an expert or the accused, the legal representative must make application to the Chamber.** The Chamber may require the legal representative to provide a written note of the questions and in that case the questions shall be communicated to the Prosecutor and, if appropriate, the defence, who shall be allowed to make observations within a time limit set by the Chamber.

**b) The Chamber shall then issue a ruling on the request**, taking into account the stage of the proceedings, the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial and in order to give effect to article 68, paragraph 3. The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under article 64. The Chamber may, if it considers it appropriate, put the question to the witness, expert or accused on behalf of the victim's legal representative.

**4. For a hearing limited to reparations** under article 75, the restrictions on questioning by the legal representative set forth in sub-rule 2 shall not apply. **In that case, the legal representative may, with the permission of the Chamber concerned, question witnesses, experts and the person concerned."**

Consequently victims may, at any stage of the proceedings, be represented by a legal representative. In this way, their status becomes equivalent to a "party bringing a civil action".

By virtue of Rule 91 (3), the victims' legal counsels may question the expert witnesses or the accused, or request that questions be asked by the Chamber's presiding judge. When the issue of reparation for damages incurred is considered, the victims' counsel may directly question the accused, the witnesses and the experts with the permission of the Chamber concerned (Rule 91 [4]) without directions on the manner and order of the questions and the production of documents.

The Statute also provides that, should there be any dispute as to the jurisdiction of the Court or admissibility of a particular case, the victims should be given the opportunity to participate in the deliberations by submitting observations to the Court (Article 19 [3]).

**V**

**THE PROTECTION  
AND SAFETY  
OF VICTIMS  
AND WITNESSES**

**"Mass crimes by their very nature often require the direct or indirect participation of individuals, some of whom hold high-ranking positions within the government or the military."**

*Report of the International Law Commission, 1996.*

## **Responsibilities of the Court**

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Appearing before an international court of justice is very difficult for a victim. This means agreeing to recall traumatic acts that he or she either suffered personally, or witnessed. By agreeing to appear before a court, a witness is sometimes also risking his or her life. Events that have occurred in connection with trials held by international criminal tribunals serve as tragic reminders.

In considering the psychological and physical risks involved, the drafters of the ICC Statute decided to provide witnesses and victims (who are sometimes one and the same) as much protection as possible.

The International Criminal Court is responsible for the safety, physical and psychological wellbeing, and the dignity and privacy of victims, witnesses, and of their families. The credibility and legitimacy of the Court depend upon it.

## **Risks incurred by victims and witnesses**

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Potential witnesses of the ICTR have been killed. Croatian national Milan Levar a key witness for the prosecution who had agreed to testify before the ICTY about the violent acts committed by the Croatian forces on Serbian civilians - was murdered on 29 August 2000. The investigation into his death did not lead to any arrest, but no one has any doubt that it was related to his decision to testify before the ICTY.

Whenever security conditions so require, the ICTR and the ICTY hear testimonies in camera. But it was found on many occasions that the identities of the protected witnesses were sometimes divulged, thereby endangering both these individuals and their families. While being cross-examined during his trial, Slobodan Milosevic, fully aware that by doing so he was placing them in jeopardy, and in a total violation of existing rules, provided indirect information that allowed the identity of certain protected witnesses to be discovered.

## **Pressures of every sort**

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Some witnesses are subject to extremely taxing pressures, just as likely to originate from those wanting the accused to receive a stiff sentence, as from those who, on the contrary, want him or her to be exonerated. These pressures can also take the form of threats of reprisal against members of their family if they fail to testify as desired. Here, too, the ICTY experience speaks volumes. At the Tadic trial, a witness "L" had been "coached" by Bosnian authorities to "further implicate" the accused. But the contradictions and vagueness of his testimony enabled the judges to discover the deception. In another trial - the Simic case - the Bosnian Serb counsel of the accused, not even hesitating to resort to death threats, had tried to force a witness to recant his testimony. He made him practise repeating "the new version" on a tape recorder.

## **Support for victims of sexual abuse**

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It is only within the last 10 years that international law has adequately taken into account the gravity of the rapes and sexual violence that have occurred in conflicts, notably exemplified by the genocide in Rwanda and the conflicts in the former Yugoslavia. Women are the primary victims but men are also concerned. Of the 600 witnesses questioned by the ICTR in 1999–2000, 113 had been confronted with crimes of sexual violence. However, despite

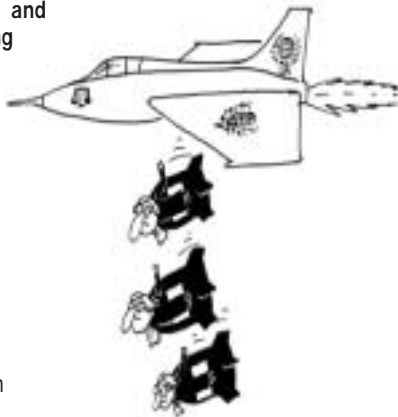
the gravity of these crimes, the ICTR judges have occasionally lacked tact - and even respect - in their treatment of the victims of abuse.

Conscious of these problems, the ICC founders concentrated from the very start on finding solutions. They assigned the Registrar a critical role: that of helping, advising, and protecting victims. In performing this task, the Registrar relies upon the "Victims and Witnesses Unit".

## A. The Victims and Witnesses Unit

**The role of the Registrar** extends far beyond mere administration of the Court. The Registrar, who must be a person "of high moral standards" (a quality not required in the ICTY and ICTR Statutes) plays a major role in respect of victims and witnesses. In accordance with the provisions of Article 43-6, the ICC Registrar has established a **"Unit [that] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses"**.

The Unit's role is presented in detail in the Rules of Procedure and Evidence (Rules 17 to 19). Rule 16 sets forth the responsibilities of the Registrar relating to victims in terms of their participation in the proceedings and reparations.



A special unit was created within the Registry - Victims' Participation and Compensation Unit - whose purpose is to help victims participate in the proceedings and submit their claim for reparations. It functions as an independent Unit within the Victims and Witnesses Unit.

Rule 16 of the "Rules" notably provides that the Registrar must:

- **Help victims to obtain legal advice and to organize their legal representation, and provide their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for them to carry out their duties.**
- **Assist victims in participating in the different phases of the proceedings.**
- **Take gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.**

## Ensuring safety

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Under the Registrar's management, the Victims and Witnesses Unit must ensure the safety and protection of victims and witnesses, and of any other person(s) who are at risk on account of their testimony before the Court. The Unit must also warn the Prosecutor and the Court of any risks incurred by victims and witnesses who have agreed to testify. The right to protection extends to all persons (such as family members) who may be threatened following their appearance before the Court.

The Unit may maintain and provide separate services to witnesses for the prosecution witnesses for the defence.

## Helping victims to organize their legal representation

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Under Rule 90 (1): **"A victim shall be free to choose a legal representative."** However, the Registrar will help victims organize their legal representation before the Court. He must also facilitate the legal counsels' work by providing them with all adequate support.

**Please note: An International Criminal Bar (ICB)** was created on 15 June 2002, during a conference in Montreal. The ICB is an international and independent organization composed of legal representatives. It includes all counsels - both those representing victims and those representing the accused (See below, in the appendices).

## Providing psychological and medical support

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The Registrar must secure the well being of the victims and witnesses. Realizing that giving testimony before the Court constitutes a hardship, the Victims and Witnesses Unit includes specialists with expertise in trauma - particularly trauma involving children and victims of sexual abuse (Article 43 [6]).

In order to accomplish all of these duties, Rule 19 specifies that the Victims and Witnesses Unit will include a wide range of experts: security guards, jurists, logisticians, psychologists with expertise in the post-traumatic disorders resulting from war, exile and sexual violence, as well as doctors, social workers, interpreters, etc.

Rule 17 of the "Rules" lists the duties of the Victims and Witnesses Unit toward such persons, as well as toward those who may be at risk on account of witness and victim testimonies before the Court:

- Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
- Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
- Assisting them in obtaining medical, psychological and other appropriate assistance;
- Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality.

- Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all inter-governmental and non-governmental organizations acting at the request of the Court, as appropriate;
- Cooperating with States, where necessary, in providing any of the measures stipulated in this rule.

With respect to witnesses - who may also be victims - Rule 17 of the "Rules" specifies that the Unit must also be:

- Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
- Assisting them when they are called to testify before the Court;
- Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.

## **B. Protecting victims and witnesses during the trial**

For victims, who may have been traumatised by the suffering that they endured, the trial is always a difficult experience and a psychological hardship that may disturb their psychological equilibrium.

### **Preventing additional trauma for sexual abuse victims**

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To avoid subjecting **sexual abuse victims to additional trauma**, the Rules of Procedure and Evidence contain several provisions to this end, some of which may also apply to protecting the life of threatened victims or witnesses.

For example, victims of sexual violence may be heard in camera. Cross-examination is not mandatory in order for their testimony to be admissible. They can also choose to be absent from the courtroom and to present their testimony via closed circuit television. Finally, they may testify before the Court in the presence of someone they trust, who may be **"a counsel (a designation broader than that of an attorney), a legal representative, a psychologist or a family member"** (Rule 88 [2] of the Rules of Procedure and Evidence).

## Anonymous testimony

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The use of anonymous testimony raises a conflict between two fundamental rights. On the one hand, victims and witnesses must be granted protection. On the other hand, the accused is entitled to a fair trial, which implies that he or she may be informed of the entire contents of the records and have the opportunity to question, or to arrange to have questioned, the prosecution witnesses. The ICC has provided, in Rule 87 of the Rules of Procedure and Evidence, a series of mechanisms to guarantee anonymity and, at the same time, the rights of the accused.

The conditions and modalities by which anonymous testimony may be presented are left to the discretion of the Court. As mentioned earlier, hearings may be conducted in camera in the victims' interest, particularly if they are children or victims of sexual abuse. They may be questioned via videoconferencing.

When the safety of a witness or of his or her family is at risk, the Prosecutor may accept certain pieces of evidence and elect to solely disclose a summary thereof. The identity of some witnesses may be withheld from court records. However, such measures must be compatible with the right of the accused to a fair trial.

Witnesses may also, individually, file a request for protection with the Chamber. Such request may include a request for anonymity.

Rule 87 provides a series of measures to protect witnesses and victims:

- That the name of the victim, witness or other person at risk on account of testimony [...] be expunged from the public records of the Chamber;
- That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
- That testimony be presented by electronic or other special means [...] enabling the alteration of pictures or voice, [...] in particular videoconferencing and closed-circuit television, [...] and other technical means;
- That a pseudonym be used for a victim, a witness or other person at risk [...];
- That a Chamber conduct part of its proceedings in camera.

## Relocation agreements

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The Registrar's obligations toward victims do not end when the trial is over. He must also plan and implement short- and long-term protective and security measures. For that purpose, it is his responsibility to negotiate relocation agreements (which may remain confidential) for all persons directly or indirectly at risk on account of testimony presented before the International Criminal Court.

Rule 16 (4) of the "Rules" specifies: **"Agreements on relocation and provision of support services on the territory of a State of traumatised or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential."**

**VI**

**REPARATIONS**

## Victims are entitled to reparations

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This provision (Article 75 of the Statute) stresses the importance attributed, under international law, to individual victims of international crimes. This is a giant step forward: neither the ICTY, nor the ICTR had provided for victim reparation - other than the mere restitution of property to its legitimate owner. For example, when the assets of ex-Serbian President, Slobodan Milosevic, were forfeited in Switzerland in June 1999, no victim was entitled to compensation.

This decision to grant reparations stems from a French proposal backed by the Scandinavian States and strongly supported by the NGOs. In broader terms, it is also the outcome of an effort to rectify the causes of the disquiet experienced within the ICTR over the treatment of victims.

In view of the fact that prisoners are treated according to the highest international standards of protection, the absence of any mention of reparations before the ICTR had produced a shocking imbalance in the judicial process. Raped women infected by the AIDS virus, for example, are not entitled to medical treatment, while the accused and convicts who contaminated them, on the contrary, are entitled to triple therapy for the full duration of their prison term.

This shocking reality - among many other factors - contributed toward limiting the impact of international justice upon Rwandan genocide victims. The case of Rwanda also demonstrates, in view of the immensity of the tragedy and the scarcity of available financial resources, just how impossible it was to offer any sort of substantial reparation to the hundreds of thousands of victims. Armed with this experience, the states re-examined the existing rules in matters of reparation when the ICC Statute was being drafted. They decided to grant reparations, while also limiting their scope in practice. The ICC will only have the authority to prosecute individuals, not states and companies.

Consequently, the Court may, on its own accord, even when no specific request has been issued, determine the amount of damages to be paid. The Court may sentence the accused to pay damages but it may also award compensation from a fund to be provisioned **"through fines or forfeiture"**

(Article 79 [2] of the Statute): "The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund". It will derive additional funds from voluntary contributions.

It is still uncertain whether the capacity of the Trust Fund will be sufficient to pay damages to the victims in cases in which the convicted persons are insolvent. The drafters of the Statute did not retain the pecuniary liability of the States, nor that of companies ("legal entities").

The Court is required to "give adequate publicity of the reparation proceedings" (Rule 96 [1]) so that as many victims as possible can assert their claim. If the number of victims is very high, The Court may **award reparations on a collective basis** (See: Rule 97 [1], below).

The States agree to carry out the decisions of the Court in respect of reparations. In certain cases, the States will also be required, under the terms of international law, or of their national legislation, to ensure that the victims are compensated, in cases where the convicted person is unable to do so or the State is also responsible for the crime committed.

Article 75 of the ICC Statute states:

- "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.**
- 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."**

The Rules of Procedure and Evidence (in Subsection 4, Rules 94 to 99) set forth the terms under which reparations are to be made to victims.

## Procedure to be followed

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Rule 94:

- "1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars:**
- a) The identity and address of the claimant;
  - b) A description of the injury, loss or harm;
  - c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
  - d) Where restitution of assets, property or other tangible items is sought, a description of them;
  - e) Claims for compensation;
  - f) Claims for rehabilitation and other forms of remedy;
  - g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.
2. At commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or [...] to any interested persons or any interested States. Those notified shall file with the Registry any representation made [...]."

## The Court automatically awards reparations on behalf of victims

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The Court may proceed on its own motion when it considers that the victims are, for all practical purposes, unable to request reparations, either because they

cannot access the Court, or they are so destitute that they are unable to afford legal representation and assert their rights. The ICC has therefore been seeking ways to compensate victims who are in the direst circumstances.

In cases where the Court decides to award reparations, it must so notify the victims, as well as any other interested person or interested State. Rule 95 proposes two hypothetical examples, which apply once the Court has notified its intention of awarding reparations:

- "a) A victim makes a request for reparations. That request will be determined as if it had been brought under Rule 94;**
- b) A victim requests that the Court does not make an order for reparations, the Court shall not proceed to make an individual order in respect of that victim."**

## **The cost of reparation**

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As of this date, the ICC has not quantified the pecuniary value of suffering. Neither the Statute, nor the Rules of Procedure and Evidence have provided a definition of the damages, or limits thereof, to which direct or indirect victims might be entitled. It will be the ICC judges who will determine the amount of such reparations, possibly based upon expert opinion, and after having heard all of the parties. By way of example, the United Nations Compensation Commission (UNCC), which was created after the Gulf War to enable Iraq to compensate victims who were natural persons, state-owned companies and multinationals, as well as the States, established certain scales of reparation:

- A plaintiff whose spouse, child, or parent has been killed: \$15,000 (maximum), or \$30,000 per family;
- Serious injury: \$15,000 (maximum), or \$5,000 if the effects of the wound were only temporary;

- A plaintiff who was sexually assaulted or tortured: \$5,000 (maximum) per incident;
- A plaintiff who witnessed the death of a spouse, child, or parent: \$2,500 (maximum), or \$5,000 (maximum) per family;
- A plaintiff who was taken hostage: \$1,500 for the first three days, and \$100 per day beyond that period, up to a ceiling of \$10,000.
- A plaintiff who went into hiding to avoid being taken hostage: \$1,500 for the first three days and \$50 per additional day, up to a ceiling of \$5,000.
- A plaintiff who was deprived of all resources, thereby endangering his or her life or that of his or her family: \$2,500 (maximum), or \$5,000 per family.
- These claims may be cumulative, but the total must not exceed \$30,000 per person or \$60,000 per family.

Within other frameworks, whether the Inter-American Commission on Human Rights, the United Nations Voluntary Fund for Victims of Torture or the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery... such scales of reparations already exist.

The ICC judges will thus be establishing their own scale of reparations, which will be applicable everywhere, regardless of the accused person's financial situation or of the wealth or poverty of the country in which the crimes occurred.

As for the ICC, it is not hard to conceive that reparations may be limited in the totally plausible eventuality that tens of thousands - if not hundreds of thousands - of victims were to lodge a complaint or have sufficient grounds to make a request for reparations. Obviously, the outcome would depend on the financial allocation available to the Trust Fund. If the forfeited assets of the accused were inadequate - as might well be expected - the voluntary contributions in the Trust Fund would be used to compensate for any shortfall. (See: Operation of the Trust Fund).

## Rule 97:

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts [...].“

## Operation of the Trust Fund

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“Who will pay for reparations?” The criminals convicted by the ICC? The banks, multinationals and state-owned companies, who backed them? Or the state-owned or semi-public businesses that were backing them, or that they were directly or indirectly managing? The State? After lively debate in Rome, the decision was finally made that only natural persons shall be required to pay for reparations. The State and legal entities (companies) will not have to pay for them.

This decision satisfies the Western countries (notably the United States and Switzerland) that were extremely concerned that some of their companies might become dragged into reparation proceedings as they were doing business with some dictatorial regimes. Class actions have been recently filed, for example, against various Swiss banks and American multinationals accused of having supported the apartheid regime in South Africa.

In respect of insolvent criminals tried by the ICC, the victims cannot, within this Court's jurisdiction, sue any party. It is the voluntary contributions to the Trust Fund that will be used to make up for the criminal's insolvency. But the rules

governing the operation of the Fund will not be finalised until September 2003, at the earliest. Some essential points remain unresolved: i.e., will the necessarily limited amount of money available to the fund be used primarily to make the individual awards for reparation determined by the judges? Or, on the contrary, will the Fund first be used to pay for community projects - such as the construction of a monument - or collective reparations? Nothing has yet been decided. It will be up to the Assembly of States Parties, in September 2003, to approve some proposals that will have been submitted to it by the Trust Fund Board. The latter is headed by a college composed of five members originating from all regional groups represented at the United Nations (Africa, Asia, Latin America and the Caribbean, Eastern Europe and Western Europe).

If the ICC is not competent to seek legal redress from the States, multinationals and state-owned or privately owned companies, the Court's decisions may eventually allow victims to initiate civil proceedings against the legal entities or State concerned.

#### **Rule 98:**

- "1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate.
4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust

Fund to an intergovernmental, international or national organization approved by the Trust Fund.

5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79."

## **Forfeiture for purposes of reparation**

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The Court may request the adoption of protective measures - such as freezing bank assets - until the end of the trial to ensure that the accused has no opportunity to conceal or transfer his or her assets in order to avoid having to pay reparations. This forfeiture of assets will make it possible to indemnify victims in the event that the accused is found guilty. In this matter, the cooperation of the States is essential.

The forfeiture of certain assets of convicted parties is not new to the international justice system. In 1999, the ICTY had requested and obtained a freeze on Slobodan Milosevic's assets that were on deposit with a Swiss bank. But in accordance with the ICTY Statute, no reparation is anticipated for victims.

Article 57 (3) (e) of the Statute provides that "The Pre-Trial Chamber may [...] where a warrant of arrest or a summons has been issued [...] seek the cooperation of States [...] to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims".

Rule 99 of the Rules of Procedure and Evidence states that:

"The Pre-Trial Chamber [...] may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested."

# VII

## CONCLUSION

On 11 March 2003, amidst a succession of international events, while the United States was preparing to abandon its effort to obtain the Security Council's backing for its military intervention against Saddam Hussein's regime, the 18 persons elected to the ICC by the Assembly of States Parties were formally sworn in as judges. Within the walls of the Dutch Parliament, they took the following oath: "I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations." The ceremony was held in the presence of Queen Beatrix of the Netherlands, UN Secretary-General Kofi Annan, and a parade of ministers from the four corners of the globe. The only representative absent was that of the American superpower - another sign of Bush's unrelenting hostility toward the ICC. Aware of the American opposition and the necessity of asserting the role of the new institution on the international scene, the 18 judges elected the man among them with the greatest experience in international diplomatic negotiations as President of the International Criminal Court. His task is to physically embody the Court and - above all, the critical factor in his success is to win the cooperation of the United States. A Canadian citizen, Philippe Kirsch's professional background is not that of a judge, but of a diplomat. Kirsch, who, for many years, served as an ambassador, was also the Chairman of the Canadian National Committee on Humanitarian Law. From 1999 to 2002, he chaired the Preparatory Commission for the ICC.

On the occasion of the judges' swearing-in ceremony, Kofi Annan stressed that the choice of the ICC's Prosecutor was "crucial", adding: "We cannot exaggerate the importance of this position. The example of the International Tribunals for the former Yugoslavia and for Rwanda taught us that nothing carries more weight in affirming the Court's reputation - particularly in the first phases of its proceedings - than the decisions and public statements of the Prosecutor. That is why it is absolutely essential that we find a person with the highest moral standards to take on this heavy responsibility. This is the moment, if ever there was one, to set aside national interests and to focus solely upon the personal qualifications of the applicants." [Non-official translation].

Two weeks later, the States Parties to the ICC found a consensus candidate who was officially confirmed by the Assembly of States Parties during their meeting of

21 to 23 April in New York City. The United Nations' geo-political logic was adhered to: while Philippe Kirsch belongs to the English-speaking world's tradition and originates from a Western bloc country, Argentinean Luis Moreno Ocampo exemplifies the Continental law tradition and originates from a southern hemisphere country. After serving as a Prosecutor in Argentina for eight years, Luis Moreno Ocampo came to public attention in 1985 as the Deputy Prosecutor in the trials of military torturers following Argentina's return to democracy. He is one of the founders, and the Chairman, of Fundación Poder Ciudadano, ("citizen power") a civil rights foundation, and Chairman of the Argentinean branch of Transparency International, an anti-corruption NGO. In the last few years, he has been teaching at Harvard. He will be the one who - in the eyes of the world - will henceforth embody international justice. It will be he who will initiate investigations and judicial proceedings, and who will be responsible for establishing the new institution's global influence and credibility. It will also be his task to remind the States of their obligation to cooperate with the Court by arresting the accused, providing evidence, and enforcing the sentences rendered.

The International Criminal Court is already fully operational. It is probably the most momentous international instrument of justice since the United Nations Charter was drafted. The complex test of reality has now replaced what many considered a mere utopia. The new Court will be facing immense challenges. One of the greatest among them will be to prove that this international justice is not reserved for the dictators and torturers of our world's weakest countries. International justice is now at work.

May 2003

# VIII

## APPENDICES

## Appendix 1.

### The International Criminal Bar (ICB)

In view of the severity of the cases that the International Criminal Court will be prosecuting, it is vital that the legal counsels who will be taking part in its proceedings receive every possible assurance of a fair, and especially of a genuinely independent trial. Defence counsels appearing before the International Criminal Tribunals were confronted with numerous problems, such as the restrictions imposed on the free choice of counsel by indigent accused persons, the refusal to designate a counsel on the basis of his or her national origin, objections to defence counsel fees raised by the Registry, embezzlements, etc. These challenges led the drafters of the ICC Statute to also consider creating an organization that would represent the counsels appearing before the International Criminal Tribunal.

The International Criminal Court differs from *ad hoc* Tribunals in that it also allows victims to be represented. For that reason, it was essential, from the moment it was created, that the International Criminal Bar be permitted to include both the victims' defence counsels and their legal representatives, and that it be made the International Criminal Court's primary interlocutor.

The term "counsel" was preferred to that of "attorney" in proceedings before the International Criminal Tribunals and the International Criminal Court because the option of intervening before these international Courts is not solely reserved for attorneys, *stricto sensu*, but is also available to other specialists in criminal or international law.

The Treaty of Rome of July 1998 did not specifically provide for an institutional organization for the defence. Some provisions cover the functions of the magistrates, the Office of the Prosecutor and of the Registry, but there is no specific text dealing with attorneys. Only Rule 20 (3) was incorporated into the Rules of Procedure and Evidence to provide for the creation of an independent authori-

ty that would represent legal associations that could be recognized in the Statute by the Assembly of States Parties. This rule specifies that: *"For purposes such as the management of legal assistance in accordance with rule 21 and the development of a Code of Professional Conduct in accordance with rule 8, the Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of States Parties."*

The first conference was held in Paris on 6 and 7 December 2001, under the auspices of the Paris Bar and of the International Criminal Defence Attorneys Association, following which the participants reached a consensus as to the necessity of creating an international Bar whose members could intercede before the Court.

On 15 June 2002, during a second conference in Montreal, a final resolution was adopted in favour of the creation of the International Criminal Bar.

It will be responsible for:

- contributing to the drafting of any text related to the work of the counsels before the Court, and in broader terms, being involved in the day-to-day proceedings of the International Criminal Court;
- defending counsels in the event of work-related problems in proceedings before the International Criminal Court;
- facilitating counsels' work in proceedings before the International Criminal Court, especially by encouraging them to acquire the knowledge necessary to practice law before this particular Court;
- ensuring effective communication between the various organs of the Court and the counsels.

Efforts are being made to ensure that the International Criminal Bar 's membership will be non-restrictive, so as to represent the largest possible number of judicial systems and geographic zones. Any counsel qualified to represent parties in proceedings before the International Criminal Court will be able to voluntarily join the International Criminal Bar. Similarly, non-governmental organi-

zations, and international attorney and jurist organizations will have to be represented by this Bar in order to contribute their expertise and experience. The purpose of the International Criminal Bar will not be to trample on the prerogatives of the various countries' professional attorney organizations.

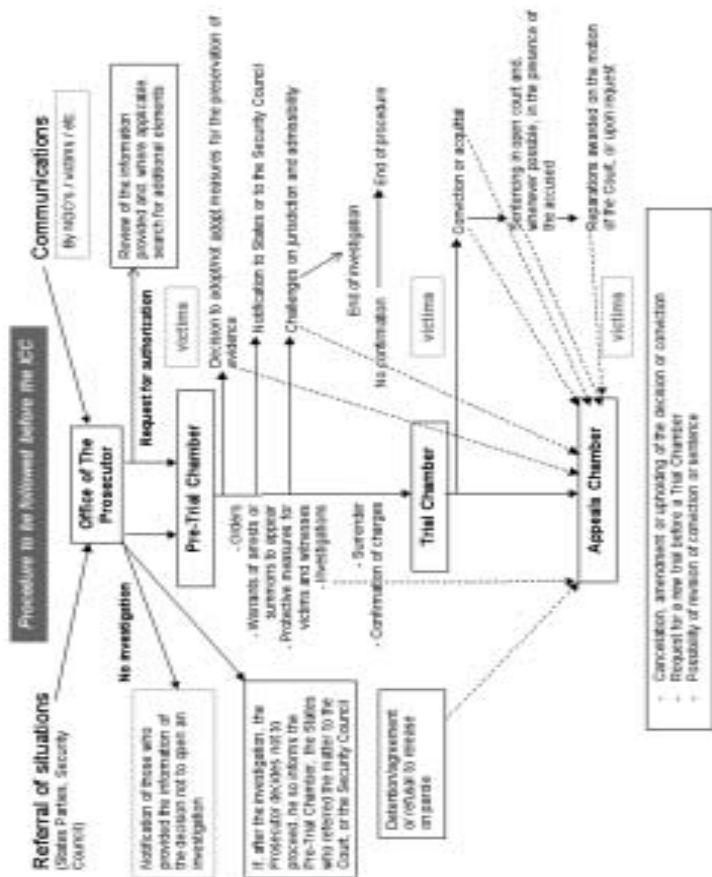
Following the meeting of the Steering Committee, which was held in Paris on 23 and 24 November 2002, a resolution was passed that established four working committees to focus on: a Code of Ethics, Finances, Training, and Jurisdictional Assistance. The Code of Ethics working committee has already drafted a Code of Ethics for counsels appearing before the International Criminal Court.

The first General Assembly of the International Criminal Bar was held in Berlin on 21 and 22 March 2003. On that occasion, the definitive statutes of the ICB were adopted, as well as a Code of Ethics for counsels serving before the International Criminal Court. The election of forty-two members to the Executive Council ensures full geographic representation, owing to the inclusion of elected representatives of five continents and of diverse judicial systems (Common Law, Roman-Germanic law, Muslim law and mixed law). Paul-Albert Iweins, President of the Paris Bar, and Elise Groulx, President of the International Criminal Defence Attorneys Association (ICDAA), have been selected to co-chair this new organization.

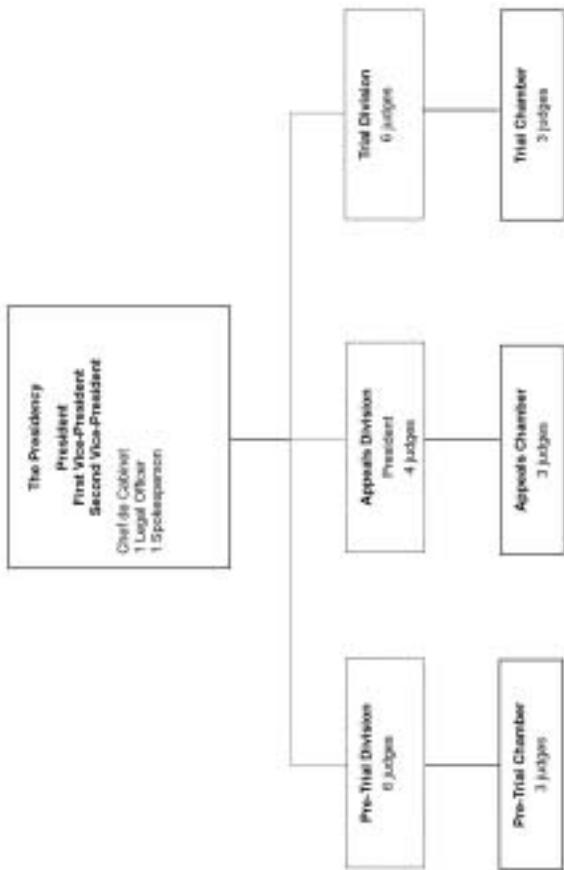
The final and decisive stage in the process of creating and effectively implementing the International Criminal Bar will be its official recognition by the ICC's Assembly of States Parties, which should occur prior to the end of the year 2003.

## **Appendix 2 .**

### **ICC Organization Charts**

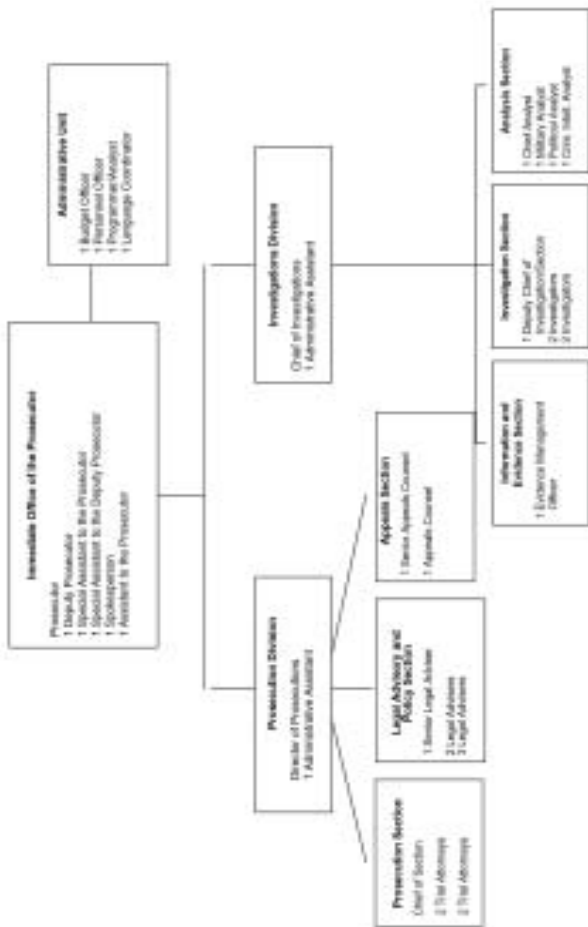


# The Presidency



Source : Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September 2002.

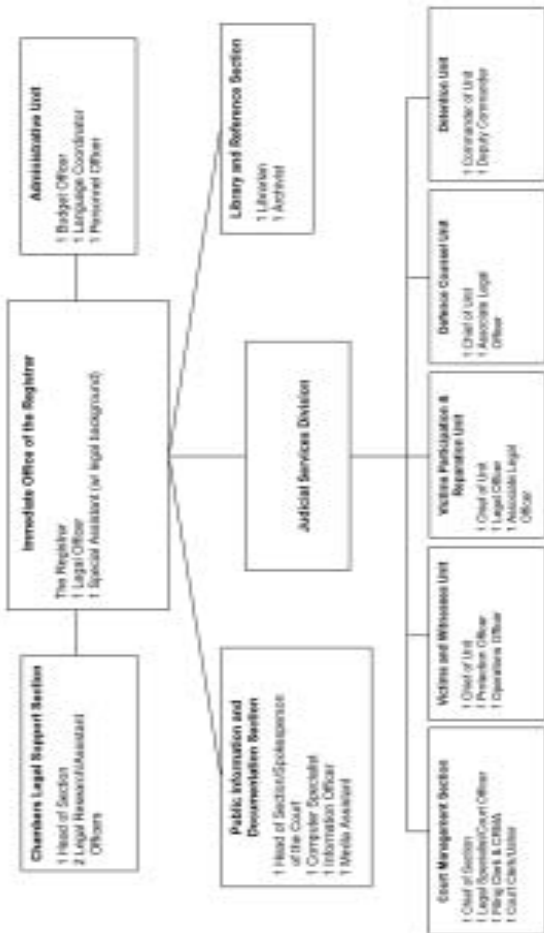
## Office of the Prosecutor



Source : Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September 2002.

## The Registry

### Office of the Registrar



Source : Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September 2002.

## Appendix 3.

### Useful Addresses

#### International Criminal Court

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174 Maanweg  
2516 AB The Hague  
The Netherlands  
Tel. + 31 70 515 85 15  
Fax + 31 70 515 85 55  
Email: [pio@icc-cpi.int](mailto:pio@icc-cpi.int)

Website: <http://www.icc-cpi.int>

#### International Criminal Tribunal for the former Yugoslavia (ICTY)

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Churchillplein 1  
2517 JW The Hague  
The Netherlands

Post Office Address:  
ICTY  
P.O. Box 13888  
2501 EW The Hague  
The Netherlands  
Tel. + 31 70 416 53 47  
Fax + 31 70 416 53 45  
Email: [icty@un.org](mailto:icty@un.org)

Website: <http://www.un.org/icty/>

## **International Criminal Tribunal for Rwanda (ICTR)**

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P.O. Box 6016  
Arusha  
Tanzania  
Tel. + 1 212 963 28 50  
Fax + 1 212 963 28 48  
Email: [ictr-press@un.org](mailto:ictr-press@un.org)

Website: <http://www.ictr.org/>

## **International Criminal Bar**

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Contacts:  
Service des relations internationales du barreau de Paris  
[International Relations Division of the Paris Bar]  
Chrystel Deray and Anne Souléliac  
Tel. + 33 1 44 32 47 77  
Fax + 33 1 44 32 49 36

Website: <http://www.bpi-icb.org>

# Non-governmental organizations

## Amnesty International

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International Secretariat  
1 Easton Street  
London WC1X 0DW  
United Kingdom  
Tel. + 44 171 413.55.00  
Fax + 44 171 956.11.57  
Email: [amnestyis@amnesty.org](mailto:amnestyis@amnesty.org)

Website: <http://www.amnesty.org>

## Amnesty International Belgium: French-speaking branch

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Rue Berckmans 9  
Brussels 1060  
Belgium  
Tel. + 32 2 538 81 77  
Fax + 32 2 537 37 29  
Email: [aibf@aibf.be](mailto:aibf@aibf.be)

Website: <http://www.aibf.be>

## **Amnesty International Canada: English-speaking branch**

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312 Laurier Avenue East  
Ottawa K1N  
Canada  
Tel. + (613) 744 76 67  
Fax + (613) 746 24 11  
Email: [info@amnesty.ca](mailto:info@amnesty.ca)  
Website: <http://www.amnesty.ca>

## **Amnesty International France**

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76 Boulevard de la Villette  
75940 Paris Cedex19  
France  
Tel. + 33 1 53 38 65 65  
Fax + 33 1 53 38 55 00  
Email: [admin-fr@amnesty.asso.fr](mailto:admin-fr@amnesty.asso.fr)  
Website: <http://www.amnesty.asso.fr>

## **Amnesty International Switzerland**

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P.O. Box 3001  
Bern  
Switzerland  
Tel. + 41 31 307 22 22  
Fax + 41 31 307 22 33  
Email: [info@amnesty.ch](mailto:info@amnesty.ch)  
Website: <http://www.amnesty.ch>

## **AsF-World**

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[International Federation of "Lawyers without Borders"]

Rue de L'Enseignement, 91

1000 Brussels

Belgium

Tel. + 32 2 223 36 54

Fax + 32 2 241 76 93

Email: [info@asfworld.org](mailto:info@asfworld.org)

Website: <http://www.asfworld.org>

## **International Committee of the Red Cross**

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19, avenue de la Paix

1202 Geneva

Switzerland

Tel. + 41 22 734 60 01

Fax + 41 22 733 20 57

Email: [press.gva@icrc.org](mailto:press.gva@icrc.org)

Website: <http://www.icrc.org>

## **Fédération internationale des ligues des droits de l'homme (FIDH)**

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[International Federation of Human Rights]

17, passage de la Main d'Or

75011 Paris

France

Tel. + 33 1 43 55 25 18

Fax + 33 1 43 55 18 80

Email: [fidh@fidh.org](mailto:fidh@fidh.org)

Website: <http://www.fidh.org>

## **Human Rights Watch**

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350 Fifth Avenue, 34th Floor  
New York, NY 10118-3299  
USA  
Tel. + 1 212 290 47 00  
Fax + 1 212 736 13 00  
Email: [hrwnyc@hrw.org](mailto:hrwnyc@hrw.org)  
Website: <http://www.hrw.org>

## **Organisation Mondiale contre la Torture (OMCT)**

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[World Organization Against Torture]  
OMCT - International Secretariat  
P.O.Box 21  
8, rue du Vieux-Billard  
CH-1211 Geneva 8  
Switzerland  
Tel. + 41 22 809 4939  
Fax + 41 22 809 4929  
Email: [omct@omct.org](mailto:omct@omct.org)  
Website: <http://www.omct.org>

## **Reporters sans frontières**

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[Reporters without Borders]  
Secrétariat international  
5, rue Geoffroy Marie  
75009 Paris  
France  
Tel. + 33 1 44 83 84 84  
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# International Justice

## Réseau Damoclès

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[Damocles Network]  
C/o Reporters sans frontières  
5, rue Geoffroy Marie  
75009 Paris  
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Tel. + 33 1 44 83 84 84  
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Website: <http://www.damocles.org>

The Damocles Network is Reporters without Borders' judicial arm. Its website offers a helpful guide for victims of international crimes who wish to lodge a complaint in order to avail themselves of the long-awaited "universal jurisdiction". Visitors to the website will also find information on international justice matters related to press freedom.

## NGO Coalition for the International Criminal Court

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c/o WFM, 777 UN Plaza, 12th floor  
New York, NY 10017  
USA  
Tel. + 1 212 687 21 76  
Fax + 1 212 599 13 32  
Website: <http://www.iccnw.org>

The Coalition for the International Criminal Court (CICC) is a network of well over 1,000 non-governmental organizations (NGOs) around the world that has been working, since 1995, to achieve one common goal: to promptly establish a fair, effective, and independent International Criminal Court.

## Coalition for International Justice

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2001 S Street, NW  
7th Floor  
Washington, D.C. 20009  
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Tel. + 1 202 483 92 34  
Fax + 1 202 483 92 63  
Email: [coalition@cij.org](mailto:coalition@cij.org)

Website: <http://www.cij.org>

The Coalition for International Justice (CIJ) is an international [non-profit] organization that supports the international war crimes tribunals for Rwanda and the former Yugoslavia, and justice initiatives in East Timor, Sierra Leone, and Cambodia.

## Diplomatie Judiciaire

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[Judicial Diplomacy]

Stéphanie Maupas: Editor-in-chief and correspondent with the International Criminal Tribunal for the former Yugoslavia  
Email: [maupas@diplomatiejudiciaire.com](mailto:maupas@diplomatiejudiciaire.com)  
Tel./Fax + 31 70 346 28 88

Website: <http://www.diplomatiejudiciaire.com>

The purpose of the Judicial Diplomacy's website is to present news reports and articles on legal action and trials that have been initiated against people prosecuted for genocide, crimes against humanity, and war crimes. In addition to news updates, the website offers visitors a vast database that allows them to access information about significant cases being tried around the world, particularly those brought before international courts.

## **The Crimes of War Project**

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Crimes of War Project  
American University (MGC-300)  
4400 Massachusetts Ave., NW  
Washington, D.C. 20016-8017  
USA

Tel. + 1 202 885 2051

Fax + 1 202 885 8337

Email: [office@crimesofwar.org](mailto:office@crimesofwar.org)

Website: <http://www.crimesofwar.org/>

The "Crimes of War" Project is the product of a collaborative effort undertaken by journalists, lawyers, and scholars who want the public to better understand the significance of international humanitarian law, as well as its application. The website offers in-depth information and analyses.

## **Hirondelle**

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3, rue Traversière

1018 Lausanne

Switzerland

Tel. + 41 21 647 28 05

Fax + 41 21 647 44 69

Email: [info@hirondelle.org](mailto:info@hirondelle.org)

Website: <http://www.hirondelle.org>

In order to help prevent acts of violence and fight to eliminate impunity by educating the public, the "Hirondelle" Foundation created a press, documentation and training agency within the International Criminal Tribunal for Rwanda (ICTR, Arusha). Its goal is to provide the population and the media of the Great Lakes Region of Africa - particularly the Rwandans (in their own language), as well as an international public - with professional and comprehensive information on the work of the ICTR and on national judicial proceedings.

## Tribunal Update

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Lancaster House  
33 Islington High Street  
London N1 9LH  
United Kingdom  
Tel. + 44 20 77 13 71 30  
Fax: + 44 20 77 13 71 40

Website: [http://www.iwpr.net/tribunal\\_index1.html](http://www.iwpr.net/tribunal_index1.html)

Tribunal Update, founded and managed by Mirko Klarin, is one of the pioneer websites specialising in international justice. It very closely monitors the work being done by the International Criminal Tribunal for the former Yugoslavia. The website is hosted by the Institute for War and Peace Reporting.

## Trial

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P.O. Box 5116  
CH-1211 Geneva 11  
Switzerland  
Tel. + 41 76 455 21 21  
Email: [info@trial-ch.org](mailto:info@trial-ch.org)

Website: <http://www.trial-ch.org>

TRIAL (Track Impunity Always) is an association governed by Swiss law, founded in June 2002. Non-partisan and non-denominational, its main purpose is to combat the impunity enjoyed by the perpetrators, accomplices and instigators of genocide, war crimes, crimes against humanity and torture. TRIAL refers such matters to the relevant courts and defends the interests of the victims of such acts in Swiss courts, as well as in cases before the International Criminal Court. A legal handbook entitled "Swiss Laws Against Impunity" can be downloaded from this website.

## Author

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Pierre Hazan is a columnist for French newspapers *Libération* and *Temps*. He is also the author of *La justice face à la guerre, de Nuremberg à La Haye*, published in 2000 by Éditions Stock.

## Sources

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This Victims' Guide to the International Criminal Court is based on information contained in official UN publications, as well as other sources consisting mainly of the following:

### UN Official publications:

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- Rome Statute of the International Court, 17 July 1998;
- Rules of Procedure and Evidence: Report of the Preparatory Commission of the International Criminal Court, 1 November 2000;
- Preliminary Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 3 to 10 September 2002.

### Other sources:

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- The international Criminal Court, Amnesty International, Fact Sheets 1 to 10, London, October 2000;
- La Cour pénale internationale, le Statut de Rome. Foreword and commentary by William Bourdon with the collaboration of Emmanuelle Duverger, "Points" Collection, Seuil, 2000;
- Victimes et témoins de crimes internationaux: du droit à une protection au droit de la parole, Luc Walley, RICR, March 2000, Vol. 84, No 845;
- The International Criminal Court: The Rome Statute Ratification and Implementation Handbook, a joint project of Droits et Démocratie ([www.ichrdd.ca](http://www.ichrdd.ca)) and the International Centre for Criminal Law Reform and Criminal Justice Policy ([www.icclr.law.ubc.ca](http://www.icclr.law.ubc.ca)).

## Credits

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Pierre Hazan and Reporters without Borders would like to thank **Chrystel Deray** and **Anne Souléliac** for their contribution on the International Criminal Bar (ICB).

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Anne Souléliac, also a barrister-at-law, handles Human Rights actions with the Paris Bar.

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