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THIRD REPORT

by

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This report of the Committee on the International Criminal Court addresses two aspects of current interest for national jurisdictions. The first part of the report finalises the study on implementation of the Rome Statute in the domestic legal order. Issues of ratification and cooperation were addressed in the second report of this Committee, presented and approved at the 2006 Toronto conference. Now, the focus is on the implementation of substantive international criminal law contained in the Rome Statute. The second part of the report concentrates on the rapidly approaching review conference and deals especially with the crime of aggression.

Both parts of the report essentially concern the position of States parties, but in both areas the views of Non-party States are also relevant. Their implementation of substantive international criminal law is vital in the struggle against impunity and may be an important factor regarding future ratification. Furthermore, the position of Non-party States will be of significance during the review conference, especially when it comes to defining the crime of aggression and regulating conditions for exercise of jurisdiction. This is not only because a definition should conform to customary international law, but also because the definition and conditions for jurisdiction may be vital factors regarding future ratification. Therefore, the questionnaire that was circulated contained questions for States parties and as well as for Non-party States.

As was mentioned in our second report, the subject of implementation of substantive international criminal law was part of the 2004 questionnaire, but treatment of the results was postponed to the Committee's third report. This means that the questionnaires received in 2004 from the following jurisdictions have been used for this report: Austria, Belgium, the Czech Republic, Finland, Germany, Greece, Israel, Italy, Japan, South Africa, South Korea, Sweden, Switzerland, the United Kingdom,

Uruguay and the United States of America. In addition, in 2006 a questionnaire was sent out which contained the same questions regarding implementation of substantive international criminal law; this resulted in updates or new responses from the following jurisdictions: Albania, Australia, Austria, Belgium, the Czech Republic, Germany, Greece, Israel, Russian Federation, Slovenia, the United Kingdom. Correspondents for these States – to the regret of the rapporteurs - also constitute the only input in respect of the part of the questionnaire dealing with the review conference.

The rapporteurs also regret that it was not possible to discuss this report at a meeting of the Committee, despite the best efforts of the Chair to organize one. A draft of this report was circulated to members in June 2008, and comments in response have been taken into account in preparing the final version.

PART I Implementation of Substantive International Criminal Law

The first part of the report is based upon the following sources:

- the responses to the 2004 questionnaire, although with some caution as developments since then may shed a different light on certain responses
- the responses to the 2006 questionnaire
- publicly available national legislation or draft legislation concerning the implementation of substantive international criminal law, although without pretending to offer a fully accurate and complete treatment of these sources

The questionnaire approached the implementation of substantive international criminal law on the basis of the principle of complementarity, assuming that the complementary role of the International Criminal Court has reminded States of their primary responsibility to prosecute international crimes. In this light one might expect a keen desire to adequately implement the substantive international criminal law set out in the Rome Statute. The questionnaire explored this implementation from the perspective of the definition of international crimes, as well as from the perspective of the incorporation of ‘general principles’ of international criminal law, including modes of liability, non-availability of certain defences etc. It sought to determine to what degree substantive international criminal law can be incorporated effectively in the domestic legal order. In addition, questions concerning the availability of universal jurisdiction and the scope of immunities under international law were posed.

The first two questions can best be treated together :

- a. *What is your State’s position on the principle of complementarity in relation to substantive criminal law set out in the Statute?*
- b. *Has your State’s position on the effects of the principle of complementarity resulted in legislative reforms in respect of substantive criminal law set out in the Statute? If so, what was or will be the nature of those reforms?*

It must be noted at the outset that these questions were only submitted to States parties, as they have no relevance for Non-party States. The position of States on the principle of complementarity is of significance for the implementation of substantive international criminal law. As the Rome Statute does not contain clear and unequivocal obligations to incorporate substantive international criminal law in the domestic legal order, the views of States as to the degree of implementation appear decisive.¹ With the literature rapidly increasing on this topic,² one can discern a variety of categories of views among States.

Generally speaking, States parties take complementarity seriously. This follows from the questionnaires, where correspondents have indicated the national support for the principle: Australia (‘has fully adopted the principle of complementarity’); Belgium (‘fully adheres to the complementarity principle’); Greece (‘always been a staunch supporter of the principle of complementarity’); Slovenia

¹ For a detailed analysis of the question whether there is an obligation for States under the Rome Statute to implement substantive international criminal law, see Jann K. Kleffner, ‘The Impact of Complementarity on national Implementation of Substantive International Criminal Law’, (2003) 1 *Journal of International Criminal Justice* 90 – 94.

² See, for example, the recent volume of the Criminal Law Forum (Volume 19, no. 1, March 2008), with a series of articles on complementarity.

(‘has been in favour of the principle of complementarity and it has implemented it in its legal system’). It also follows from the legislative activity in many states, to be further explored in the context of question b.

Regard must also be had to explanatory memoranda, where these exist. For example, in the explanatory memorandum to the International Crimes Act (2003) the Dutch government submitted that it considered itself bound to penalise under national law the crimes set out in the Rome Statute and to establish universal jurisdiction over them. It read this into the principle of complementarity, even if it recognised that the Statute did not contain explicit obligations to that end.³ The *travaux préparatoires* of amendments to the Finnish Penal Code (212/2008, adopted on 11 April 2008 and in force since 1 May 2008, specifically refer to the complementary principle. Likewise, Uruguay referred to the principle of complementarity as a key pillar of the International Criminal Court, giving primacy to national courts, necessitating reforms in Uruguayan law.

However, complementarity is not only supported in the interests of combating impunity. Complementarity is also presented as a concept that limits infringement upon national sovereignty. The correspondent for Albania explained that the Albanian Constitutional Court, in its Decision no. 186 re the compatibility of the ICC Statute with the Albanian Constitution, specifically pointed to the principle of complementarity as an argument in favour of limited or even no infringement upon national sovereignty concepts set out in the constitution. The argument would then be that national prosecution prevents the International Criminal Court from operating and thus from infringing upon national sovereignty. In a similar vein, the correspondent for Australia responded to question a by underlining that Australia maintains a primary right to prosecute offences under the Court’s Statute. Likewise, Slovenia has incorporated in legislation the primary jurisdiction of its national courts.⁴ The same applies to Senegal, which also wished to secure the primacy of its domestic courts by new legislation.⁵ According to the correspondent for the United Kingdom, it is the official position of the British government that no British service personnel need appear before the International Criminal Court, since they would be prosecuted if appropriate in the British courts.

It should be mentioned that exceptionally some criticism was voiced. The correspondent for Belgium referred to the Law of 5 August 2003 replacing the 1993-1999 War Crimes Statute, explaining that it restricts the possibility of universal jurisdiction and does not give optimal effect to the principle of complementarity.

The concrete impact of the principle of complementarity in national legal orders remains uncertain. At the very least, the decision making process does not appear to be transparent and will be difficult to review by the International Criminal Court. A positive exception is South Africa. According to the correspondent, as a starting point a prosecution must take place in South Africa. If that is not the case, the Ministry of Justice must be provided with the full reasons for a decision not to prosecute and is obliged to forward that decision, with reasons, to the Registry of the International Criminal Court.

A direct concrete effect of the principle of complementarity might be the enactment of legislation enabling States to effectively investigate and prosecute within the Court’s jurisdiction. Question b dealt with this issue.

First, a small minority of States takes the view that no changes in substantive criminal law are necessary, as domestic law sufficiently allows for prosecution of conduct penalised in the ICC Statute

Second, a few States have not enacted legislation, but for an entirely different reason. In these States it did not appear necessary to undertake any legislative reform as the relevant provisions of the Rome Statute are directly applicable. Albania is an example of this.

Third, the majority of States has enacted – or is in the process of doing so - special legislation enabling investigation and prosecution of crimes within the jurisdiction of the Court. Other questions focus on whether this legislation adequately reflects substantive international criminal law set out in the Rome

³ Explanatory Memorandum, TK, 2001-2002, 28 337, nr. 3, p. 2.

⁴ Article 6 of the Slovenian Act on Cooperation.

⁵ See Loi no. 2007-02 du 12 février 2007 modifiant le Code pénal, Exposé des motifs, Journal Officiel de la République du Sénégal, 10 mars 2007, p. 2377.

Statute. These States are the following: Australia (International Criminal Court Act (2002)), Belgium (1993 – 1999 War Crimes Statute, replaced by the Law of 5 August 2003), Finland (Penal Code revision of 2008), Germany (Code of Crimes against International Law of 26 June 2002), Slovenia (Act on Amendments to the Criminal Code (2004), Criminal Code (2008)), South Africa (International Criminal Court Act), United Kingdom (International Criminal Court Act 2001 and its Scottish equivalent), Panama (Ley no. 14, 18 May 2007), Senegal (Loi no. 2007-02 du 12 février 2007 modifiant le Code penal), Trinidad and Tobago (The International Criminal Court Bill, 2005), Canada (Crimes against Humanity and War Crimes Act 2000), the Netherlands (International Crimes Act, entered into force 1 October 2003), New Zealand (International Crimes and International Criminal Court Act 2000) and Malta (International Criminal Court Act 2002). Switzerland and Sweden are in the process of adopting legislation. We have also identified draft legislation in the Democratic Republic of Congo, Uruguay, Ecuador, Italy and Argentina, but are unable to comment on its current status. Within this category there are differences in approach. Some States have incorporated legislative changes within existing laws, notably the Penal Code. Other States, like Germany and the Netherlands, have opted for a separate code, supplementing the Penal Code. Only practice will established which of the methods is preferable.

Fourth, in certain States information provided by the correspondents suggests there have been no developments (Austria and Greece).

Finland initially took the view that its legislation corresponded roughly to the Rome Statute and that therefore a revision of the Penal Code was not deemed necessary at that time. The view seemed to be that ‘as long as crimes included in the Statute would be criminalized under chapter 11 of the Penal Code ‘War crimes and offences against humanity’ or be punishable as ‘normal crimes’ in Finland, this would be sufficient’. But Finland has changed its mind. Pursuant to amendments to the Finnish Penal Code (212/2008), the substantive criminal law provisions have been revised in Chapter 11 of the Penal Code (‘War crimes and crimes against humanity’) so that the complementary principle can be realistically applied.

As a general rule, the relevant legislative reforms do not have retroactive effect. This implies that they can only apply to crimes committed after 1 July 2002, the date of entry into force of the Rome Statute, at best. As a result, investigations and prosecutions of crimes committed prior to that date have to be conducted on the basis of the applicable legal scheme at the time of their commission. Belgium, which adopted legislation in advance of and in anticipation of adoption of the Rome Statute, is an exception. Similarly, the United Kingdom legislation came into effect on 1 September 2001, which means that crimes committed after that date are punishable. There has been one case brought under the Act. Corporal Payne pleaded guilty before a court martial to a charge of inhumane treatment as defined by article 8(2)(a)(ii) of the Rome Statute, in relation to the death of Baha Musa in British custody in Iraq. Other charges, including some under the 2001 Act, were also brought against other soldiers in the same case but they were acquitted.⁶

The next question submitted to the correspondents dealt with the penalisation of crimes set out in the Statute:

- c. Are currently –or soon will be- all the crimes set out in the Statute –with the exception of aggression- penalised in your State’s domestic law? Are the definition of those crimes, including the elements of crimes, identical to the ones set out in the Statute and the Elements of Crimes?*

This question was submitted to both States parties and Non-party States. The response of the latter is, as has already been mentioned, of relevance from both the perspective of identifying obstacles to future ratification as well as from the perspective of their contribution to combating impunity.

Generally speaking, States intend to faithfully follow the Rome Statute, although there are tendencies to both under- and over-inclusion in relation to the crimes. Obviously, the most faithful adaption of the ICC-crimes occurs when a State does not transform the provisions in the Statute into domestic law but applies them directly. This can be done by either a rule of reference or by generally attributing direct effect to norms in the Statute. The latter situation appears to be the case for Albania where, according

⁶ See <http://www.parliament.the-stationery-office.co.uk/pa/ld200506/ldlwa/50719ws1.pdf>.

to the correspondent, article 122 of the Albanian Constitution makes the crimes defined in the Rome Statute directly applicable in the domestic legal order.

The rapporteurs are aware that the degree of similarity between definitions in the Rome Statute and in domestic law depends very much upon the perception of correspondents and their judgment in relation to differences. For example, the correspondent for Australia submitted that ‘the definitions of crimes in Australian legislation are substantially identical to those contained within the Statute of the Court, although the Australian legislation provides additional detail of the defined terms’.

In several States, there appears to be faithful implementation, without apparent discrepancies: South Africa (‘The drafters of the ICC Act, aware of this benefit of codification, incorporated the ICC Statute’s definitions of the core crimes directly into South African law through a schedule appended to the Act’); the United Kingdom (‘the offences have been incorporated verbatim into UK law through the International Criminal Court Act 2001 (and its Scottish equivalent)’). However, the correspondent pointed out that Sec 50(4) provides that the offence-creating articles are to be construed subject to and in accordance with reservations made by the United Kingdom to relevant treaties; it is submitted by the correspondent that this could lead to a possible contradiction – under-inclusion – if, for example, the International Criminal Court considered that reprisals against civilians were illegal in all circumstances, contrary to the effect of the United Kingdom reservation to Additional Protocol I; Senegal (Exposé des motifs: ‘La technique de la transposition littérale des infractions a été adoptée pour affirmer le caractère de jus cogens des règles posées.’); Trinidad and Tobago (‘these offences are defined, respectively, by reference to certain acts specified in Articles 6, 7, and 8 of the Statute’),

In several States, national laws go further than the definition in the Rome Statute. In Belgium, for example, the codification of genocide and crimes against humanity are nearly word for word copies of the definitions in the Rome Statute, but the incorporation of war crimes, in article 136quater of the Belgian Penal Code, differs both in structure as well as in content from article 8 of the Rome Statute. It was submitted that ‘the Belgian legislator has even gone further than the Rome Statute’. The same can be said of the Netherlands and Germany. Germany seems to have adopted definitions of genocide and crimes against humanity by and large identical to those set out in the Rome Statute, but has made deliberate choices that may result in expanded criminal liability compared to the Rome Statute. In relation to genocide, the German legislation specifies that even the killing of one single member of the group may amount to genocide. The German law deliberately omits the compromise formula set out in the definition of crimes against humanity (article 7(2)(a)) of the Rome Statute. In relation to war crimes, Germany wanted to create a comprehensive implementation of this body of law. Its codification of crimes committed in non-international armed conflict is more comprehensive than those listed in Article 8 (2) (c) and (e) of the Rome Statute.

The Netherlands has copied the definition of core crimes in the Rome Statute verbatim. However, in relation to war crimes, the codification is only partly based on the Rome Statute, as three categories were distinguished: treaty provisions entailing a duty to penalise, the Rome Statute and a ‘safety net’ with reference to ‘laws and customs of war’; the latter language is derived from the preceding ‘Criminal Law in Wartime Act’ (1950), and is intended to adequately take into account developments in the law. In addition, the Netherlands has included the crime of torture, as defined in the Convention Against Torture, in the International Crimes Act and has applied general principles of international criminal law to it.

The 2008 Criminal Code of Slovenia brought the definition of genocide (article 100) in line with the one in article 6 of the Rome Statute, deleting the reference to ‘social or political groups’ which appeared in earlier legislation. However, the definition remains somewhat broader than the one in the Statute, in that it criminalises the acts set out in the definition of genocide with respect to grounds listed in article 7(h) of the Rome Statute (persecution as a crime against humanity), which has been faithfully transposed in article 101 of the new Criminal Code.

In respect of States for which there is no report available, we can base ourselves – with the necessary degree of caution - on the content of adopted legislation. Canada has taken an interesting approach to the matter, which – depending on the current and future state of the law - can be regarded as over-inclusion in relation to the Rome Statute. Section 4 of the Crimes against Humanity and War Crimes Act contains definitions of genocide, crimes against humanity and war crimes. However, where other legislative efforts tend to contain rather detailed definitions, or direct references to the Rome Statute,

Canadian law contains an open ended reference to customary international law, conventional international law or the general principles law for defining the core crimes. Admittedly, at this stage, this can bring in more expanded definitions of the core crimes then set out in the Rome Statute. It raises a number of questions, which cannot be fully addressed here. Especially the establishment of criminal responsibility on the basis of ‘general principles of law recognised by the community of nations’ is an intriguing matter, seemingly at odds with the principle of legal certainty.

Under-inclusion, in the sense that penalisation of conduct is restricted in comparison to the Rome Statute, is more frequent. Correspondents report that the following States have not fully penalised the crimes set out in the Rome Statute: Greece (‘not all crimes penalised, for example forced pregnancy’); Japan – although the questionnaire was filled out at the time when Japan was not yet a State party and the correspondents pointed out that when Japan would accede legislative steps would be taken to improve the situation - (‘most of the crimes under international humanitarian law (including genocide) can be covered by the existing Penal Code as ordinary crimes’),

Clearly, for Non-party States this is unproblematic, at least from the perspective of the principle of complementarity. For example, the current Penal Code of the Czech Republic does not penalise public incitement to genocide. Crimes against humanity have only been partially reflected in the Penal Code and still require a nexus with armed conflict. It is reported that the draft new Penal Code seems to improve the definitions, mostly in line with the Rome Statute.

No similar developments appear to be taking place in other Non-party States, suggesting that these States have not (yet) an inclination to accede to the Rome Statute. In Israel, the correspondent reported, that the only crime that is formulated essentially identically compared to the Rome Statute is genocide. There is no definition of war crimes and crimes against humanity applicable in all circumstances. These crimes are included only in the Punishment of Nazis and Nazis Collaborators Law, 1950. As a result, prosecution in Israel for ICC-crimes will need to be based on ordinary crimes.

The correspondent from the Russian Federation reported that the existing definition of genocide under Russian law is identical to the one in the Rome Statute. Crimes against humanity, however, are unknown as such under Russian law. It is contended that ‘ordinary crimes’, including ‘use of slave labour’ and ‘trafficking in human beings’ offer a basis for prosecution. Similarly, the crime against humanity of ‘deportation or forcible transfer of population’ has similar elements to those in article 356(1) of the Criminal Code of the Russian Federation (‘Use of Banned Means and Methods of Warfare’), which include ‘deportation of civilian populations’. The title of the provision implies that such a crime is committed in wartime, although the text contains no such qualification. The offence is punishable by deprivation of liberty for a term of up to 20 years. Nevertheless, coverage of the underlying crimes against humanity is not at all complete nor is punishment severe enough where the crimes exist. Therefore, article 7 of the Rome Statute is not adequately reflected in Russian law. The notion of war crimes is under Russian law restricted to crimes against the peace and security of mankind, notably the title dealing with ‘use of banned means and methods of warfare’; it is concluded that Russian law only penalises a small number of war crimes.

In the United States only genocide and war crimes are criminalised. It has been reported that the United States has narrowed the definition of genocide, regarding ‘incite’ and ‘substantial part’. The implementation of war crimes concerns primarily grave breaches and other acts prohibited by treaties, to which the United States is a party. Prosecution is limited to situations where the person committing the crime or the victim is a member of United States armed forces or a United States national.

The current legislative framework in some States reveals a mixed picture of both under- and over-inclusion. For example, in Finland the provision on genocide is wider, including ‘comparable groups’ as the possible targeted group and an additional open-ended modus operandi: ‘in another comparable manner essentially impairs the survival of the group’. The reference to ‘another comparable manner’ was removed in the 2008 amendments. The definitions of the crimes against humanity are the real novelty of the 2008 amendments. The war crime definitions are now *expressis verbis* applicable also to crimes committed in internal armed conflicts. In Sweden war crimes are defined by reference to customary international law, offering a basis for criminal responsibility broader than the Rome Statute; as regards crimes against humanity, however, doubts were expressed whether Swedish law covered all Rome Statute crimes, especially when certain crimes, such as forced deportation or sexual slavery, are committed outside of the context of an armed conflict.

As far as the Elements of Crimes are concerned, we have noted that they play hardly any role in assisting national courts; at least no special place has been allocated to them in the national international crimes-acts. An exception can be found in the International Criminal Court Act of Malta, where courts are obliged to use the Rome Statute and the Elements of Crimes in applying and interpreting the International Criminal Court crimes contained in domestic law. As far as the United Kingdom is concerned, section 50(2) of the 2001 Act provides that ‘in interpreting and applying the provisions of those articles [the offence creating articles, 6, 7 and 8(2)], the court shall take into account’ the Elements of Crimes adopted in accordance with Article 9 of the Statute. As with the Court itself, a United Kingdom court would not be bound by the Elements. Thus under United Kingdom law, the Elements have the same authority as they do before the International Criminal Court itself.

As the incorporation of crimes is just one side of international criminal responsibility, the following question regarding general principles of international criminal law, dealing with matters such as modes of liability and defences, was submitted:

d. Which of the general principles of criminal law set out in arts. 22 – 33 of the Rome Statute are applicable to the prosecution of international crimes in your State? Which principles of part 3 has your State identified as important principles of international criminal law?

At the outset it may be helpful to briefly categorise these principles, set out in Part 3 of the Statute. Four main categories can be identified.

First, there are principles of criminal law with a strong basis in human rights law, such as the nullum crimen rule which, as a result, find their origin in terms of applicable sources in international human rights treaties. This concerns, at least in significant part, articles 22 (nullum crimen) and 23 (nulla poena) and, to a lesser degree, article 26 (no jurisdiction over minors, under 18).

Second, Part 3 contains principles of criminal law generally recognised and applicable in all criminal justice systems and which retain their value and relevance for the international criminal justice system. The sources of law are general principles of substantive criminal law, provided that where these diverge a choice for one legal family is inevitable. Under this category one can group articles 25 (2) and (3) (modes of liability), 30 (mental element), 31 (grounds for excluding criminal responsibility) and 32 (mistake of fact or mistake of law).

Third, there exists a category of rules of substantive criminal law unique to international criminal law and which have developed since the Nuremberg trial because of the unique features of international criminal law. In Part 3 this concerns articles 27 (irrelevance of official capacity), 28 (command responsibility), 29 (non-applicability of statutes of limitations) and 33 (superior orders and prescription of law).

Fourth, the drafters of the Rome Statute have made choices regarding the International Criminal Court’s jurisdiction which are unique to its context and should not impact upon development of national or international substantive criminal law. These are the articles 24(1) (non retroactivity *ratione personae*), 25(1) (only jurisdiction over natural persons), 25(4) and 26 (no jurisdiction under 18).

For the purpose of this report, the third category is of most interest; as these rules differ considerably from ordinary national criminal law, and their specific implementation is expected to be most problematic for States. Furthermore, as key elements of international criminal law, incorrect implementation may give rise to an ‘unwilling’ or ‘unable’ determination by the Court in the exercise of the principle of complementarity.

As far as the States parties are concerned, the answers to the questionnaires were not always conclusive in respect of all principles set out in Part 3. Concentrating on the aforementioned category of international criminal law principles, the following observations can be made.

First, in respect of a significant number of States we do not really know to what degree the general principles have been incorporated in domestic law, which might suggest unfamiliarity with them. This applies to Albania, Greece (‘the general principles of Greek criminal law are largely similar in scope

and content to those set out in Part 3 of the Statute’) and Switzerland (‘The Swiss military and civil criminal codes provide for the same general principles as those contained in the ICC Statute’). In a special category are the States for which we can only rely on special implementing legislation. While we can detect in that legislation the faithful implementation of certain provisions of Part 3 of the Statute, for example articles 28 and 31 are covered by the Maltese International Criminal Court Act of 2002, we do not know if other provisions are already part of existing law or have been ignored, whether deliberately or inadvertently. This applies also to Canada, where we see in the Crimes Against Humanity and War Crimes Act the implementation of article 28 and a small part of article 25 of the Rome Statute, but not of other provisions in Part 3.

Second, a number of correspondents firmly claim that the contents of articles 22 – 33 of the Rome Statute are part of domestic law, displaying the intention of faithful codification. This is the case for Australia and Trinidad and Tobago. The latter has incorporated a direct reference to the bulk of general principles of Part 3 of the Statute in its International Criminal Court Bill of 2005.⁷ It is provided that these provisions of the Statute ‘apply, with any necessary modifications’; it is also provided that if there is any inconsistency between the general principles of the Rome Statute and the rules under national law, the Rome Statute law shall prevail.

Third, there appears to be a category of States for which correspondents submitted that the general principles of international criminal law have not been specifically implemented but are still, by and large, available under ordinary domestic criminal. These States are Austria and Uruguay (with the exception of article 27 of the Statute; problems may also arise in relation to article 32 of the Statute).

Fourth, in certain States the general principles of international criminal law set out in the Rome Statute have not been directly codified, but may nevertheless be effective. For example, the correspondent for South Africa indicates that ‘while the drafters of the ICC Act have not chosen to expressly adopt Part 3, s 2 of the Act says that applicable law for any South African court hearing any matter arising under the Act includes ‘conventional international law’, and in particular the Rome Statute. Accordingly, the general principles of international criminal law applicable to the prosecution of genocide, war crimes and crimes against humanity (including the available defences contained in the Rome Statute such as superior orders) ought to find application before a South African Court.’ One wonders, however, how this would function in practice, especially bearing in mind the fundamental rule of *nullum crimen* in most national criminal justice systems.

Fifth, in a number of States problems of inconsistency have been identified, but the solution, in the sense of new legislation, has not yet been adopted. For example, the correspondent for Sweden reported that article 28 (command responsibility) would require new rules in Swedish law, and article 32 will require abolition of existing rules in the Criminal Code allowing for the removal of responsibility or reduction of sentences.

Sixth, when correspondents have paid detailed attention to the implementation of general principles there is a mixed picture. For example, regarding Belgium command responsibility (article 28) has not been directly incorporated and, therefore, a similar provision does not exist in Belgian law. However, Belgian law contains a provision penalising the omission to act, which is in certain but not all respects similar to command responsibility. The defence of superior orders (article 33) has found faithful implementation in Belgian law. Slovenia provides another example, where command responsibility (article 28) and the non or limited applicability of the defence of superior orders are not incorporated in the Slovenian Criminal Code. However, the new Penal Code contains a provision on command responsibility. The correspondent reports that the maximum sentence for command responsibility for genocide will be eight years, which is amazingly low.

The correspondent for the United Kingdom pointed out a number of possible inconsistencies. With a view to secure relatively easy acceptance of the Bill, under the political circumstances at the time, the choice was made not to address these possible inconsistencies and accept – in the unlikely event that they might materialise – that it might not be possible to take advantage of the complementarity regime.

In some States with a strong monist tradition, international law holds a prominent place in the domestic legal order. The Netherlands is a good example here. In drafting the Dutch International Crimes Act the

⁷ See Section 12 of that Bill.

Government adopted the view that there should be no exact copy of Part 3 of the Statute and that Dutch criminal law remains applicable. However, when elements of part 3 are unknown to Dutch criminal law or in clear conflict with them, the provisions of Part 3 shall prevail.⁸

Germany seems to have adopted a similar position, in that the bulk of Part 3 of the Statute is found in the provisions of German Criminal Law on individual responsibility which are in line with the Rome Statute. The correspondent reported that a few issues, such as command responsibility and superior orders, had to be addressed explicitly in the German *Völkerstrafgesetzbuch* in order to implement articles 28 and 33 of the Statute.

As far as Non-party States are concerned, there are more significant discrepancies. The Czech Republic, for example, knows two sets of incompatibilities; the first concerns irrelevance of official capacity (article 27), which is still a legal obstacle to ratification; the second relates to command responsibility, which is larger in the Rome Statute. The attribution of immunities, for parliamentarians and ministers, which is inconsistent with article 27 of the Statute, is also an obstacle for prosecution in Israel, with the exception of genocide. Israel may also have a problem in relation to statutes of limitations, which are currently only inapplicable in relation to the Punishment of Nazis and Nazi Collaborators Act.

In respect of Japan, it must be mentioned that the question was answered at the time Japan was not yet a State party. The correspondent reported that most of the principles in articles 22 – 33 of the Rome Statute are part of domestic law, with the exception of the non-applicability of statutes of limitation.

As to the Russian Federation, there exist a number of discrepancies, the most important of them being the absence of command responsibility under domestic law.

The important procedural aspect of the division of cases between the International Criminal Court and national courts concerns the jurisdictional reach of the latter. With a view to effectively combating impunity for international crimes it is vital to learn to what degree states exercise the maximum permissive jurisdiction under international law, even if the Rome Statute does not contain any explicit provision on this matter. The following questions will be addressed jointly:

- e. Does your State provide for universal jurisdiction for crimes set out in the Statute? If so, which crimes? What is under your State's current laws –or future laws- the scope and content of universal jurisdiction?.*
- f. If your State does not provide for universal jurisdiction, which are the jurisdictional bases for prosecution of crimes contained in the ICC Statute?*

The position of States seems to have developed on two important subjects: a) the Rome Statute does not contain any obligation or even strong expectation in relation to the scope of jurisdiction; b) the current state of international law, as has emerged to some degree from the International Court of Justice judgment in the dispute between Congo and Belgium.⁹

The following States recognise universal jurisdiction for the core crimes, or some of them: Australia; Finland (although universal jurisdiction here depends upon treaty obligations to exercise jurisdiction); Germany; South Africa ('that person, after the commission of the crime is present in the territory of the Republic'); Switzerland (but, 'with regard to international crimes subject to military courts, the principle of universal jurisdiction will be limited to cases where the commission of the crimes will have a close nexus with Switzerland'); Trinidad and Tobago (see section 8 of its International Criminal Court Bill of 2005); the Netherlands (article 2 of its International Crimes Act 2002); and Canada (section 8 of Crimes against Humanity and War Crimes Act).

An interesting combination of universal jurisdiction and jurisdiction on the basis of the protective principle was reported by the Albanian correspondent. Albanian courts have jurisdiction for crimes against humanity committed by foreign citizens outside Albanian territory which are to the detriment of the Albanian State or Albanian citizens.

⁸ Explanatory Memorandum, Kamerstukken 2001-2002, 28 337, nr. 3, p. 29.

⁹ Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

A confusion of the protective and universality principles is not uncommon. The correspondent for the Czech Republic –not a State party- indicated that this was the situation in this State to some degree, even though the Czech Republic knows a form of subsidiary universal jurisdiction. It requires two conditions: a) the crime is also punishable under the law of the State on which territory the act was committed, and b) the offender was arrested on the territory of the Czech Republic and was not extradited or transferred to another State.

Likewise, the report for Slovenia refers to extraterritorial jurisdiction as a form of universal jurisdiction, but upon closer look this is confined to crimes affecting essential interests of Slovenia and in fact thus falls under the protective principle.

In certain States the issue appears more uncertain, according to correspondents. For example, Austria has not directly provided for jurisdiction, but there is a reference to treaties, in the sense that Austria has jurisdiction over crimes for which there is a treaty obligation to prosecute. Arguably, for the core crimes this concerns at least the grave breaches of the Geneva Conventions. This is also the case for Japan, although the correspondent notes that the duty does not extend to exercise universal jurisdiction in absentia.

Similarly, the correspondent for Israel –not a State party- referred to a provision in the Israeli Penal Code since 1994 stating that ‘Israeli criminal laws apply to extraterritorial offences that the State of Israel has pledged to penalize through multilateral international treaties that are open for accession to all States, notwithstanding the fact that the offences were committed by non-Israeli citizens or non-Israeli residents, and regardless of the place in which the offences were committed’. According to the correspondent, this concerns only explicit (treaty) obligations to penalise and prosecute; this brings in the grave breaches of the Geneva Conventions under the umbrella of universal jurisdiction, but the problem with that body of law is that it has not been transformed into Israeli law. This makes that probably at this stage universal jurisdiction is in Israel confined to the ‘Nuremberg crimes’ committed during WW II, on the basis of special legislation, as applied, for example, in the Eichmann case.

Uncertainty also subsists currently in Belgium. Belgium used to have the widest possible form of universal jurisdiction under the War Crimes Statute of 1993 – 99, but that Act was repealed. The currently applicable provisions embody the traditional jurisdictional principles; in addition, Belgian Courts have jurisdiction for crimes committed outside Belgium and meant in a ‘rule of international customary or treaty law or a rule of secondary European law that binds Belgium when it is in any way obliged under such rule to refer the case to its competent authorities for prosecution’. The correspondent reports that although this provision seems to allow for universal jurisdiction both the text and the intention of the drafters, which were acting under high political pressure, remain extremely unclear.

The position of the Russian Federation is equally not quite clear. Extraterritorial jurisdiction is provided for by Article 12 (3) of its Criminal Code, according to the correspondent, but only if the crimes run counter to the interests of the Russian Federation, or where a citizen of the Russian Federation or person constantly living in the Russian Federation without citizenship is involved, in cases provided for by treaty.

Finally, Uruguay deserves attention, where the correspondent reports that universal jurisdiction is provided for under the Uruguayan Criminal Code, but only if ‘the case requires it’. This is said to be an open claim that allows for universal jurisdiction to be applied when it is foreseen in the international instrument approved by Uruguay. We do not know, however, whether the Rome Statute is regarded in any way as such instrument.

The only State to our knowledge which has enacted special International Criminal Court legislation, but deliberately did not establish universal jurisdiction over the Rome Statute crimes, is the United Kingdom. The correspondent for this State reports that the policy of the United Kingdom is usually to only establish universal jurisdiction where this is required by treaty. As this is not the case for the International Criminal Court, no universal jurisdiction was established. Two important observations need to be made, however. There is a form of universal jurisdiction in that jurisdiction can be exercised on a suspect now resident in the United Kingdom even if the alleged crime was committed prior to that suspect becoming so resident. This is to prevent the United Kingdom becoming a safe haven for fugitives. Also, despite the inclusion of the grave breach provisions of the 1949 Geneva

Conventions in the Rome Statute and hence in the International Criminal Court Act 2001, the Geneva Conventions Act of 1957 remains in force which provides for universal jurisdiction over grave breaches of both the 1949 Conventions and Additional Protocol I.

As to the scope of universal jurisdiction, the fundamental discussion in case law (*Congo v. Belgium*, International Court of Justice) and doctrine is whether the presence of the suspect on the State's territory is a condition for lawful exercise of universal jurisdiction. There is no definitive answer to the matter; however, given that there is no duty under international law to exercise universal jurisdiction in absentia, States tend to exclude this scope of universal jurisdiction. This so called conditional universal jurisdiction appears to be the standard for all States that allow for universal jurisdiction.

Germany provides the only current exception to this rule. Pursuant to section 1 of its *Völkerstrafgesetzbuch*, it has full and unconditional universal jurisdiction, also in the absence of the suspect. It is reported, however, that in such a situation the Federal Prosecutor enjoys relatively broad discretion whether to start investigations.

To the extent that universal jurisdiction is not available, the jurisdictional bases can be found in the principles of territoriality, active nationality, passive nationality and protection.

The jurisdictional reach of national courts in relation to international crimes may find restriction in obligations under international law, especially international law regarding immunities. The following question was therefore submitted:

g. What is the current –or future- legal regime in your State on international immunities for persons accused of the crimes set out in the Rome Statute?

The answer to this question is clearly influenced by two apparently contradicting norms. On the one hand, there is the general principle of international criminal law set out in article 27 of the Rome Statute, according to which official capacity is irrelevant for criminal responsibility. On the other hand, current international law, as recently restated in the Congo-Belgium decision of the International Court of Justice still attaches significant value to inter-State immunities. The question is how to reconcile these conflicting values and the approaches adopted by States are obviously significant here.

We concentrate us here on immunities pursuant to international law, although we are aware of the fact that immunities under national law, for example for the Head of State, may give rise to considerable more national debate. However, the question of possible inconsistency between article 27 of the Rome Statute and national law has already been addressed in our previous report.

It seems that a number of States have not substantially changed their national law regarding immunities of foreign diplomats and States in light of the Rome Statute. For example, the correspondent for Australia indicated that serving ambassadors and heads of state continue to be immune from prosecution under the Foreign States Immunities Act. The same appears to be the case for Austria, Germany ('the Code of Crimes against International Law does not contain any specific provision concerning immunities of States or persons which, thus, is governed by the general rules of international law on immunities'), Greece ('in the absence of implementing legislation, international immunities would apply'), Slovenia. And certainly Non-party States have not felt the impetus to change anything in their law and practice regarding diplomatic or other immunities under international law. This is the case with the Czech Republic, the Russian Federation, the United States, and Israel.

As losing party in the Congo-Belgium case at the International Court of Justice, Belgium reacted most strongly to the dictum in that judgment. The change in legislation made that the immunities of foreign heads of state, foreign heads of government and foreign ministers of foreign affairs in function are now fully respected; furthermore, Belgium will respect the immunities of other persons recognised by international law or a treaty binding on Belgium.

The Netherlands also had the benefit of taking into account the International Court of Justice *Arrest Warrant* decision, although it was reluctant to blindly follow it. Article 16 of the Dutch International Crimes Act seeks to codify the International Court of Justice's ruling in the *Arrest Warrant* case, but also anticipates future developments in the field of international immunities:

Criminal prosecution for one of the crimes referred to in this Act is excluded with respect to:

- (a) foreign heads of state, heads of government and ministers of foreign affairs, as long as they are in office, and other persons in so far as their immunity is recognised under customary international law;
- (b) persons who have immunity under any Convention to which the Netherlands is a party.

This provision is flexible, which is illustrated by the reference to customary international law, and saves the Netherlands from having to adopt at this time a certain stance on the scope of immunities of former heads of state and other former officials.

South Africa is an exceptional case, as it is the only State –to our knowledge- to in some way challenge and not follow the International Court of Justice *Arrest Warrant* decision, as reported by the correspondent. It is said that the implementation of article 27 of the Rome Statute, can be regarded as allocating to South Africa the same power to ‘trump’ the immunities which usually attach to officials of government by virtue of Article 27 of the Rome Statute.

The logical concluding question is whether the State has in view of the correspondent adequately implemented the International Criminal Court’s substantive international criminal law, in light of the complementarity principle:

- h. In your opinion, only on the basis of the current –or future- laws in your State concerning the investigation and prosecution is there reason to believe that the Court will decide that your State has been unable or unwilling to genuinely investigate and/or prosecute crimes within the Court’s jurisdiction (art. 17 ICC Statute)? In other words, does the legal framework concerning international crimes harbour risks of inability or unwillingness determination?*

For Non-party States the question is whether much work would have to be done in case of ratification:

- f. In your opinion, if your State would be a party to the ICC Statute is there on the basis of your State’s law governing the investigation and prosecution of international crimes reason to believe that the Court will decide that your State has been unable or unwilling to genuinely investigate and/or prosecute crimes within the Court’s jurisdiction (art. 17 ICC Statute)? In other words, does the legal framework concerning international crimes harbour risks of inability or unwillingness determination?*

Of course, the answers to these questions depend very much on one’s view of a) the scope and content of the principle of complementarity and b) the value judgement in respect of a State’s efforts. Therefore, the results have to be presented with caution.

One also has to bear in mind that the available legal framework is just one factor in relation to determining inability or unwillingness. Just as important –even more important- is a State’s policy and practice concerning investigation and prosecution of ICC-crimes.

The general conclusion is unanimously positive for States parties; not a single correspondent has expressed that there would occur an unacceptable inability/unwillingness-risk. However, the following correspondents seem to acknowledge that the legislative framework is not (yet) perfect: Albania (‘provides sufficient ground, albeit not entirely up-to-date, for investigation and prosecution of ICC-crimes’); Sweden (‘only problem may be the short Swedish prescription periods. However it is proposed that these will be changed in the new law on international crimes’), the correspondent refers to the practice regarding a number of investigations into allegations arising from the conduct of British troops in Iraq; the rapporteurs observe that the unavailability of universal jurisdiction for genocide and crimes against humanity might be an inability/unwillingness-risk).

Full conformity and confidence has been expressed by the correspondents for: Australia; Austria; Germany (‘the legal framework clearly excludes risks of inability or unwillingness’); Greece; South Africa (the correspondent points out that even if a determination of inability or unwillingness would occur in respect of South Africa the International Criminal Court Act explicitly allows for prosecution by the Court), Switzerland; and the United Kingdom

The Belgian correspondent said it can be expected to be able and willing, but that the 2003 legislative change has nevertheless considerably weakened Belgium’s capacity to prosecute Rome Statute crimes.

In relation to Non-party States, the gap between the law of the International Criminal Court and national criminal law is as expected the widest. However, the correspondent for the Czech Republic has said that its national criminal law is essentially ready to pass any 'ability' or 'willingness'-test, with the exception of the issue of immunities.

The problematic areas for Israel are well known and lie –from its government perspective- in house demolition and Israeli settlements in the territories occupied in 1967. While these are identified as inability or unwillingness-risks, there are other areas of incompatibility but they may be resolved more easily.

The correspondent for Japan – responding at a time when it was not yet a State-party - pointed out the application of statutes of limitations as potential 'inability'/'unwillingness'-risk and interestingly, the delay in criminal proceedings, which might, according to the correspondent, be regarded by the International Criminal Court as incompatible with a genuine intent to bring a suspect of Rome Statute crimes to justice.

The correspondent for the Russian Federation has identified a significant number of risks regarding ability and willingness: no correct penalisation of Rome Statute crimes, no universal jurisdiction, applicability of statutes of limitations and unavailability of command responsibility.

PART II 2009 Review Conference

Pursuant to article 123(1) of the Rome Statute,

Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

The Assembly of States Parties has decided that the Review Conference will be held during the first half of 2010, on the basis of invitations issued by the Secretary-General of the United Nations in July 2009. The Review Conference will be convened for between five to ten days.¹⁰ According to draft rules of procedure, the Conference will be open to States parties and to States that have signed the Statute or the Final Act of the Rome Conference.¹¹ The Conference may also agree to the presence of other States.¹² Uganda has offered to host the Conference, but as yet no final decision on the venue has been taken.¹³ Uganda gets credit for being the first State to invoke the provisions of article 14, by referring a situation to the Court. Preparatory work on the Conference has been undertaken by the Bureau of the Assembly of States Parties, and by a Working Group on the Review Conference which met during the sixth session of the Assembly in November-December 2007.¹⁴ The 'focal point' for the Review Conference is the Norwegian diplomat Rolf Einar Fife.

Article 123 of the Rome Statute specifically refers to changes to the list of crimes contained in article 5 as the subject matter of the first Review Conference, but adds that this in no way limits its scope with respect to other amendments. The one mandatory requirement is review of the Statute's sole 'Transitional Provision', article 124,¹⁵ which allows States to exclude jurisdiction over war crimes for a period of seven years from the time of entry into force for the State concerned. Other amendments to the Statute may also be considered by the Review Conference, in accordance with article 121. Resolution E adopted as part of the Final Act at the conclusion of the Rome Conference 'recommends' that terrorism and drug crimes be considered by a Review Conference, with the perspective that they

¹⁰ 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/6/Res.2, para. 53.

¹¹ 'Draft rules of procedure of the Review Conferences', ICC-ASP/6/17, pp. 4-18.

¹² *Ibid.*, Rule 71.

¹³ 'Assembly of States Parties to the Rome Statute of the International Criminal Court Sixth session, New York, 30 November - 14 December 2007, Official Records, Volume I', ICC-ASP/6/20, para. 55. See also: 'Review Conference: Report on the Uganda site-visit', ICC-ASP/6/WGRC/INF.1,

¹⁴ 'Assembly of States Parties to the Rome Statute of the International Criminal Court Sixth session, New York, 30 November - 14 December 2007, Official Records, Volume I', ICC-ASP/6/20, para. 55.

¹⁵ *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 124 *in fine*.

lead to an acceptable definition and incorporation of the offences within the Rome Statute.¹⁶ The other unfinished business in the Statute concerns completing the provisions on the crime of aggression in the subject matter jurisdiction of the Court. In addition, an annex containing a list of weapons whose employment would constitute an offence could be considered.¹⁷ The Review Conference may also consider amendments of an institutional nature, in accordance with article 122 of the Statute.

Although amendment of the Statute is the only formal mandate of the Review Conference, it is anticipated that the event will serve other purposes in addition. According to the 'focal point' designated by the Assembly of States Parties,

The Review Conference will also (and not least) play an important role in projecting to the outside world an image of the present stage of development of the Court and of the continued existence of a consensus among States Parties with regard to international criminal justice. In practice, this will also, and not least, be an occasion for a 'stock taking' of international criminal justice at a time where the completion strategies of the International Criminal Tribunals for Rwanda and the Former Yugoslavia are well under way. The key success criteria for the Conference may therefore have less to do with amendments to the Statute than with what kind of overall message is conveyed to the international community at large about international criminal justice, through the holding of the Review Conference.¹⁸

The Assembly of States Parties has recommended that 'in addition to a focus on amendments that may command very broad, preferably consensual support, the Review Conference should be an occasion for a 'stocktaking' of international criminal justice in 2010'.¹⁹

The questionnaire that was circulated to members of the International Law Association Committee on the International Criminal Court requested information concerning amendments of the Rome Statute that might be proposed pursuant to article 121(1). Only one report, from Israel, indicated the possibility of proposed amendments. The correspondent from Israel expressed concerns about article 8(2)(b)(viii), the provision criminalizing settlement in occupied territories. Israel has signed but not ratified the Rome Statute, and indeed claims that it has rescinded its signature. Amendments to the Statute can only be presented by 'any State Party'.²⁰ Amendment of the contested provision may be necessary in order to secure Israeli ratification or accession.

The paucity of information from States about their positions concerning the Review Conference seems to be confirmed by a recent report from the 'focal point' of the Assembly of States Parties, who has himself received few written comments or general views 'without attribution'.²¹ According to the 'focal point', 'several States have indicated that the scope of the Conference with regard to amendments should be limited. Preserving the integrity of the Statute is deemed primordial'.²² There is a very perceivable reticence to expand the agenda of the Review Conference beyond the status of article 124, whose consideration is required by the Statute, and the provisions concerning the crime of aggression. The Rome Statute was a complex and in many ways fragile compromise between various competing interests and values, and attempts to modify a particular element of the text might result in an unravelling of the consensus.

No positions appear to have crystallized with respect to the approach to be taken to article 124. Article 124 declares: 'Notwithstanding article 12 paragraph 1, 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.' Only two

¹⁶ UN Doc. A/CONF.183/C.1/L.76/Add.14, at p. 8.

¹⁷ *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 8(2)(b)(xx)

¹⁸ 'Review Conference: Scenarios and Options, Preliminary Paper by Mr. Rolf Einar Fife', ICC-ASP/5/INF.2, paras. 12-13. Also: 'Review Conference: Scenarios and Options, Progress report by the focal point, Mr. Rolf Einar Fife', ICC-ASP/6/INF.3, paras. 28-31.

¹⁹ 'Strengthening the International Criminal Court and the Assembly of States Parties', ICC-ASP/6/Res.2, para.

²⁰ *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, art. 121(1).

²¹ 'Review Conference: Scenarios and Options, Progress report by the focal point, Mr. Rolf Einar Fife', ICC-ASP/6/INF.3, para. 6.

²² *Ibid.*, para. 27.

States parties, France and Colombia, have availed themselves of its provisions. Indeed, it was widely understood that the text was included in the Statute in order to obtain the support of France.²³ Neither France nor Colombia appear to have made known their own positions on this issue. They might ask to have the provision extended for a further period of time, but they have little to bargain with and it would appear unlikely that other States would be willing to comply. They might also choose to denounce the Rome Statute, in accordance with article 127, although that is an unlikely scenario. Finally, they could simply accept the express terms of article 124, and recognize that its effect is only temporary. The Prosecutor has indicated that Colombia is one of the situations currently being studied by his office, and he may invoke his *proprio motu* powers in this regard within the near future so as to begin an investigation into crimes against humanity (but not war crimes) in that country.

Although the Statute requires that article 124 be ‘reviewed’ by the Review Conference, its repeal would amount to an amendment and would require near unanimity, in accordance with article 121. The purpose of article 124 is to facilitate ratification or accession by States that are nervous about prosecution for war crimes. Arguably, it assisted in obtaining the assent of the two States that have invoked the provision, and perhaps it can do this again with one or more of the nearly ninety States that have not yet joined the Court. In July 1998, the provision was widely condemned by non-governmental organizations as an ugly and unnecessary compromise that would encourage impunity, but the case was surely overstated. The wisest course may be simply to leave it alone.

Crafting the Rome Statute’s provisions with respect to the crime of aggression has been a constant focus of attention by the Assembly of States Parties and, prior to the entry into force of the Rome Statute, by the Preparatory Commission. Article 5(1)(d) of the Rome Statute identifies the crime of aggression as falling within the subject matter jurisdiction of the Court. Article 5(2) declares: ‘The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’ Although nowhere is this issue specifically assigned to the Review Conference required in accordance with article 123(1), the Final Act of the Rome Conference calls for proposals on the issue of aggression to be submitted to the Assembly of States Parties ‘at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute’.²⁴ According to the ‘focal point’ for the Review Conference, the crime of aggression is given particular priority ‘as may be gathered from its inclusion in article 5 of the Statute and from the work currently being carried out by the Special Working Group on the Crime of Aggression, both in the course of various sessions of the Assembly of States Parties and during intersessional discussions’.²⁵ The correspondent of the International Law Association Committee from Germany said that ‘there is the impression that success in this domain is needed in order to further support the acceptability and reliability of the Statute. Failure in this context would, in the eyes of the German Government, constitute a severe set-back with regard to the credibility of the Rome Statute.’ Responses from other correspondents indicated that governments take a constructive approach towards completing the provisions of the Statute concerning the crime of aggression. There is no indication of any government opposed to the process of defining the crime and addressing the related issues.

The crime of aggression figured in the subject-matter jurisdiction of the Court from the time of the International Law Commission draft. Defining what the International Military Tribunal had called ‘the supreme crime’ was the ostensible obstacle that stalled progress on establishment of the Court in the early 1950s. Much effort went into the modalities of including aggression within the Statute both prior to and during the Rome Conference, but the progress was insufficient. As the end of the Rome Conference drew near, the Bureau said that if generally acceptable provisions and definitions were not developed forthwith, aggression would have to be dropped from the Statute.²⁶ This provoked much

²³ Hans-Peter Kaul, ‘Preconditions to Exercise of Jurisdiction’, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, pp. 583-616, at p. 604.

²⁴ UN Doc. A/CONF.183/10, paragraph 7 of Resolution F of the

²⁵ ‘Review Conference: Scenarios and Options, Progress report by the focal point, Mr. Rolf Einar Fife’, ICC-ASP/6/INF.3, Para. 24.

²⁶ UN Doc. A/CONF.183/C.1/L.59.

discontent among many of the delegations, and forced the Bureau to reconsider the matter.²⁷ The result can be seen in article 5.

After adoption of the Rome Statute, the Preparatory Commission established a Working Group on the Crime of Aggression, whose work was then continued by the Special Working Group on the Crime of Aggression set up under the authority of the Assembly of States Parties. There are a number of complex issues, including the definition to be adopted, the role of the United Nations and more particularly the Security Council, and the relevance of other provisions of the Statute concerning issues such as complicity, complementarity and defences in prosecutions for the crime of aggression. The Working Group has yet to reach consensus on the central issues, although some agreement appears to be emerging.

There have been two main schools of thought concerning the definition of the crime, one favouring a generic text while the other advocates a specific approach, through the use of an illustrative list drawn from General Assembly Resolution 3314 (XXIX). The report from Slovenia indicates a preference for the generic approach, but a willingness to compromise. The second approach is said by many to be clearer, and responds to imperatives of legal certainty in a manner consistent with the other definitions, set out in Articles 6 to 8 of the Statute. The most recent discussion paper prepared by the Chairman of the Working Group for its June 2008 session opts for the specific approach.²⁸ The German correspondent reports that previously Germany had limited the crime to clear-cut cases of wars of aggression leading to the occupation or annexation of foreign territory, such as the invasion of Poland by Germany in 1939 or the invasion of Kuwait by Iraq in 1990. Most of those who replied to the questionnaire were not able to indicate the position of their governments on this point.

The reference, in article 5(2) of the Rome Statute, to the fact that the definition ‘shall be consistent with the relevant provisions of the Charter of the United Nations’ is a ‘carefully constructed phrase’ that was ‘understood as a reference to the role the Council may or should play’.²⁹ The underlying issue is the fact that Article 39 of the Charter of the United Nations declares that determining situations of aggression is within the powers of the Security Council: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.’ In the final session of the Rome Conference, the British representative said that ‘the United Kingdom interpreted the reference to aggression in article 5 and, in particular, the last sentence of paragraph 2 of that article, which mentioned the Charter of the United Nations, as a reference to the requirement of prior determination by the Security Council that an act of aggression had occurred’.²⁹ The member of the International Law Association Committee from the United Kingdom reports that the United Kingdom would not wish to see any text emerge that would interfere with the role of the Security Council under the Charter of the United Nations. Along much the same lines, the correspondent from Russia reports that Russia has consistently taken the position that the Court should exercise jurisdiction over aggression only when this has previously been determined by the United Nations Security Council.³⁰ If the United Nations Security Council does not establish the existence of aggression, Russia takes the view that no action by the Court should be taken. Russia considers that the legal bases of balance between functions of the Security Council and the International Criminal Court is governed by article 39 of the Charter of the United Nations. Exercise of jurisdiction by Court without authorization of the Security Council will entail creation of a parallel system for the maintenance of peace and international

²⁷ See, e.g., UN Doc. A/CONF.183/C.1/SR.33, para. 17 (Movement of Non-Aligned Countries), para. 29 (Syria), para. 63 (Ghana), para. 73 (Germany); UN Doc. A/CONF.183/C.1/SR.34, para. 9 (Trinidad and Tobago), para. 43 (Azerbaijan), para. 54 (Southern African Development Community), para. 61 (Iran), para. 68 (Cuba), para. 72 (Jordan), para. 94 (Sudan), para. 98 (Poland); UN Doc. A/CONF.183/C.1/SR.35, para. 1 (Egypt), para. 10 (Greece), para. 12 (Nigeria), para. 18 (Tunisia), para. 29 (Afghanistan), para. 30 (Algeria), para. 33 (Indonesia), para. 47 (Tanzania), para. 57 (Qatar), para. 58 (Philippines), para. 64 (Iraq), para. 70 (Mozambique), para. 83 (Madagascar); UN Doc. A/CONF.183/C.1/SR.36, para. 9 (Angola), para. 11 (Congo), para. 19 (Oman), para. 27 (Malta), para. 32 (Zimbabwe), para. 38 (Bolivia), para. 45 (Cameroon).

²⁸ ‘Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008)’, ICC-ASP/6/SWGCA/2, p. 3.

²⁹ Herman von Hebel and Darryl Robinson, ‘Crimes Within the Jurisdiction of the Court’, in Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999, pp. 79–126 at p. 85.

²⁹ UN Doc. A/CONF.183/SR.9, para. 51.

³⁰ ‘Proposal submitted by Russian Federation’. UN Doc. PCNICC/1999/DP.12

security, and conflicts with the Charter of the United Nations, reports the Russian correspondent, who adds that resolving this matter will affect a decision by Russia to join the Court.

Germany is also of the view that the prerogatives of the Security Council must be safeguarded, reports the correspondent from Germany. The Israeli correspondent says that insisting upon Security Council predetermination of acts of aggression serves Israel's interests, given the almost automatic support that Israel receives from the United States in the Security Council. The most detailed reply on this point was in the report of the correspondent from Slovenia. Slovenia believes that the Security Council's role in determining the existence of the act of aggression is primary. However, the Security Council's powers under article 39 of the Charter of the United Nations are not exclusive. For that reason, Slovenia considers that the Court should be competent and entitled to determine the existence of an act of aggression in the context of individual criminal responsibility. Slovenia is favourable to recognizing the primary role of the Security Council in determining that an act of aggression has taken place, but considers that if it fails to make a determination within a given period of time, then the Court should be empowered to proceed nevertheless.

The latest draft proposed at the June 2008 Working Group leaves this issue essentially unresolved.³¹ Although many options have been considered over the years, it does not seem that consensus on this point is significantly closer than it was ten years ago at the Rome Conference, although there is greater clarity about the possibilities.

Several issues have arisen in the discussions concerning what are principally technical aspects of incorporating a definition of aggression within the Statute. These mainly concern modes of liability and available defences. There appears to be general agreement within the Working Group that aggression should be conceived of as a 'leadership crime' whose scope is confined to persons who 'exercise control over or direct the political or military action of a State'. Confining prosecutions to leaders in a general sense, be they those of the State committing the crime or its accomplices, is in harmony with existing policy of the Office of the Prosecutor as well as some of the early case law of the Court concerning the admissibility criterion of gravity.³²

The questionnaire sent to members of the International Law Association Committee inquired as to whether States currently criminalize the crime of aggression under domestic law, and if so under what conditions. This question is of some relevance to the issue of complementarity. The replies confirm that few States have statutory provisions making aggression a crime. Of course, several States have legislation that addresses, in one form or another, attacks on the State itself. For example, the Albanian correspondent reports that the term 'aggression' is not used in Albanian criminal law, but that there are some related offences, such as 'crimes against the independence and constitutional order', 'crimes against independence and integrity', 'provocation of war' and 'agreement for armed intervention'. Slovenia has provisions dealing with 'attack on territorial integrity', 'attack on the state's independence', 'attack on the State's independence' and 'encroachment upon territorial inviolability'.

Five members of the Committee reported legislation concerning aggressive war in their national legislation, from Austria, Czech Republic, Germany, Russian Federation and Slovenia.

According to the Austrian correspondent, Austria has no specific crime of aggression, but does provide for punishment in the case of a treacherous attack against a foreign State and support of a party to an armed conflict.

Article 26(1) of the German Basic Law contains a ban on preparations for a war of aggression: 'Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare a war of aggression, shall be unconstitutional. They shall be made a criminal offence'. The Committee correspondent from Germany says implementation of this provision is still unsatisfactory, however. Section 80 of the Criminal Code is entitled 'Preparation of a War of Aggression'. It states: 'Whoever prepares a war of aggression (Article 26 subsection (1), of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the

³¹ 'Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008)', ICC-ASP/6/SWGCA/2, pp. 4-5.

³² *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06-8), Decision on the Prosecutor's Application for a Warrant of Arrest, 10 February 2006, paras. 65-66.

Federal Republic of Germany, shall be punished with imprisonment for life or for not less than ten years.’ This provision was invoked in 2003 in the context of complaints to the Federal Prosecutor (*Generalbundesanwalt*) concerning indirect involvement of Germany in the military action against Iraq, through the use of German airspace and military airports by United States forces. In view of the Federal Prosecutor, such ‘indirect’ involvement does not yet amount to a crime under section 80. The Federal Prosecutor also indicated a reluctance to proceed with an investigation given the vagueness of the definition of the crime of aggression under customary international law.

Czech legislation entitled ‘On the Protection of Peace’, enacted in 1950, provides as follows:

- (1) A person who tries to breach a peaceful coexistence of nations by any means of incitation to war, war propaganda or by other form of its furthering, commits a crime against peace.
- (2) The perpetrator shall be punishable by imprisonment between one year and 10 years; the term of imprisonment between 10 and 25 years may be imposed to the perpetrator who commits the crime under par. (1) as a member of the conspiracy group, or in a large scale, or in other aggravating circumstances.’

The Russian Federation criminalizes aggression in chapter 34 of the Criminal Code, which is entitled ‘Crimes against the peace and security of mankind’. The relevant provision, article 353, reads: ‘Planning, preparing, or unleashing an aggressive war shall be punishable by deprivation of liberty for a term of seven to fifteen years. Waging an aggressive war shall be punishable by deprivation of liberty for a term of 10 to 20 years.’ The correspondent reports that this definition corresponds to that of article VI of the Charter of the International Military Tribunal. Also relevant is article 354, which punishes ‘Public Appeals to Unleash an Aggressive War’..

Finally, the Slovenian draft Criminal Code, which was adopted in 2008, introduces a provision on the crime of aggression. According to article 103: ‘Whoever commits an act of aggression defined in accordance with international law shall be given a prison sentence of at least 15 years.’ The term ‘in accordance with international law’ replaces the words ‘the relevant provisions of the Charter of the United Nations’, which were used in the draft legislation submitted by the Ministry of Justice in 2007. The provision appears in the Chapter entitled ‘Criminal offences against humanity’, together with Genocide, Crimes against humanity and War crimes. According to the commentary on the draft legislation, the crime of aggression means ‘declared or undeclared war’, which is criminalised in article 5 of the Rome Statute. The Slovenian Criminal Code also includes a provision on warmongering, which is of general application.

There has been some discussion about the existence of the crime at common law, although it has not been codified in the statutes of common law jurisdictions. In 2003, in his opinion to British Prime Minister Tony Blair on the legal issues involved in invading Iraq, Attorney General Goldsmith warned of possible prosecution for the crime of aggression, which he recalled was recognised customary international and which therefore automatically formed part of the country’s domestic law.³³ The British House of Lords, in *R. v. Jones, et al.*, later confirmed that the crime of aggression formed part of customary international law, but it is not a criminal offence under United Kingdom domestic law.³⁴

³³ Lord Goldsmith, Attorney General, ‘Iraq: Resolution 1441’, 7 March 2003, para. 34.

³⁴ *R. v. Jones et al.*, [2006] UKHL 16.