International Criminal Court (ICC) And Rome Statute

Training Module

Avocats Sans Frontières

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Training Module of International Criminal Court (ICC) and Rome Statute

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PREFACE

The accession to the Rome Statute of the International Criminal Court (ICC) is a crucial step towards addressing impunity and creating lasting peace in a country. It will be a deterrent factor in preventing future atrocities and grave human rights violence in the future.

We believe that all the political leaders, human rights defenders, legal practitioners and other stakeholders should be aware of the importance of the country's accession to the Rome Statute.

The then restored House of Representatives had, on July 25, 2006 had given a directive order to the Government of Nepal to become a party of the Rome Statute of ICC. This had offered an opportunity to Nepal for formally being Member of the ICC through exhausting the process of ratification or accession as per the prescription of the domestic law.

Similarly, Minister of Foreign Affair, Upendra Yadav also filed a proposal to Council of Ministers for the ratification of Rome Statute on February 11, 2009. However, there has been little progress since then.

Proper understanding of the Rome Statute by the stakeholders including the human rights defenders, journalists, lawyers and judges along with parliamentarians and political leaders is mandatory, not only to exert pressure on the Government of Nepal to accede to the Statute but also to create a section that will help its implementation in the country once it is acceded and put into use.

The training module, designed for the three-day training is comprised of sessions on introduction of ICC, structure of the ICC, jurisdiction, process, genocide, war crimes, crime against humanity and relevance of ICC in Nepal with the target audience as mentioned above.

INSEC has brought forward the Training Module on the Rome Statute with the objective of ensuring similar line of understanding among the trainers and the trainees. The module lays out general directions to anyone with an understanding of the international justice process and the international laws and provisions guiding it.

This tool, we hope help explain the Statute to the trainees leading to the creating of a good number of people including lawyers and judges with the understanding of how the Statute works.

I would like to thank Avocats Sans Frontières (ASF) for their financial support to prepare this module. I would also like to thank Adv. Govinda Prasad Sharma 'Bandi', INSEC's HR Monitoring & Advocacy department manager Samjha Shrestha and senior officer Prashannata Wasti, INSEC's Publication head Yogish Kharel and graphic designer Gita Mali for their collective contribution to bring out this module.

Subodh Raj Pyakurel
Chairperson

LIST OF ABBREVIATIONS

AP: Additional Protocol

ASP: Assembly of State Party

ICC: International Criminal Court

IHRL: International Human Rights Law

IHL: International Humanitarian Law

ICL: International Criminal Law

ICTR: International Criminal Tribunal on Rwanda

ICTY: International Criminal Tribunal on Yugoslavia

INSEC: Informal Sector Service Centre

NGOs: Non-Governmental Organizations

OTP: Office of the Prosecutor

UN: United Nations

VWU: Victim and Witness Protection Unit

WPP: Witness Protection Program

The opinions expressed in these texts are the exclusive responsibility of the author and do not necessarily reflect the position and opinion of INSEC.

INTRODUCTION

This Module has been developed to facilitate a series of training programs on International Criminal Court (ICC) and its jurisdiction to be conducted by INSEC and other stakeholders throughout the country in order to make the legal community of Nepal familiar with the ICC and its relevance in Nepal.

The Module aims to help strengthen the capacity of trainers and other legal training providers to effectively organize and deliver comprehensive, practice-oriented and lasting-impact for legal practitioners. It is also hoped that the materials will strengthen the capacity of legal practitioners that would enable them to investigate, prosecute, try and otherwise manage proceedings relating to violations of IHL in support of human rights, rule of law, democratization and other long-term development in Nepal.

The materials are intended to serve primarily as training tool and resource for legal trainers in Nepal. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal law of Nepal.

1. Structure

The introductory section includes a list of abbreviations, objectives of the Module and structure of the Sessions.

The first session begins with the historical evolution of the International Criminal Court (ICC), as well as its first decade of operation. In doing so, this section highlights some of the key controversies surrounding the ICC, notably the role of the UN Security Council in bringing cases to it.

The second session then provides an overview of the ICC, organizational structure of the ICC, that includes- Presidency, Chambers, Office of the Prosecutors, Registry and Assembly of the States.

The Third Session will deal with the question of jurisdiction in detail. This session considers the four possible jurisdictional bases under the Rome Statute for the prosecution of the three core crimes which are the focus here: a) The territorial jurisdiction over states parties (jurisdiction *rationae loci*); b) Personal jurisdiction over nationals of states parties (jurisdiction *rationae personae*); c) Ad hoc consent-based jurisdiction in respect of non-states parties, and; c) conferred jurisdiction by the UN Security Council.

The Fourth, Fifth and Sixth Sessions aim to deal with crimes under the ICC jurisdiction. Each session will deal with the definition of the crimes, elements of crimes and nexus with the act of the perpetrator and the context of the commission of such crimes.

The Seventh Session deals with the grounds for defense, this includes –the notion of immunity under international law, supper orders, alibi, intoxication and mental capacity. The Eighth Session deals with the witness and victim protection provision under the Rome Statute. It describes the various victim and witness protection programs that have been in place in various international criminal tribunals.

The Final Session deals with the relevance of the ICC in Nepal's case. It will examine the advocacy efforts by NGOs and civil society so as to get Nepal accede to Rome Statute.

2. Sessions/ issues

Session 1: Introduction of the international criminal court

Session 2: Jurisdiction of the court

Session 3: Proceeding of the court

Session 4: Genocide

Session 5: Crimes against humanity

Session 6: War crimes

Session 7: Defenses and other grounds for excluding liability

Session 8: Witnesses and victims protection

Session 9: Relevance of the ICC in Nepal

Each session contains a note for trainers, a description of the issues to be discussed and a list of outcomes. The training materials also include the substantive law in relation to modes of liability, superior/command responsibility, grounds for excluding criminal liability and sentencing. Procedural and evidentiary issues are also addressed, as well as issues pertaining to victims and witnesses. However, the Module is not a comprehensive legal text on all the jurisprudence of the international courts and national jurisdictions. It deals with the main legal issues and cases in order to facilitate training. Where possible, materials have been identified in the footnotes. The materials are meant to be used as a resource in training programs for lawyers, prosecutors and judges.

Session 1

INTRODUCTION OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court (ICC) is a treaty-based, world court aimed at helping bring an end to impunity for the offenders of the worst crimes of alarm to the global community. The International Criminal Court is an independent international organization, though the UN had played role in establishing it. Its headquarters is at The Hague in the Netherlands.

Objective of the session

At the end of this session, participants will understand:

- An overview of the ICC
- The organizational structure of the Court;
- The procedures of the Court;
- The power, function and mandate of the Courts;

Notes for trainers

- Familiarize participants with the ICC by identifying the main debates surrounding its creation and the crimes it should address.
- Ideally, someone with in-depth knowledge on International Criminal Court should be invited to speak, discussing his or her experience with the creation of the ICC and emphasizing the importance of organized civil society's participation in the process.
- Once the facilitator has outlined the topic and/or the invited speaker has finished, open up the session for questions and consultations.

Trainer should explain the historical background and explanation of the establishment of the various international and hybrid courts to participants. It will provide them with an understanding of the emerging system of international criminal justice, a foundation from which they will be able to appreciate the diverse range of courts relevant to their work, the differences between these jurisdictions, and most importantly, the basis of the case law that they may wish to rely on in their national jurisdictions. This is also the Module in which participants can focus on the ICC as the primary jurisdiction for the purposes of the training to follow. It is essential that participants are familiar with the manner in which these courts were established and the nature of the different jurisdictions. This will enable participants to advance arguments in their national jurisdictions about the applicability or usefulness of the law of these courts

1.1 An Overview of the Rome Statute

The International Criminal Court (ICC) is a permanent institution, which was created by a treaty, the Rome Statute, after 120 states adopted the Rome Statute of the International Criminal Court on 17 July 1998. The ICC sits in The Hague, the seat of the government of the Netherlands, alongside its long-established cousin, the International Court of Justice (ICJ).

1.1.1 The Historical Evolution of the Court

The concept of an international criminal court can be seen as early as the 15th century[1]. The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.

The Brussels Protocol of 1874 was one of the earliest attempts at drafting a code regulating the conduct of armies in the field. While it made no reference to enforcement or any potential consequences of violations of the agreement, it resulted in a group known as the Institute of International Law drafting the "Manual on the Laws of War on Land" in 1880. This document was to become the model for the conventions adopted at The Hague Peace Conferences of 1899 and 1907[2].

The Hague Convention IV, adopted in 1907, for the first time referred to liability for breaches of international law. The Convention simply established state obligations, not personal criminal liability. Before this, international obligations had always been trumped by the doctrine of state sovereignty, going back at least to the Treaty of Westphalia of 1648.

1 Sandra L. Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," Denver Journal of International Law and Policy, Vol. 23, 1995, p. 421

2 Leslie Green, "War Crimes, Crimes against Humanity, and Command Responsibility," Naval War College Review, Vol. L, No. 2, Spring 1997, p. 68.

World War, Trial and International Tribunal

The development of international humanitarian law from 1939 to 1945 that intended to regulate the war contributed to develop the world court concept on serious crimes. The Nazi government of Germany, in launching a military offensive and committing startling atrocities, led the Allied powers to "place among their principal war aims the punishment, through the channel of organized justice, of those guilty for these crimes, whether they have ordered them, perpetrated them, or participated in them." In the aftermath of World War II, the International Military Tribunal sitting at Nuremberg (the IMT or "Nuremberg Tribunal") and the International Military Tribunal for the Far East sitting at Tokyo (the IMTFE or "Tokyo Tribunal") were established.

In Nuremberg trial, major war criminals responsible for "crimes against peace," "war crimes" and "crimes against humanity" were prosecuted, tried and punished. Similarly, trials of Japanese ministers and military leaders took place in Tokyo. The Tokyo Charter was almost identical to that of Nuremberg. The Tokyo Tribunal trials lasted for more than two years and all accused were found guilty. Seven were sentenced to death. In 1948, the Genocide Convention was adopted in response to Nazi atrocities and was among the first conventions of the United Nations to address international crime.

The Geneva Conventions

The Geneva Conventions codify laws regulating armed conflict and the humane treatment of prisoners of war and are a recent development in the history of war.

The four Geneva Conventions, as most recently revised and expanded in 1949, comprise a system of safeguards that attempt to regulate the ways wars are fought and to provide protections for individuals during wartime. The first Convention covers soldiers wounded on the battlefield; the second covers sailors wounded and shipwrecked at sea; the third covers prisoners of war; and the fourth covers civilians taken by an enemy military.

The ad hoc tribunals

The International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague (Netherlands), was established in February 1993 by Security Council resolution 808. Its jurisdiction is limited to the acts committed in the former Yugoslavia since 1991 and covers four categories of crimes as defined in the Tribunal's Statute, namely, grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity.

The International Criminal Tribunal for Rwanda (ICTR), based in Arusha (United Republic of Tanzania), was established in November 1994 by Security Council resolution 955. Its jurisdiction is limited to the acts committed in Rwanda or by Rwandan nationals in neighboring States during 1994 and covers three categories of crimes, namely, genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, which set out rules applicable to non-international armed conflicts.

Before the creation of ICC and other international *ad hoc* tribunals, prosecution for war crimes and crime against humanity was used to be conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power[3]. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases.

The Rome Statute empowers the ICC to prosecute the crimes of genocide, crimes against humanity, war crimes, and probably the crime of aggression from 2017 onwards. According to its Preamble, one of its primary purposes is to 'establish an independent permanent International Criminal Court ..., with jurisdiction over the most serious crimes of concern to the international community as a whole' in order to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

The Rome Statute came into force on 1 July 2002, after 66 states ratified it. Many features of the ICC are distinct from the ICTY and ICTR, including its role as a complementary, as opposed to the primary, judicial institution with regards to national courts. The ICC is a court of "last resort" and is based on the principle of complementarity—that the primary responsibility for exercising jurisdiction over international crimes rests with domestic jurisdictions and that the ICC cannot act unless the country with jurisdiction over the case is not investigating and prosecuting or is "unwilling or unable genuinely" to do so[4].

The Judicial Division includes pre-trial chambers in addition to trial and Appeals Chambers; the ICTY and ICTR do not have pre-trial chambers. In addition to the Registry, Office of the Prosecutor and Judicial Division, it also includes the semi-autonomous Office of Public Counsel for the Defence and the Office of Public Counsel for Victims, both of which fall under the Registry. The court is also subject to administrative oversight by the Assembly of States Parties (ASP).

Another notable difference between the ICC and other tribunals is that victims have the right to participate in proceedings. The ICC has jurisdiction over "the most serious crimes of international concern", namely, genocide, crimes against humanity, war crimes and aggression committed after the Statute entered into force (1 July 2002). In order to provide certainty and avoid issues with the principle of legality, the ICC Statute defines the crimes within its jurisdiction in great detail. The ICC Elements of Crimes, which can be used by the court in interpreting and applying the law, provides further definition of crimes[5].

3 An introduction to International Criminal Court, Second edition, William A Schabas, Cambridge University Press 2004, page 1.

4 The ICC has a structure similar to the ICTY and ICTR but includes some important differences.

5 Currently, the crime of aggression forms part of the basis for the jurisdiction of the ICC, but the court is currently unable to exercise jurisdiction over this crime.

The ICC's personal and territorial jurisdictions are also limited. A case can be heard if the crime is committed on the territory of a State Party to the Rome Statute, if the accused is a national of a State Party or if a non-State Party has accepted the jurisdiction of the ICC with respect to the crime at issue. However, if the UN Security Council refers the case to the ICC, these limitations do not apply and the ICC can hear cases about crimes originating in or committed by nationals of states that are not parties to the Rome Statute. The UN Security Council, under its Chapter VII powers (which apply only when there is a threat to peace, a breach of the peace or an act of aggression), can also ask the ICC to defer an investigation or prosecution for renewable periods of up to 12 months.

At the heart of the Rome Statute is the principle of complementarity, under which the court will only be able to admit a case before it (where the other jurisdictional bases of nationality and territoriality are present) if the state party concerned is unwilling or unable to prosecute the offender nationally.

The principle of complementarity represents far more than a presumption in favour of local prosecutions; rather, it ensures that the ICC reinforces the criminal justice systems of states parties at a national level, as well as the broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. Aside from assuaging the concerns of states over the potential usurpation of their national sovereignty, the principle carries with it other important consequences, such as recognition of the need for full participation by victims; the practicality of local prosecutions; and the practical limitations of a court with potentially universal jurisdiction.

The Rome Statute performs two distinct roles: the first is to set out the structure, powers, and functions of the ICC in prosecuting the crimes of genocide, crimes against humanity, war crimes, and aggression; the second is to establish a cooperation regime for states parties to assist the ICC in fulfilling this mandate. The first part of this module will set out the structure, power, and functions of the court. The second part considers important practical and legal aspects of its operation, especially the matter of state cooperation and the related issue of immunities.

1.1.2 Importance of the Court

"The establishment of the Court is … a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."[6]

The ICC contributes to the fight against impunity and the establishment of the rule of law by ensuring that the most severe crimes do not go unpunished and by promoting respect for international law. The core mandate of the ICC is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity and war crimes when national jurisdictions for any reason are unable or unwilling to do so. The ICC's first verdict was issued on 14 March 2012 and the first sentence

6 Kofi Annan, Secretary-General of the United Nations, Campidoglio, Rome 18 July 1998

on 10 July 2012 in the Lubanga case, where child soldiers under the age of 15 were conscripted, enlisted and used to actively participate in hostilities in the DRC.

"Determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the International Community as a whole and thus contribute to the prevention of such crimes"[7]

"The role of the International Criminal Court in a multilateral system that aims to end impunity and establish the rule of law"[8]

"…the fight against impunity for the most serious crimes of international concern has been strengthened through the work of the International Criminal Court"[9].

"The International Criminal Court offers new hope for a permanent reduction in the phenomenon of impunity" and establishment of the ICC is "[u]ndoubtedly the most significant recent development in the international community's long struggle to advance the cause of justice and the Rule of Law"[10].

2. Organizational Structure of the Court

Presidency

Under article 34 of the Rome Statute, the ICC is composed of four organs: the Presidency, Chambers, the Office of the Prosecutor (OTP), and the Registry. The Presidency consists of the president of the court, together with his or her first and second vice-presidents. The Presidency is primarily responsible for the proper administration of the ICC. This role, however, does not include the administration of the OTP, which is reserved for the prosecutor under article 42.

Chambers

The judges' Chambers are divided into three divisions:

- an appeals division,
- a trial division, and
- a pre-trial division

The appeals division is composed of the president and four other judges who sit on a single Appeals Chamber. The trial division is composed of not less than six judges, three of whom make up each pre- trial chamber. The pre-trial division consists of not less than six judges. Although three judges sit on each pre-trial chamber, certain functions of this division are carried out by a single judge in relation to the state(s) concerned and various procedural aspects (e.g. the disclosure of evidence prior to trial) under the Rules of Procedure and Evidence.

The ICC has 18 full-time judges who are nominated and elected under a complex procedure set out in article 36. Briefly, the Assembly of States Parties (ASP) (see

7 Preamble of the Rome Statute

8 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1, 19 September 2012.

9 Statement by the President of the Security Council, 26 June 2010, S/PRST/2010/11

10 Report of the Secretary-General, 23 August 2004, S/2004/616, para. 49

infra) elects the judges by secret ballot from candidates nominated by states parties to the Rome Statute, who are not necessarily a national of a nominating state. There are two lists: one comprising individuals with 'established competence in criminal law and procedure'; the other detailing candidates with 'established competence in relevant areas of international law'. Judges must be 'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices'. Furthermore, in selecting judges, states must consider the need for representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges.

Judicial terms are for nine years and, ordinarily, are not eligible for re-election, although a judge assigned to a trial or Appeals Chamber 'shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber. Judges assigned to the appeals division 'serve in that division for their entire term of office', while judges assigned to the trial and pre-trial divisions shall serve in those divisions for a period of three years, after which they will be re- assigned. Finally, no two judges may be nationals of the same state.

Once elected, judges are assigned to a division 'based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law.' Article 52 mandates judges to adopt Regulations of the Court 'necessary for its routine functioning'. Article 41 sets out the procedure for excusing and disqualifying judges.

Office of the Prosecutor

The OTP is a separate organ of the ICC. Headed by the prosecutor, it is responsible for receiving referrals and any substantiated information on suspected crimes falling within the jurisdiction of the court, for examining them, and for conducting investigations and prosecutions before the ICC. The prosecutor and deputy prosecutor – who must be of different nationalities – are elected by secret ballot by the ASP for a non-renewable 9-year term. Both must be persons of high moral character, be highly competent, and have extensive practical experience in the prosecution or trial of criminal cases.

In order to guarantee its independence, the prosecutor has full authority over the management and administration of the OTP, including the staff, facilities, and other resources thereof. The issue of independence of the prosecutor and the OTP was raised recently in the context of the introduction of an Independent Oversight Mechanism by the ASP (see infra).

Registry

The Registry is responsible for the 'non-judicial aspects of the administration and servicing of the Court'. It is headed by the registrar, who falls under the authority of

the president of the ICC. The registrar is elected by secret ballot by the judges of the court, for a 5-year term of office, which is renewable once.

One of the key functions of the registrar is the establishment of a Victims and Witnesses Unit within the Registry. According to the Rome Statute:

> *This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling 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 shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.*

The Assembly of States Parties

The Assembly of State Party (ASP) is not an organ of the ICC, yet is a key part of its structure. The ASP was a relative latecomer in the negotiations leading up to the adoption of the Rome Statute. As Bos notes, 'only at the very end of the discussion in the Prep Com was serious attention given to ... [its] establishment'. Perhaps for this reason, in the final version of the Rome Statute the ASP's role is defined functionally (by what it does) rather than conceptually (by what it is). In particular, article 112 sets out different tasks assigned to the ASP as well as how the body shall be constituted and operate. This provision is supplemented by other articles that assign additional tasks to the ASP.

As a result, there is little in the Rome Statute regarding what the ASP cannot do; instead it is open-ended, reflected in the catch-all clause in article 112(2)(g) which gives the ASP the power to '[p]erform any other function consistent with this Statute or the Rules of Procedure and Evidence'. That said, there is one important limitation on the ASP's role with respect to issues of judicial independence. As the debates during the negotiations, and subsequent wording, of article 112 (and article 119) reveal, there was a deliberate choice to preclude the ASP from considering matters of a judicial nature.

The Rome Statute further provides (in article 119) that the ASP will play a role in the settlement of disputes. Article 119, which relates to general disagreements, provides for two distinct procedures. First, disputes regarding the judicial functions of the ICC must be settled by the court itself. Second, disputes that do not pertain to judicial functions – that arise between two or more states parties – and relate to the interpretation or application of the Rome Statute, shall be referred to the ASP. In such circumstances the ASP may: (a) seek to settle the dispute itself; or (b) make recommendations on further means of dispute settlement, which notably includes referral to the International Court of Justice (ICJ). Here too the drafters were careful to ensure that the ASP was prevented from considering judicial questions – that role was left to the ICC. However, there is uncertainty regarding the distinction between disputes relating to 'judicial functions' and 'other disputes' arising between two or more state parties.

Session 2

JURISDICTION OF THE COURT

Objectives of the session

At the end of this session, participants will understand:

- The territorial jurisdiction over states parties (*jurisdiction rationae loci*).
- Personal jurisdiction over nationals of states parties (*jurisdiction rationae personae*).
- Ad hoc consent-based jurisdiction in respect of non-states parties.
- Conferred jurisdiction by the UN Security Council.

Notes for trainers

- Familiarize participants with the jurisdictions of the ICC.
- Ideally, someone with in-depth knowledge on International Criminal Law should be invited to speak, discussing his or her experience on the subject matter and territorial jurisdiction
- Once the facilitator has outlined the topic and/or the invited speaker has finished, open up the session for questions and consultations.

Trainer should explain the four possible jurisdictional bases under the Rome Statute for the prosecution of the three core crimes which are the focus here:

- The territorial jurisdiction over states parties (*jurisdiction rationae loci*).
- Personal jurisdiction over nationals of states parties (*jurisdiction rationae personae*).
- Ad hoc consent-based jurisdiction in respect of non-states parties.
- Conferred jurisdiction by the UN Security Council.

The first two are basically the same as the traditional domestic bases of jurisdiction by the same name, as adopted and applied by the ICC. The latter two are unique to international law and, in the case of jurisdiction conferred by the UN Security Council, to the Rome Statute.

The trainer should explain the sticking points on jurisdiction :

- under what conditions prosecutions would be initiated (and therefore jurisdiction would be exercised); and
- what the basis of such jurisdiction would be.

With reference to the former issue, in one camp were like- minded countries that argued for a progressive prosecutorial regime whereby the prosecutor could undertake *proprio motu* prosecutions. In the other camp were UN Security Council veto-bearing states, especially China and the US, that sought, somewhat predictably, a court that would be subject to UN Security Council control. This matter overlapped with the second issue of controversy, namely the basis upon which the ICC would exercise jurisdiction. Some states (notably Germany) pushed for automatic, universal jurisdiction, whereas others sought to limit the court's jurisdiction to those states (and their nationals) who sign up to the Rome Statute. The result of these negotiations was a primarily consent-based jurisdictional regime – including options of both permanent and ad hoc consent to jurisdiction by states – with a special referral power for the UN Security Council; but with some limitations on how jurisdiction can be triggered.

2.1 Territorial jurisdiction (ratione loci)

Under article 12(2)(a), the ICC may exercise its jurisdiction if '[t]he State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft' is a party to the Rome Statute. In effect, this gives the ICC territorial jurisdiction over all states parties. As noted above, this jurisdiction may be exercised either upon self-referral by the state party concerned under article 14, or when the prosecutor initiates an investigation in respect of such a crime under article 15.

2.2 National jurisdiction (ratione personae)

Under article 12(2) (b) the ICC may exercise its jurisdiction if '[t]he State of which the person accused of the crime is a national' of a state party. In effect, this gives the ICC personal jurisdiction over all such nationals. Once again, this jurisdiction may be exercised either upon self-referral by the state party concerned under article 14, or when the prosecutor initiates an investigation in respect of such a crime in exercise of his or her powers under article 15.

2.3 Ad hoc referrals by non-states parties

Article 12 of the Rome Statute makes provision also for a non-state party to accept the exercise of the ICC's jurisdiction over a crime within the subject matter jurisdiction of the court that either took place on the territory of that state or else was committed by one of its nationals. In such circumstances, article 12(3) provides that when a non-state party accepts the ICC's jurisdiction it must do so by lodging a declaration to this effect with the registrar. Further, under this provision, the 'accepting state' must cooperate with the ICC 'without any delay or exception in accordance with Part 9' of the Rome Statute.

2.4 UN Security Council Referrals

Under article 13(b), the UN Security Council can refer 'a situation in which one or more [article 5] ... crimes appears to have been committed' to the ICC for investigation and possible prosecution. This referral power potentially has far- reaching implications for many states, particularly for the ICC's detractors. In particular, through this provision the court's jurisdictional reach may extend to the territory and nationals of every state in the world, whether or not they are a party to the Rome Statute[11]. This extraordinary and unsurprisingly controversial jurisdiction stems from the binding nature of Chapter VII, UN Security Council resolutions on all UN member states[12].

Article 13(b) of the Rome Statute is especially important in relation to intra- state conflicts involving non-states parties such as Sudan, because without it such states, even if directly or indirectly involved in the alleged atrocities committed, would be beyond the jurisdictional reach of the ICC. Consequently, Cassese calls this article the 'sledgehammer' of the ICC, which 'may prove to be the most effective to seize the Court whenever situations similar to those in the former Yugoslavia and Rwanda occur'.

However, in order for the referral to be lawful it must be exercised in accordance with Chapter VII, that is, the situation referred to the ICC must constitute a 'threat to peace and security' within the international community as understood with respect to article 39 of the UN Charter. When the Rome Statute was drafted, and even after it came into force, such UN Security Council referrals were considered to be unlikely, especially given the initial negative responses to the ICC by some P5 states, specifically the US and China. However, to date the UN Security Council has utilised this article on two occasions already, once in respect of Darfur by way of Resolution 1593 (2005), and more recently in respect of Libya by way of Resolution 1970 (2011).

2.5 Subject-matter jurisdiction (ratione materiae)

Article 5(1) sets out the four core crimes, which come within the ICC's jurisdiction. It state:

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- The crime of genocide;
- Crimes against humanity;
- War crimes;
- The crime of aggression
- Other offences : offence against the administration of justice

11 Sadat and Carden, The International Criminal Court, 404; S Bourgon, Jurisdiction ratione loci, in A Cassese, P Gaete, and J Jones (eds), *The Rome Statute of the International Criminal Court: A commentary*, Oxford: Oxford University Press, 2002, 556.

12 Article 25, UN Charter (1945)

Importantly, article 5(2) qualifies the court's jurisdiction in respect of the crime of aggression by stating that the ICC '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', with the added proviso that '[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations'.

2.6 Temporal jurisdiction (ratione temporis)

The ICC's jurisdiction is limited temporally in two respects. First, under article 11(1), the court itself only has jurisdiction with respect to crimes committed after 1 July 2002, the date on which the Rome Statute entered into force. This is a general temporal limitation on the ICC's jurisdiction, based on the *nullen crimen, nullen poena* principle.

Second, article 11(2) limits its temporal jurisdiction in respect of those states that ratified the Rome Statute after 1 July 2002. It states that '[T]he Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State'.

An exception is created in circumstances when the state concerned has made a declaration to the registrar under article 12(3) accepting the ICC's jurisdiction, subject to the potential difficulty of retrospectively as explained previously.

Session 3

THE PROCEEDINGS OF THE COURT

Objectives of the session

At the end of this session, participants will understand:

- The arrest and surrender procedures
- The confirmation of the charges
- The sentencing procedures
- Appeal procedures
- Immunity under Rome Statute

Notes for trainers

Trainer should:

- Familiarize participants with the arrest and surrender, confirmation of charges, sentencing policy and the appeal procedures under Rome Statute,
- Ideally, someone with in-depth knowledge on International Criminal Court should be invited to speak,
- Once the facilitator has outlined the topic and/or the invited speaker has finished, open up the session for questions and consultations.

3.1 Investigation

The prosecutor initiates an investigation under article 53 once he or she is satisfied that, on the information available, there is:

- A reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed; and
- The case is or would be admissible, unless taking into account the 'gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'.

If, upon further investigation, the prosecutor concludes that there are insufficient grounds to launch a prosecution – based on inter alia the factual and legal basis of the case, issues of admissibility, and/or the interests of justice – in accordance with article 53(2), he or she shall inform the pre-trial chamber and either the state that referred the situation under article 14 or the UN Security Council under article 13(b), whichever is applicable.

This decision is reviewable by the pre-trial chamber – either at the request of the referring party or, under certain circumstances, by the pre-trial chamber *mero motu.*

Importantly, the prosecutor himself or herself may 'reconsider a decision whether to initiate an investigation or prosecution based on new facts or information'. In addition, article 54 sets out the duties and powers of the prosecutor with respect to investigations; article 55 sets out the rights of suspects during this phase; and article 56 establishes a special procedure to be followed in the case of a 'unique investigative opportunity'.

Throughout this phase of the proceedings, it is the pre-trial chamber that is responsible for the efficient administration of justice. Its functions and powers are detailed in article 57, which include: issuing such orders and warrants as may be required for the purposes of investigation; issuing requests for cooperation from states; assisting the suspect in obtaining the necessary information and evidence for his or her defence; facilitating the prosecutor's investigation where appropriate; and other specific functions under the Rome Statute and Rules of Procedure and Evidence.

3.2 Arrest and surrender, summons and voluntary surrender

If the prosecutor, upon investigation, decides to proceed to trial with a particular case, there are two procedures available to him or her to secure the accused's presence in court for any proceedings.

Arrest and surrender

The first involves the issuance of an arrest warrant for the suspect under article 58. The prosecutor can apply to the pre-trial chamber for an arrest warrant at any time after the initiation of the investigation.

In deciding whether or not to grant such an application, the pre-trial chamber must be satisfied that: 'There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'[13], and that the issuance of an arrest warrant is necessary to ensure the accused's presence at trial, to ensure that the person does not obstruct or endanger the investigation or court proceedings, or to prevent the continued commission of the crime or a related crime which is within the jurisdiction of the ICC and which arises out of the same circumstances.[14]

Notably, the issuance of an arrest warrant alone appears to be insufficient to place an obligation on states in respect of arrest and surrender. Rather, on a literal interpretation, the Rome Statute appears to require a further request for cooperation to be made by the ICC to the state[s] concerned under articles 89 and 91, in addition to the issuance of the arrest warrant.[15]

13 Article 58(1) (a), Rome Statute.

14 Article 58(1) (b), Rome Statute.

15 Article 91(2) sets out modalities for: '[A] request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 ...'. Moreover, under article 58(5): 'On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.'

Summons and voluntary surrender

An alternate, less coercive, means available to the prosecutor to secure the attendance of the suspect before the ICC is to request the pre-trial chamber to issue a summons for his or her appearance under article 58(7). Such a request will only be granted if the pre-trial chamber is satisfied that 'there are reasonable grounds to believe that the person committed the crime', and that the summons alone will be sufficient to secure the accused's attendance.

The first person to appear voluntarily before the ICC under this procedure was Bahr Idriss Abu Garda, in May 2009, on the basis of a summons issued by Pre-Trial Chamber I on 7 May 2009 relating to an attack on peacekeepers in Sudan. During the initial hearing, the prosecutor indicated that he would not be seeking an arrest warrant because Abu Garda had indicated his willingness to appear voluntarily. He was followed by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, who appeared voluntarily in June 2010 pursuant to a summons issued in August 2009 in connection with the same attack. On 8 February 2010, Pre-Trial Chamber I refused to confirm the charges against Abu Garda, while the charges against Banda and Jerbo were confirmed unanimously by Pre-Trial Chamber I on 7 March 2011.

The procedure was followed again in a different, more recent case when, in April 2011, six Kenyans appeared before Pre-Trial Chamber II following the issuance of summonses in respect of their alleged roles in the 2007-8 post-electoral violence in that country.

Initial appearance of the suspect

Once the suspect's presence has been secured – whether by way of an arrest warrant, pursuant to a summons, or through voluntary surrender – article 60 sets out the procedure that the pre-trial chamber must follow during the suspect's initial appearance. This includes ensuring that the suspect is aware of the crimes which he or she is alleged to have committed, and that he or she has been informed of his or her rights under the Rome Statute, which include the right to apply for interim release.[16]

In the event that the pre-trial chamber denies interim release, the suspect may appeal that decision in the same way that conversely the prosecutor may appeal a decision to grant such release.

3.3 Confirmation of charges

The next stage of the proceedings is the confirmation of charges hearing, which must take place 'within a reasonable time after the person's surrender or voluntary appearance before the Court'.[17]

16 Article 60(1), Rome Statute

17 Article 61(1), Rome Statute

At this stage, the prosecutor must adduce sufficient evidence to establish 'substantial grounds to believe that the person committed the crime' with respect to each charge. The burden of proof on the prosecutor at this stage ('substantial grounds to believe') is more onerous than that at the arrest warrant phase of proceedings ('reasonable grounds to believe'), but a lower burden than the one applicable at the trial ('beyond a reasonable doubt').

At the confirmation of charges hearing, the suspect may challenge the charges and present evidence in support of it. After considering the evidence presented by the prosecutor, and any submission made by the suspect(s) in response to it, the pre-trial chamber will either confirm or decline to confirm the charge(s) (in whole or in part) or request further evidence from the prosecutor in respect of specific charges. In addition, the pre-trial chamber may amend the charges on the basis that the evidence establishes that a different crime within the ICC's jurisdiction has been committed.[18]

Notably, and notwithstanding the fact that article 61(1) states that the confirmation of charges hearing 'shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel', there is a procedure for such a hearing to take place without the presence of the accused in exceptional circumstances. Under article 61(2), the prosecutor may request a confirmation of charges hearing in absentia if the suspect has waived his or her right to be present, or has *'[f]led or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held'*. In addition, the pre-trial chamber can elect to undertake a confirmation of charges hearing in absentia in the same conditions.

Once the charges have been confirmed, but before the trial has begun, the prosecutor may approach the pre-trial chamber to amend the charges provided that if additional charges are preferred, the confirmation of those charges takes place de novo.[19]

3.4 Trial

Following the confirmation of charges, the Presidency assigns the case to a trial chamber in order for the trial phase to commence.[20]

Once this has been done, it becomes that chamber's responsibility, in consultation with the parties, to lay the ground rules for the fair and expeditious conduct of proceedings. This includes providing for the disclosure of documents or information; ruling (if applicable) on the joinder of proceedings; and addressing any other preliminary issues that arise before the trial proper commences.[21]

18 Article 58(6), Rome Statute

19 Article 61(9), Rome Statute

20 Article 61(11), Rome Statute

21 In this regard, article 64(4) states: 'The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division'

In addition, according to article 19(6), any challenges to the admissibility of a case or the jurisdiction of the ICC under that provision must be referred to the trial chamber from this point onwards.

Once the trial commences, the presiding judge is responsible for the conduct of proceedings and will, as appropriate: rule on any question of admissibility and evidential matters; maintain order in the course of the hearing; call witnesses and order the production of certain documents; rule on the protection of confidential information; protect the accused, witnesses, and victims; and rule on any other relevant matters.

Furthermore, article 64(2) places a special obligation on the trial chamber to 'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'. To this end, when the trial starts the accused must be read the confirmed charges, and the trial chamber must ensure both that the accused understands the charges and that he or she is afforded an opportunity to plead in this respect.

In addition, articles 66 and 67 set out the rights of an accused, which include the right to a prompt, impartial and fair hearing; the right to prepare a defence (including the right to counsel); the right to cross-examine witnesses and present evidence; the right to remain silent; and, perhaps most importantly, the right to be presumed innocent until proven guilty beyond reasonable doubt. Further notable provisions include article 64(7), which provides for proceedings to be heard *in camera* in special circumstances; and article 63, which unequivocally precludes trials in absentia.

Where an accused decides to make an admission of guilt, the trial chamber must ensure that he or she understands the nature and consequences of this admission; that the admission was made voluntarily; and that it is supported by the facts of the case based on the available evidence.

Having done so, it may convict the accused of the crime or order the continuation of the trial. In the event that the accused pleads not guilty and the case goes to a full trial, at the end of the trial the judges of the trial chamber must reach a decision based on the evaluation of the evidence and the entire proceedings.[22] In this regard, the court may not exceed the facts and circumstances described in the charges and must base its decision only on the evidence submitted before it during the trial. The decision of the trial chamber shall be taken by the majority of the judges, although the Rome Statute encourages them to achieve unanimity where possible, failing which the minority decision must be included in the court's judgement.

Furthermore, the Rome Statute itself contains detailed provisions relating to evidence (article 69, e.g. its weight, relevance, and admissibility); offences against the administration of justice (article 70, e.g. giving false testimony); sanctions for misconduct before the court (article 71, e.g. disruption of proceedings); and protection of national security information (article 72).

22 Article 74(1), Rome Statute

One final aspect of the trial phase, which warrants further mention here, is the prominent role given to victims and witnesses under the Rome Statute. Article 68 ensures that victims and witnesses are given an active role in proceedings, which includes the right of victims under article 68(3) to present their views and concerns in respect of matters of personal interest (through legal representatives where appropriate). Further, article 75 provides that the ICC may make an order against a convicted person specifying 'appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. This can be done directly or else through the trust fund established under article 79.

3.5 Sentencing

If the trial chamber convicts the accused, then it proceeds to sentencing through the imposition of penalties available under article 77. These include: imprisonment for a specified period not exceeding 30 years;[23]imprisonment for life if 'justified by the extreme gravity of the crime and the individual circumstances of the convicted person'; in addition to a fine and/or the forfeiture of proceeds from the crime.[24]

In determining an appropriate sentence, the trial chamber must consider factors such as the gravity of the crime, and the individual circumstances of the convicted person. With respect to the former, rule 145(1)(c) of the Rules of Procedure and Evidence lists additional factors to be considered here, which include: the extent of the damage caused, in particular the harm caused to the victims and their families; the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

As far as potential mitigating factors are concerned, these are listed in rule 145(2) as:

- circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;
- the convicted person's conduct after the act, including any efforts by the person to compensate the victims; and any cooperation with the ICC.

Finally, the Rules of Procedure and Evidence list the following as aggravating factors:[25]

- any relevant prior criminal convictions for crimes under the jurisdiction of the ICC or of a similar nature; abuse of power or official capacity;
- commission of the crime where the victim is particularly defenceless;
- commission of the crime with particular cruelty or where there were multiple victims;
- commission of the crime for any motive involving discrimination; and

23 Article 77(1)(a), Rome Statute
24 Article 77(2)(b), Rome Statute
25 Rule 145(2), Rules of Procedure and Evidence

- other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

In addition to considering the evidence presented and submissions made during the trial, the trial chamber may call further upon the parties to make submissions and adduce evidence relating specifically to the issue of sentencing.

3.6 Appeals on conviction and sentencing

Under the Rome Statute, when an accused person is convicted by the trial chamber, he or she has a right to appeal to the Appeals Chamber against the decision, the sentence, or both. Similarly, the prosecutor has a corresponding right of appeal.

In respect of convictions or acquittals, the accused's right of appeal is broader than that of the prosecutor, with the ability to appeal against any decision of the trial chamber based on an error of law, an error of fact, a procedural error, or *'[a]ny other ground that affects the fairness or reliability of the proceedings or decision*'.[26]

The prosecutor has the same right of appeal in respect of the first three grounds, but not the final one. In terms of possible outcomes of an appeal, if the Appeals Chamber finds that a decision or sentence was materially affected by any error of fact, law, or procedure, it may reverse or amend the decision or sentence, or order the trial de novo. As far as appeals against sentences are concerned, both the convicted person and the prosecutor can appeal on the grounds of 'disproportion between the crime and the sentence'. In the event that the Appeals Chamber finds that the sentence is in fact disproportionate to the crime, it may revise the sentence as it deems fit.

3.7 Immunity under the Rome Statute

Articles 27 and 98 of the Rome Statute

One of the most controversial issues under the Rome Statute relates to what many regard to be its prima facie conflicting provisions regarding immunity. Article 27(1) states:

> *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.*

26 Article 81(1) (b) (iv), Rome Statute.

This provision is generally understood to refer to functional immunity, making it clear that it is inapplicable to any individual before the ICC. It is based on article 7(2) of the ICTY Statute (and article 6(2) of the ICTR Statute). For the purposes of the Rome Statute, this is not controversial as it simply restates the now accepted position under international law. Admittedly, this provision is not a model of clarity, and is not limited to functional immunity alone.

> *The Rome Statute's personal immunity provision proper is article 27(2), which states that: '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 makes it clear that such immunities do not apply when the ICC is exercising jurisdiction over an individual. This is not of itself controversial, illustrated by the fact that in the Arrest Warrant case the ICJ explicitly cited article 27(2) as an exception to the diplomatic immunity that certain state officials enjoy under customary international law.

It is novel, however, not least because the ICTY and ICTR statutes do not contain a correlative provision. The primary difficulty relating to the application of article 27(2) comes when trying to reconcile it with the wording of article 98(1), which states:

> *The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.*

This apparent contradiction is compounded by the fact that article 98 is unclear on who decides when it applies, and whether its conditions in article 98 are met. It states that 'the Court may not proceed', but it does not explicitly give the ICC the power to determine or explain when this might be the case. An argument could be made that it is the responsibility of states themselves (and not the ICC) to determine the applicability of their international obligations to other states. However, article 97 suggests that this is probably not the case due to the central role played by the ICC. This provision requires a state party that receives a request from the court 'in relation to which it identifies problems which may impede or prevent the execution of the request' to 'consult with the Court without delay in order to resolve the matter'. Once again though, this provision is not terribly clear or definitive, including whether – if it is the decision of the ICC – states are bound by its determination.

According to rule 195(1) of the ICC Rules of Procedure and Evidence, it is the court that decides whether article 98 applies, but the procedure for doing so remains unclear. As to whether the state concerned is bound by this determination, no such explicit

power is given to the ICC under this article (or Part 9 generally) and to imply such a far-reaching power would seem to be an over- stretch of article 98. Once again, the issue regarding the proper distinction between article 27 and article 98 re-emerges here.

Under article 119 of the Rome Statute – which deals with the settlement of disputes – any dispute 'concerning the judicial function of the Court ... shall be settled by the decision of the Court'. On the one hand, those who favour the article 27's waiver argument would most likely regard any interpretative disputes relating to article 98 as falling within the scope of the ICC's judicial functions. On the other hand, those who maintain a strict separation between the exercise of the ICC's jurisdiction and the cooperative obligations on states parties might consider such a dispute as a non-judicial one, governed by article 119(2) of the Rome Statute.

4 Session

GENOCIDE

Objective of the session

At the end of this session, participants will understand:

- The essential elements of the crime of genocide;
- The "specific intent" requirement and the difficulties of proving this element;
- The acts that constitute genocide;
- The forms of participation in genocide;
- The manner in which the crime of genocide could be prosecuted before domestic courts.

Notes for trainers

Participants need to explain the drafting history of the Genocide Convention, which is the basis for interpreting and applying the elements of the crime of genocide. Despite the significance of charging the crime of genocide, regarded as the most serious crime against humanity, prosecutors should only proceed with the crime of genocide where there is sufficient evidence of each of the elements of the crime. Therefore, it is vital to convey the very specific nature of the legal elements of this offence. When prosecuting genocide, whether in an international or national setting, careful consideration must be given to whether the evidence establishes the unique requirements of this offence. Crimes against humanity can be charged where there is insufficient evidence of genocide, providing that the requirements for such crimes are met. In order to achieve these objectives you will find "Notes to trainers" inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions the trainers can use to focus on the important issues and to stimulate discussion, make references to the parts of the case study that are relevant and which can be used as practical examples to apply the legal issues being taught.

4.1 Definition

Genocide was described by the UN General Assembly as "a denial of the right of existence of entire human groups, as homicide is the denial of the right to life of individual human beings".

Article 6 of the Rome Statute and article 2 of the Genocide Convention define Genocide as consisting of five specific acts committed with the intent to destroy a

national, racial, or religious group as such. These five acts are:

- Killing members of the group Causing serious bodily or mental harm to the members of the group
- imposing conditions on the group calculated to destroy it
- Preventing birth within the groups
- And forcibly transferring the children from the group to another group

A perpetrator of genocide must:

- Intend to destroy
- in whole or in part
- a protected group, as such.

Specific intent is an element of the crime, and requires that the perpetrator clearly intended the result charged. In the case of genocide, the perpetrator must intend that his or her actions will result in the destruction, in whole or in part, of a protected group. This intent turns in part on the reason a victim or victims were targeted. They must have been targeted specifically because they were members of a protected group. As stated by the ICTR trial chamber:

> [F]or any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends to encompass the realization of the ulterior purpose to destroy, in whole or in part, the group of which the person is only a member.

"Intend to destroy"

Genocidal intent must be present at the moment the acts are committed, but does not have to be formed prior to committing the acts.

The specific intent of genocide is not:

- simply to harm the group or discriminate against the group, or even to commit discriminatory killings, but rather the specific intention of the perpetrator must be "to destroy" the protected group
- the same as motive (see below section 6.3.1.3)
- the intent to merely dissolve a group.13

"To destroy" means the physical and biological destruction of a protected group

"In Whole or part"

To be convicted of genocide, a perpetrator must intend to destroy a protected group entirely, or in part. As noted by the ICTY Appeals Chamber, the intent to destroy a group:

> [E]ven if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group *…+ they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.

Key concepts related to the requirement that the group be destroyed "in whole or in part" include:

- A perpetrator need not intend to annihilate the entire targeted group. "In part" requires the intention to destroy at least a substantial part of the group.
- While the part of the group targeted must be substantial, it does not need to form an important part of the group.
- There is no numeric threshold of victims necessary to establish genocide. However, the numeric size of the targeted part of the group can help determine whether it is a "substantial" part of the group as a whole.
- It is enough to intend to destroy a part of that group. "Part" can be defined geographically, such as a specific identity located in a particular location.
- It is important to note that the prohibited genocidal acts must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group.
- The requirement that the perpetrator intended to destroy a group in whole or in part should not be confused with the scale of participation of an individual offender.

"Motive v. Sufficient Intent"

The personal motive of the perpetrator may be, for example, to obtain personal economic benefits, political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.

The fact that an accused took "pleasure" in killings does not detract in any way from his intent to perform such killings, as this is a matter that goes to motivation.

Similarly, evidence that an accused was acting in the quest of a personal goal, such as vengeance, material gain or for the elimination of a business competitor, may explain their motivations but does not preclude a finding of specific intent.

Other factors such as:

- the scale of atrocities committed;
- their general nature;

- their execution in a particular region or country;
- the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups;
- the political doctrine which gave rise to the acts referred to;
- the repetition of destructive and discriminatory acts;
- the perpetration of acts which violate the very foundation of the group; or considered as such by their perpetrators.

4.2 Elements of Crime under the Rome Statute (Article 6 (a))

4.2.1 Genocide by killing

In addition to proving the specific genocidal intent, criminal liability for killing members of the groups requires proof that the perpetrator intentionally killed a member of the protected group. The Genocide convention states that the protected group must be a

o National
o Ethnic
o Racial or
o Religious group as such

Elements

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

4.2.3 Genocide by causing serious bodily or mental harm (Article 6 (b))

Elements

1. The perpetrator caused serious bodily or mental harm to one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

5.2.4 Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction (Article 6 (c))

Elements

1. The perpetrator inflicted certain conditions of life upon one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

4.2.5 Genocide by imposing measures intended to prevent births *(*Article 6 (d)*)*

Elements

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

5.2.6 Genocide by forcibly transferring children *(*Article 6 (e)*)*

Elements

1. The perpetrator forcibly transferred one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Session 5

CRIME AGAINST HUMANITY

Objectives of the session

At the end of this Session, participants should understand:

- The elements of crimes against humanity;
- The concepts of:
  - An "attack" against a civilian population,
  - A widespread attack, and
  - A systematic attack;
  - The definition of a civilian population;
  - How an attack against civilian population can be proved
  - The difference among genocide, war crimes and crimes against humanity.

Notes for trainers

Trainer should explain what constitutes crimes against humanity under international law. In the beginning of the session, the trainer should provide an overview of the general contextual elements of crimes against humanity as well as the specific prohibited underlying acts that constitute crimes against humanity. Thereafter, the trainer focus on:

- How a link or nexus can be drawn between the attack on a civilian population and the acts of the accused;
- How an attack against a civilian population can be proved;
- The prohibited acts that constitute crimes against humanity;
- The differences between genocide, war crimes and crimes against humanity;
- The differences between murder and extermination;
- The differences between sexual slavery and enforced prostitution;
- The distinction between specific intent, required for persecution, and the intent to commit all underlying acts amounting to crimes against humanity; and
- How crimes against humanity are or can be charged in ICC.

Trainers are required to deal with both the contextual elements for crimes against humanity and the specific prohibited underlying acts that constitute crimes against humanity. It is important for participants to understand what the general contextual requirements are for crimes against humanity, namely that these crimes are committed as part of a widespread or systematic attack on any civilian population. It is these features, which distinguish crimes against humanity from war crimes and ordinary crimes. It must be emphasised that isolated acts are excluded from crimes against

humanity. It is only when criminal conduct forms part of a widespread or systematic attack that it can be characterised as a crime against humanity. In addition to these contextual elements, participants must discuss and understand which particular prohibited acts, if committed as part of an attack against a civilian population, will constitute crimes against humanity.

Questions to develop the participants' understanding of these matters are, for example:

- What are the main features of a widespread or systematic attack?
- What constitutes a civilian population? Does it make any difference if there are armed forces mixed in with the population?
- What role does an accused need to play in relation to the widespread or systematic attack?
- Do the underlying prohibited acts (i.e. murder, torture, rape, etc.) themselves have to be widespread or systematic? What relationship must there be between the underlying acts and the attack?

In order to encourage participants to engage with these questions, they could be referred to the case study, in which a number of different acts were allegedly committed against civilians. Participants should be encouraged to discuss whether these acts could be charged as crimes against humanity and what evidence would be required to prove such crimes based on the factual summary and any other evidence that may need to be identified.

5.1 Definition *(*Article 7 of the ICC Rome Statute)

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other forms of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 Elements of a crime against humanity

A crime against humanity is committed when:
The accused commits a prohibited act;

That is part of:

- an "attack"
- which is "widespread or systematic" and
- "directed against any civilian population";

And when there is a link or "nexus" between the acts of the accused and the attack. The ICTY Statute requires that the attack be committed in the context of an armed conflict[27], and the ICTR Statute requires that the attack have a discriminatory element. Neither of these elements is required by the definition of crimes against humanity under customary international law. At the ICC neither of these additional elements is required[28].

Contextual Elements

A crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population. When committed within this context, what would have been an "ordinary" domestic crime, such as murder, becomes a crime against humanity.

"An Attack"

A person commits a crime against humanity when he or she commits a prohibited act that forms part of an attack[29].

Factors to consider when determining whether an "attack" against a civilian population has taken place include:

- Were there discriminatory measures imposed by the relevant authority?
- Was there an authoritarian takeover of the region where the crimes occurred?
- Did the new authority in fact establish "governmental" structures?
- Did summary arrests, detention, torture, rape, sexual violence or other crimes take place?
- Did massive transfers of civilians to camps take place?
- Was the "enemy population" removed from the area?[30]

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27 However, the ICTY has held that under customary international law, a connection with an armed conflict is not required. Duško Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, ¶ 141, See also Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, ¶ 2I8.

28 It should be noted that while the attack need not be discriminatory, the crime of persecution requires that the act amounting to persecution be carried out on discriminatory grounds.

29 See, e.g., Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, 205.

30 Dragan Nikolid, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, TC, IT-94-2-R61, 20 Oct. 1995, 27.

The concepts "attack" and "military attack" differ. A crime against humanity can occur when there is no armed conflict[31].

Thus, an attack is not limited to the conduct of armed hostilities or use of armed force. CAH can include mistreatment of a civilian population. The attack could also precede, outlast or continue during an armed conflict, without necessarily being part of it[32]. The attack does not need to involve the military or violent force[33].ICTY and ICTR jurisprudence, and the Rome Statute, provide that there must be at least "multiple" victims or acts to be considered an attack directed against a civilian population. The acts can be of the same type or different[34].

At the ICC, an attack is "a campaign or operation carried out against the civilian population"[35].

"Directed against Civilian Population"

"Directed against" requires that the civilian population must be the primary target of the attack, not just an incidental target. Thus, the primary object of the attack is "any civilian population".

"Any" highlights the fact that CAH can be committed against both enemy nationals and crimes by a state' own subjects.

"Civilian" refers to non-combatants.

"Population" refers to a larger body of victims and crimes of a collective nature[36].

It is not required that an entire population of an area be targeted. It is enough to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way that demonstrates that the attack was in fact directed against a civilian "population", rather than against a small and randomly selected number of individuals.

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31 Except at the ICTY, where crimes against humanity must be committed "in armed conflict, whether international or internal in character". ICTY Statute, Art. 5. This requirement was abandoned in the ICTR

32 Dragoljub Kunarac et al., Case No. IT-96-23-A, Appeal Judgement, 12 June 2002, 86

33 Akayesu, TJ 676 – 684.

34 Rome Statute of the International Criminal Court, Art. 7(2)(a); Dragoljub Kunarac et al., Case No. IT-96-23-T, Trial Judgement, 22 Feb. 2001, 415; Milorad Krnojelac, Case No. IT-97-25-T, Trial Judgement, 15 March 2002, 54

35 "ICC Elements of Crimes" ICC-ASP/1/3 (adopted 9 Sept. 2002, entered into force 9 Sept. 2002), Introduction to Art. 7 (ICC Elements of Crimes).

36 DuškoTadic, Case No.IT-94-1-T, Trial Judgement, 7 May 1997, 644.

Factors to determine whether the attack was directed against a civilian population include:

- the means and methods used in the course of the attack;
- the number of victims;
- the status of the victims;
- the discriminatory nature of the attack;
- the nature of the crimes committed in the course of the attack;
- the resistance to the assailants at the time; and
- the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war[37].

The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population. Rules of IHL apply equally to both sides of a conflict, irrespective of who is the "aggressor", and the absolute prohibition under international customary and treaty law on targeting the civilian population precludes military necessity or any other purpose as a justification.[38] At the ICC, "civilian population" refers to people who are civilians, and not members of armed forces or other legitimate combatants[39]. The civilian population must be the primary target of the attack, not a secondary victim[40].

"Widespread and Systematic"

"Widespread or systematic" describes the character of the attack, particularly its scale. "Widespread" refers to the large-scale nature of an attack, primarily reflected in the number of victims. There is no set number of victims that makes an attack "widespread". "Widespread" may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims[41].

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37 Blaškid, AJ, 106; Kunarac et al., AJ 90.

38 Moinina Fofana et al., Case No. SCSL-2003-11-A, Appeal Judgement, 28 May 2008, 247.

39 Geneva Conventions 1949 (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) (GC I-IV), Common Art. 3, and Additional Protocol I (adopted 8 June 1977, entered into force 7 Dec. 1978) (AP I) Arts. 43 and 50; Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, 82 (fn 74), citing Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 78; Kunarac et al., TJ 425

40 Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute, 82(fn 73), citing Bemba Confirmation Decision 77; Kunarac et al., AJ 91-2; Milomir Stakid, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, 624; Mitar Vasiljevid, Case No.IT-98-32-T, Trial Judgement, 29 Nov. 2002, 33.

41 Akayesu, TJ 579-580; Rutaganda, TJ 67-69; Alfred Musema, Case No. ICTR-96-13, Trial Judgement, Jan. 27 2000, ¶ 204

"Systematic" refers to the organized nature of the acts of violence and the recurrence of similar criminal conduct on a regular basis[42]. It involves "a pattern or methodical plan"[43] that is "thoroughly organized and following a regular pattern"[44].

The requirement that the attack is "widespread" or "systematic" is disjunctive: only one must be proven. So a crime against humanity could be committed as part of a large-scale attack against a civilian population resulting in many deaths, or as part of regular and methodical violence or crimes with fewer victims.

Only the attack as a whole, not the accused's individual acts, must be widespread or systematic[45]. In other words, the separate underlying prohibited acts do not need to be widespread or systematic (i.e. there is no requirement that the murders must be widespread or systematic under a charge of murder as a crime against humanity), as long as the prohibited acts form part of an attack that is widespread or systematic.

Factors to consider when determining whether an attack is "widespread or systematic" include the:

- number of criminal acts;
- existence of criminal patterns;
- logistics and resources involved;
- number of victims;
- existence of public statements related to the attacks;
- existence of a plan or policy targeting the civilian population[46];
- means and methods used in the attack;
- foreseeability of the criminal occurrences;
- involvement of political or military authorities;
- temporally and geographically repeated and coordinated military operations leading to same result;
- alteration of ethnic, religious, racial or political composition of overall population;
- establishment of new political or military structures in region; and
- adoption of various discriminatory procedures[47].

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42 Tadic, TJ 648; Kunarac et al., TJ, 429; Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-T and ICTR-96-17-T, Trial Judgement, 21 Feb. 2003, 804.

43 Tadic, TJ 646 and 648.

44 Akayesu, TJ 580.

45 Blaškid, AJ 101; Kunarac et al., AJ 93-96; Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 Sept. 2004, 135-6

46 Previous ICTR jurisprudence held that a systematic attack encompassed acts done pursuant to a policy or plan; this was later rejected by the Appeals Chamber. Laurent Semanza, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, 268-269; Kunarac et al., AJ 98 (existence of policy or plan may be evidence going to other elements of the crime, but is not an independent legal element).

47 Semanza, AJ 268-269; Kunarac et al., AJ 98; Galid, TJ 147; Brđanin, TJ 137; Goran Jelisid, Case No. IT-95-10T, Trial Judgement, 14 Dec. 1999, 53.

"Nexus"

The acts of the accused must be "part of"—and not simply coincide with—the widespread or systematic attack directed against a civilian population. Except for extermination, the underlying offence need not be carried out against multiple victims in order to constitute a CAH. But the attack must include multiple acts. Thus an act directed against a limited number of victims, or even against a single victim, may suffice, provided it forms part of a widespread or systematic attack against a civilian population[48].

The nexus requirement has two elements the prosecution must prove:

- The commission of a
- an act that, by its very nature or consequences, is liable to have the effect of furthering the attack.
- Knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.

Factors to determine whether a prohibited act of an accused forms "part of" an attack include:

- the characteristics,
- aims,
- nature, and
- consequences of the act;
- The similarity between the accused's act and the other acts forming the attack;
- The time and place of the acts, and how they relate to the attack; and in particular
- How the acts relate to the attack or further any policy underlying the attack.

The accused's act must be related to the attack. A crime which is committed before, after or away from the main attack against the civilian population could still, if sufficiently connected, be part of that attack.

"Knowledge of the Attack"

In addition to the intent to commit the underlying crime (such as murder, persecution, torture), an accused must know of the broader context in which his actions occur, and more particularly, he must:

- know of the attack directed against the civilian population, and
- know that his criminal act comprises part of that attack or at least take the risk that his acts are part of that attack.[49]

48 Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, 924; Blaškid, AJ 101; Kunarac et al., AJ 96.

49 Kunarac et al., AJ 102; Brđanin, TJ138; Galid, TJ 148; Krnojelac, TJ 59; Kunarac et al., TJ 434.

An absence of such knowledge may suggest an ordinary crime or, depending on the circumstances, a war crime. Usually, a crime against humanity will be committed in the context of an attack that is well known, and an accused could not credibly deny knowing about the attack. Thus, drawing inferences from relevant facts and circumstances can prove knowledge.[50]

The *mens rea* relates to knowledge of the context, not motive. A CAH may be committed for purely personal reasons. The accused need not share the purpose or goal behind the attack.

50 Mitar Vasiljevid, Case No. IT-98-32-A, Appeal Judgement, 25 Feb. 2004, 28, 20; International Criminal Court, Elements of Crimes, General Introduction, 3 (9 Nov. 2002) available at http://www.icccpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm (accessed 5 July 2014).

Session 6

WAR CRIMES

Objectives of the session

At the end of this session, participants should understand:

- The distinction between war crimes committed in an armed conflict and other domestic crimes not committed during an armed conflict.
- The distinction between grave breaches, violations of Common Article 3 to the Geneva Conventions and other violations of the laws and customs of war.
- The constitutive elements of proving war crimes before international and national courts.
- Factors that can be used to prove a nexus between the alleged criminal conduct and an armed conflict, including in cases of sexual violence.
- The ways in which sexual violence and other gender-based crimes can be prosecuted as war crimes.

Notes for trainers

Trainer should explain the crimes discussed will be frequently prosecuted within national jurisdictions. It is critical for participants to grasp the unique elements of war crimes as compared with the ordinary national crimes. The participants should also examine the differences in the elements between war crimes, crimes against humanity and genocide.

The elements of the offences must be thoroughly explored, and the use of practical examples from the international and domestic case law would greatly assist in illustrating how the elements are defined and implemented.

It is imperative that participants appreciate the origins and development of IHL, as this will empower them both to understand the rationale behind the legal requirements of war crimes and to develop arguments in favour of interpretations they wish to advance in their cases.

In order to encourage participants to engage with these questions, they could be referred to the case study, in which a number of different acts were allegedly committed against civilians. Participants should be encouraged to discuss whether these acts could be charged as crimes against humanity and what evidence would be required to prove such crimes based on the factual summary and any other evidence that may need to be identified.

6.1 Definition of War Crimes

Various provisions under IHL (customary law and treaty law) prohibit the commission of war crimes:

- Grave breaches of the Geneva Conventions and of Additional Protocol I (AP I) that apply in international armed conflict;
- Common Article 3 of the Geneva Conventions that apply in all conflicts; and
- Other serious violations of international humanitarian law that apply in either international or internal armed conflicts.

6.2 Grave breaches of the Geneva Conventions

Each of the four Geneva Conventions includes "grave breaches" provisions that expressly criminalize the most serious grave violations of the rules provided in the Conventions.

- The list of grave breaches in the Geneva Conventions was expanded in API.
- Grave breaches provisions are regarded as part of customary international law.
- Grave breaches provisions only apply to violations committed during an international armed conflict and against persons who are protected by the Geneva Conventions.

Protected persons under the Geneva Conventions include civilians and combatants.

- Protected civilians are those persons who are in the hands of the adversary.
- Protected combatants are those persons who qualify as prisoners of war.

6.3 Common Article 3 of the Geneva Conventions

- By contrast, Article 3 common to the four Geneva Conventions sets out certain fundamental protections that also apply during armed conflict "not of an international character".
- The ICTY has held that Common Article 3 sets forth a minimum core of mandatory rules applicable to any armed conflicts, whether the conflict is of an international or non-international character. The character of the conflict is therefore irrelevant.
- The ICTY has held that violations of Common Article 3 provisions give rise to criminal responsibility. Violations of Common Article 3 are expressly criminalised in the ICTR and ICC Statutes.

6.4 Other serious violations of IHL

Customary international law and other treaties provide for other serious violations of IHL giving rise to criminal responsibility. They set forth prohibitions that apply in:

- International armed conflicts only;
- Internal armed conflicts only; or
- In both international and internal armed conflicts.

6.5 Differences between War Crime and Crime against Humanity

War crime and CAH may overlap. For example, a mass killing of civilians can be both a war crime and CAH. The main differences between a war crime and a CAH include:

- War crimes require a nexus to an armed conflict, whereas a CAH do not (despite CAH often being committed during armed conflicts), but CAH require an attack on civilian populations;
- War crimes focus on the protection of certain protected groups, including enemy nationals, whereas CAH protect victims regardless of nationality of affiliation to the conflict; and
- War crimes regulate conduct on the battlefield and military objectives, whereas CAH regulate actions against civilian populations.

6.6 War Crimes under Article 8 of the Rome Statute

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. For the purpose of this Statute, "war crimes" mean:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
  (i) Willful killing;
  (ii) Torture or inhuman treatment, including biological experiments;
  (iii) Willfully 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) Willfully 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.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
  (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  (iv) 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;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) 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, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or treacherously wounding individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) 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's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and

are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) 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;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of 15 years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) 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.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) 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;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or treacherously wounding a combatant adversary;
(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

6.7 Elements of War Crimes under Rome Statute

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes. The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea.

With respect to the last two elements listed for each crime:

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with"

6.8 Essential principle of IHL

Distinction

The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as whole, nor individual civilians may be attacked. Attacks may be directed solely against military objectives (including combatants).

Proportionality

Attacks are prohibited if they cause civilian damage that is excessive or disproportionate when compared with the direct and concrete military advantage that is gained. In attacking military objectives, combatants must take measures to avoid or minimise collateral civilian damage and refrain from causing excessive civilian damage. There is a prohibition on employing methods and means of warfare of a nature to cause superfluous injury and unnecessary suffering.

Protection

Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be treated humanely and without adverse distinction. They must be protected against all acts of violence or reprisal.

7 Session

DEFENCES AND OTHER GROUNDS FOR EXCLUDING LIABILITY

Objectives of the session

At the end of this session, participants should understand:

- Whether specific immunities could be a bar to prosecution;
- The differences between functional and personal immunity;
- Whether amnesties constitute a bar to prosecutions; and
- The various defences available before the ICTY, ICTR and ICC, as well as the domestic courts of the region.

Notes for trainers

Trainer should explain the grounds of defences and grounds for excluding liabilities recognised at the international courts. It should begin with a discussion of immunities and amnesties. And then the trainers should explain differences between the "defences" or the grounds for excluding liability, including:

- Official capacity;
- Superior orders;
- Self-defence;
- Duress and necessity;
- Lack of or diminished mental capacity;
- Intoxication;
- Alibi;
- Mistake of law and fact;
- Military necessity;
- Tuquoque; and
- Reprisals.

Trainers should ensure that participants discuss the different defences that are available under international law and consider the extent to which they apply before their national courts. It should be expected that defence counsel will rely on defences under international law in their own domestic proceedings. The case study provides a useful tool for prosecutors to discuss which particular defences they anticipate the accused will raise, and how they intend to respond as prosecutors to each of these defences. The international section of this Module is structured

to first deal with immunities and amnesties, which do not prevent prosecutions before international criminal courts and secondly, to deal with each of the specific defences that are incorporated within the Statutes of the ICTY, ICTR and ICC. In order to achieve these objectives you will find "Notes to trainers" in the boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, make references to the parts of the case study that are relevant and identify which case studies can be used as practical examples to apply the legal issues being taught.

7.1 Immunities under international law

Under international law, two types of immunity are broadly recognised: functional immunity and personal immunity. These immunities are recognised on the basis of the sovereignty of states, and therefore only apply to prosecutions in national courts. Neither functional nor personal immunities are a bar to trials before the international or hybrid criminal courts.

7.2 Immunities under ICC Statute (Article 27)

Irrelevance of official capacity

- 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.

Functional immunity (immunity *rationae materiae*) applies to government officials acting in their official capacity. It protects conduct, and extends widely to anyone who carries out state functions. Protected persons cannot be charged for criminal acts if they are acting in an official capacity, as they are considered to be acting as an arm of the government and not as individuals.

They can usually only be charged for criminal acts if they are acting in a personal capacity. The functional immunity lasts forever—a person can never be charged for crimes committed while acting in an official capacity.

However, an exception has developed for some serious crimes of international concern. In the Pinochet case, the British House of Lords held that immunity for a former head of state did not extend to a trial for charges of torture.[51]

51 R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577, HL.

Personal immunity (*rationae personae)* applies to high level government officials, such as heads of state or diplomats. It is unclear exactly which government officials benefit from personal immunity. Personal immunity protects the person, and is absolute while the person is in office.

It is based on the idea that government officials must be free from the threat of criminal sanctions in order to effectively do their jobs and facilitate international relations. Thus, while in office, they cannot be tried for crimes committed either in their personal or official capacity. However, when a person leaves office, they can be charged for crimes committed while they held office if they were acting in their personal capacity.

The International Court of Justice (ICJ) found that there is no exception to personal immunity in national courts, even for serious international crimes. However, the ICJ also found that personal immunity was no bar to prosecution before international courts.[52]

7.3 Amnesties

Amnesties are laws that preclude criminal prosecutions (and sometimes civil claims) in the state in which they are issued. Amnesties have a long history. The status of amnesties in international law is unclear. There is some indication that amnesties are no bar to prosecution for some crimes, such as torture[53]. The Inter-American Court of Human Rights has stated that[54]:

> *This Court considers that all amnesty provisions, provisions on the prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law.*

The Rome Statute indicates that amnesties are no bar to prosecution before the ICC. Under the Rome Statute, states have a duty to prosecute serious crimes—otherwise

52 *Charles Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity From Jurisdiction, Appeal Chamber, 31 May 2004, 51 – 3 (relying on Yerodia and holding that personal immunity was no bar to jurisdiction in international courts and therefore it had jurisdiction to try former Liberian president Charles Taylor).

53 See General Comment 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev. 1 at 30 (1994) (stating that amnesties for state officials for torture were "generally incompatible" with the duty to prosecute human rights violations); Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgement, 10 Dec. 1998, 155 (holding that amnesties for torture are no bar to prosecution because torture is jus cogens); see also Radovan Karadžid, Case No. IT-95-5/18-PT, Decision on Accused's Second Motion For Inspection and Disclosure: Immunity Issue, Trial Chamber, 17 Dec. 2008.

54 Case of Barrios Altos v. Peru, Series C No. 75 [2001], Inter-Am. C.H.R. 5, 14 March 2001.

the ICC will[55]. The prosecutor's position is that the drafters of the Rome Statute chose prosecution as the correct response to international crimes.

7.4 Official capacity

Before the ICTY, ICTR and ICC, official capacity cannot be claimed to excuse the commission of war crimes[56]. It is neither a defence nor a mitigating circumstance[57]. Therefore, the official capacity is not a bar to personal jurisdiction and prosecution before the ICC.

7.5 Superior orders

ICTY Statute Article 7(4) and ICTR Statute Article 6(4) preclude superior orders being used as a defence, but permit superior orders to be considered in mitigation of punishment. At the ICC, however, superior orders can exclude criminal liability in limited circumstances:

- where the accused had a legal obligation to obey the orders;
- where the accused did not know the order was illegal; and
- the order was not manifestly unlawful.

According to the Rome Statute, orders to commit genocide or crimes against humanity are manifestly unlawful.

7.6 **Grounds under the Rome Statute**

Superior orders and prescription of law *(*Article 33)

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 unless:

- The person was under a legal obligation to obey orders of the Government or the superior in question;
- The person did not know that the order was unlawful; and
- The order was not manifestly unlawful.

However, the ICC statute states that "for the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful".

7.7 Self defense

Under the Rome Statute, defence of self, another person, or property can be grounds for excluding criminal liability. There must be a threat of an "imminent and unlawful use of force"[58]. The accused must have acted reasonably and proportionately to the threat. Defence of property can only be raised as a defence to a war crime, and only

55 Rome Statute, Preamble.

56 Blaškid, AJ 41; see also Statute of the Special Court for Sierra Leone, Art. 6; Charter of the Nuremberg Tribunal, Art. VII; and the Genocide Convention, Art. IV.

57 Rome Statute, Art.27(1).

58 Rome Statute, Art. 31(1)(c).

with regards to property that is essential for the survival of the accused or another person, or for accomplishing a military mission[59].

7.8 Duress and necessity

The Rome Statute recognises duress as a defence when an accused acts under duress from a threat of imminent death or continuing or imminent serious bodily harm of the accused or another person. The accused's actions must have been caused by the threat, and they have acted necessarily and reasonably to avoid the threat. Moreover, the accused cannot have intended to cause more harm than the harm they were trying to avoid. Threats can be made by another person or can arise from other circumstances outside of the accused's control[60].

7.9 Lack of mental capacity

At the ICC, this defence applies if the accused, at the time of his conduct, suffers from a defective mental state that destroys his ability to either understand the unlawfulness of or control his conduct[61]. The defence is seemingly limited to "mental", not psychic, disturbances. Also, the mental state must be "destroyed", not merely diminished, in order to serve as a defence. Diminished mental capacity is not specifically mentioned in the Rome Statute, but under Article 31(3), it could be considered as a defence.

7.10 Intoxication

Intoxication can also exclude criminal liability at the ICC. If the accused, at the time of conduct, was intoxicated to the point that they could not understand the lawfulness of or control their behaviour, they cannot be held guilty. It is notable that the intoxication must destroy the accused's mental capacity—impairment, even if extreme, is not enough. The defence does not apply if the accused was voluntarily intoxicated and knew, or disregarded the risk, that they would be likely to commit a crime under the jurisdiction of the ICC if intoxicated[62].

7.11 Alibi

If a defendant raises an alibi, he is denying that he was in a position to commit the crime. By raising that issue, the defendant requires the prosecution to eliminate the reasonable possibility that the alibi is true[63]. The purpose of an alibi is to cast reasonable doubt on the prosecutor's allegations; the burden is on the prosecution to prove all aspects of the case beyond reasonable doubt, notwithstanding the alibi raised by the defence[64].

59 Rome Statute, Art. 31(1)(c).
60 Rome Statute, Art. 31(1)(d)
61 Rome Statute, Art. 31(1)(a).
62 Rome Statute, Art. 31(1)(b)
63 Čelibidi, AJ 581.
64 Clèment Kayishema, Case No. ICTR-95-1-T, Trial Judgement, 21 May 1999, 234; Protais Zigiranyirazo, Case No.ICTR-01-73-A, Appeal Judgement, 16 Nov. 2009, 17.

A successful alibi does not require conclusive proof of an accused's whereabouts[65].

There is no requirement that an alibi excludes the possibility that the accused committed a crime; the alibi need only raise reasonable doubt that the accused was in a position to commit the crime. Where an alibi is properly raised, the prosecution must establish that, despite the alibi, the facts alleged are nevertheless true. For example, the prosecution may demonstrate that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime. Where the alibi evidence *prima facie* accounts for the activities of the accused at the relevant time, the prosecution must "eliminate the reasonable possibility that the alibi is true"[66]. For example, the prosecution could demonstrate that the alibi evidence is not credible. There is no obligation on the prosecution to investigate the alibi[67]The ICC also recognises alibi as a defence, although it is not included in the Rome Statute.

7.12 Mistake of law and fact

Under the Rome Statute, a mistake of fact excludes criminal liability if it negates the mental element required by the alleged crime[68]. A mistake of law may exclude criminal liability if it negates the mental element required by the alleged crime. A mistake about whether an act is a crime is not a defence at the ICC.

7.13 Military necessity

Military necessity may nevertheless be used as a defence in certain circumstances. The Rome Statute, for example, provides that military necessity could be raised as a ground for excluding liability for war crimes involving the destruction of property. In Article 8(2) (a) (iv), it notes that extensive destruction of property is a war crime when it is not justified by military necessity and is carried out unlawfully and wantonly.

7.14 Reprisal

Reprisals consist of unlawful acts that are undertaken in response to unlawful acts committed by the opposing armed force in an effort to persuade this force to desist from committing further unlawful acts. Reprisals are prohibited by AP I, which is applicable to international armed conflicts. No mention is made of reprisals in AP II, but as noted above, the ICTY's jurisprudence has indicated that reprisals are forbidden in all armed conflicts.

65 Zigiranyirazo, AJ 42.

66 Juvènal Kajelijeli, Case No. ICTR-98-44A-A, Appeal Judgement, 23 May 2005, 41; Kayishema, AJ 106.

67 Ferdinand Nahimana, Case No. ICTR-99-52-A, Appeal Judgement, 28 Nov. 2007, 417-8

68 Rome Statute, Art. 32(1).

Session

WITNESS AND VICTIMS PROTECTION

Objectives of the session

At the end of this session, participants should understand:

- The witness protection before international criminal court;
- The ways in which victims may participate directly in the criminal proceedings; and
- The various forms of victim compensation, reparations and restitution that are available before international and national courts.

Notes for trainers

Trainer should explain all of the laws and rules relating to the protection of victims and witnesses in criminal proceedings before international criminal courts. The direct participation of victims in these proceedings is also examined. This section will also cover the various forms of victim compensation, reparations and restitution, which are provided in international jurisdictions.

The trainer should make the participants aware of :

- the rights of victims and witnesses under international criminal law and procedure, both in respect of protection and participation;
- With respect to witness protection, the procedure for applying for protective measures and the implementation of such measures before international courts; and
- With respect to victim participation in the proceedings, the procedure for applying to participate and the modalities of such participation before the ICC.

8.1 'Victims and witnesses protection program

Witness and victim protection and support are critical aspects of any cases involving war crimes, crimes against humanity and genocide. The protection international courts afford to victims who testify as witnesses or participate as victim- participants (such as at the ICC) have improved significantly since the creation of international criminal tribunals. Each court places great importance on providing protective measures in appropriate circumstances. Such measures include:

- The non-disclosure of identity until necessary for the adequate preparation of the defence;
- Protection from the public and media;

- Protection from confrontation with the accused; and
- Special measures for victims of sexual violence.

At all international courts, both prosecution and defence witnesses can be afforded protective measures. Any witness, who has a legitimate need for protection, including witnesses who are not victims, can receive protective measures[69].

All of the international courts allow judges to grant pre-trial and in-court protective measures. These measures will be discussed, as they apply before the ICTY, ICTR and the ICC, below.

8.2 General consideration

Participation in proceedings can carry a level of risk to victims and witnesses. This applies to participation at all stages of proceedings, including the investigative stage.

Addressing victims' and witnesses' fears of participating in proceedings, arising from both real risks to their safety and perceptions of threats to their safety, is important and can ensure their participation in proceedings[70]. This can be done using a range of supportive and protective measures, which range from simple measures such as the provision of accurate information, to more intrusive measures such as temporary or permanent relocation.

Any protective or support measures should only be implemented with the voluntary and informed consent of the individual concerned. This can be difficult to ensure, for example, in cases of minors or in situations of considerable stress when the safety of the individual is at risk. Protective measures should be aimed at the best interests of the individual and ensuring that no further harm is caused to them as a result of their participation in proceedings.

Because protective measures may have a significant impact on the lives of the participating victims/witnesses and their families, any such measures should be carefully considered and chosen to meet the specific needs of the individual, and implemented only in response to a real and assessed level of risk. In the course of this preliminary risk assessment, ensuring the reliability of information and intelligence is important. It is also very important to ensure that witnesses and victims do not have unrealistic expectations of protective and support measures. It is vital to ensure that individuals understand that protective measures are not a reward for testimony and are not routine practice, but that protective measures are intended to respond to

69 Vojislav Šešelj, Case No. IT-03-67-T, Decision on Vojislav Šešelj's Motion for Reconsideration of the Decision of 30 Aug. 2007 on Adopting Protective Measures, 11 Jan. 2008, 14.

70 Commonwealth Secretariat, Best Practice Guide for the Protection of Victim/Witness in the Criminal Justice Process, Meeting of Commonwealth Law Ministers and Senior Officials, Provisional Agenda Item 4(d), LMM(11)(14 14 July 2011 (hereinafter "Victim/Witness Best Practices Guide"), available at http://www.thecommonwealth.org/document/181889/34293/35232/238332/clmm_2011.htm.

real and credible threats to the individual's safety resulting from their participation in court proceedings. Any such measures should be clearly discussed with the individual, to determine specifically which protective measures are best suited to each individual. Witnesses and victims should also be made aware of the limitations of protective measures and the steps required to enable them to protect themselves. It is also important to ensure that individuals do not confuse the term "protective measures" with the status of a "protected witness". It is important to ensure that individuals understand that there is a range of protective measures available, and that the most appropriate protective measures will be employed to respond to real and credible threats to the individual's safety—and this will only rarely be temporary or permanent relocation.

8.3 Protection during investigation

During the investigative phase, investigators should be aware that their mere contact with victims and witnesses may place them in jeopardy. Investigators may therefore need to employ protection measures in their initial and ongoing contacts with victims and witnesses in these early pretrial stages of proceedings, throughout the course of investigations of the crimes.

Such measures will need to take account of the current and local context, including the environmental, social and cultural situation, the security situation and the availability of security and policing, and the potential threats.

These measures may include:

- Conducting an initial assessment to identify potential key witnesses, identify potential threats and current risks, and develop a strategy if needed;
- Considering and developing a strategy around the number, mode and duration of contacts needed;
- Considering the ability of witnesses to be interviewed;
- Considering the location of interviews;
- Developing cover stories for witnesses to be interviewed (for example, visiting relatives or friends);
- Ensuring that investigators behave discreetly; and
- Informing witnesses of the importance of maintaining confidentiality, for the safety of other witnesses and themselves.

The measures adopted will need to be based on an accurate preliminary assessment of the potential risks to the safety of victims and witnesses, the support needs of victims and witnesses and the available resources. It is important that the assessment of the potential risks to the safety of victims and witnesses is based on reliable information, in order to accurately assess the potential threats.

Providing assistance to investigators can be a stressful experience for victims and witnesses. Supportive measures are thus often needed to ensure the individuals'

continued participation in proceedings and the provision of testimony in the trial stage.

8.4 Protection during trial

An important aspect of preparing victims and witnesses for trial is providing them with detailed information about the proceedings, and the role they will play in them, to enable them to fully understand the function of their involvement in proceedings. It is also important to ensure that victims and witnesses have realistic expectations about their involvement in proceedings.

Unrealistic expectations, goals or demands may negatively impact on the individuals' cooperation and testimony, or cause them to feel disappointed or betrayed by the system and possibly lead to further psychological harm. Various factors may affect a victim's or witness' capacity to participate in proceedings and give truthful and accurate statements to investigators, as well as cope with testifying, questioning and cross-examination at trial. Victims and witnesses may be particularly vulnerable or face psychological difficulties participating in proceedings due to:

- Age;
- Disability;
- Previous experiences;
- The nature of the crime perpetrated against them; and
- Personality and coping skills.

The extent of supportive measures required will depend on the particular circumstances of the individual. Especially vulnerable individuals may need specialized support in order to prepare them for the experience of testifying at trial. Potentially vulnerable victims and witnesses should be identified as early as possible.

Traumatized witnesses and victims of crime who are required to recount the events that victimized them may show reactions to the stress of testifying at trial. It is therefore vital that vulnerable witnesses are identified and that support measures are put in place before, during, and if needed, after the trial.

8.5 Relocation

At the ICTY and ICTR, certain witnesses and victims, as well as their families, have been temporarily or permanently relocated to third countries. The assessment as to whether a witness qualifies for such relocation is done on a case-by-case basis and usually will only apply to the most vulnerable witnesses and those who are found to face the most serious security risks.

Sometimes the relocation itself can provide the necessary protection, with the third country providing a range of services to assist in the resettlement of the relocated witness in the new country. However, in the case of the most threatened witnesses, certain third countries have provided for the change of identity for the witnesses

and their families as well as additional on-going measures. At the ICTY and ICTR, relocations have been within the exclusive purview of the registrar, and the respective chambers are not involved in either arranging or monitoring such relocations.

Witness relocation is expensive and may be stressful for the witness and their family, as it requires them to make a very difficult transition. Other, less intensive, witness protection measures should therefore be considered as a first option when evaluating each witness' security plan.

8.6 Protection of the victims and witnesses and their participation in the proceedings

According to the Rome Statute, the ICC bears full responsibility for ensuring that victims and witnesses are not placed at undue risk because of their participation in the proceedings. The entire court has a duty to protect victims and witnesses.

The ICC's Victims and Witnesses Unit ("VWU") is responsible for specific aspects of witness protection. The prosecution has a more general mandate in relation to protection matters under Articles 54(3)(f) and 68(1) of the ICC Statute. This includes the responsibility to take protective measures during the investigation and prosecution stages, although this does not extend to the preventive relocation of witnesses. Although the judges can take the initiative to raise witness protection issues, ultimately it is the party calling the witness that is responsible for requesting witness protection measures.

The ICC mechanisms for the protection of victims and witness are comprehensive. The ICC may order protective measures upon the application of the prosecution, defence or the victim/witness, after having consulted with the VWU.

The Registry is mandated to provide protective measures and security arrangements for participating victims and witnesses. Thus, the creation and maintenance of a witness protection programme is the responsibility of the Registry. This covers both prosecution and defence witnesses. According to the Rome Statute, the ICC bears full responsibility for ensuring that victims and witnesses are not placed at undue risk because of their participation in the proceedings. The entire court has a duty to protect victims and witnesses.

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8.7 Balancing the right of the accused and protection of the witness

Protective and support measures for victims and witnesses participating in proceedings must be balanced with the rights of the accused to a fair trial. For example, granting full anonymity to victims and witnesses is a particular issue. There is a general principle that a conviction cannot be based solely or to a decisive extent on testimony of an anonymous witness, and the defendant must be able to put questions to an anonymous witness during testimony.

8.8 Protection under the Rome Statute (Article 68)

- The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.
- The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
- As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
- 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 and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
- The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
- Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

- A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

8.9 Reparations to victims (Rome Statute Article 75)

- 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.
- 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.
- Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
- In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
- A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
- Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Session 9

RELEVANCE OF ICC IN NEPAL

Objectives of the session
At the end of this session, participants will understand:

- Why Nepal needs to accede the Rome Statute;
- What benefits does it bring after being a Party to the Statute;

Notes for trainers

- Explain participants about the importance of the ICC by identifying how it helps to end impunity in Nepal.
- Ideally, someone who has been actively involved in the advocacy of ICC should be invited to speak, discussing his or her experience with the importance of organized civil society advocacy in the process.
- Once the facilitator has outlined the topic and/or the invited speaker has finished, open up the session for questions and consultations.

The aim of this session is to highlight the general issues in domestic implementation of the Rome Statute in Nepal; and the compatibility of the Statute's general principles of criminal law with our national constitution, penal legislations and other international conventions to which Nepal is a party.

9.1 Where are we?

On July 25, 2006, the House of Representatives (HoR) passed a resolution instructing the Government of Nepal to immediately access the Rome Statute. Following up the resolution the Government formed a task force to study the pros and con of the accession to the Statute and the task force submitted its report with a recommendation to accede to the Statute. On February 11, 2009, the Minister for Foreign Affairs tabled a proposal in the cabinet, however, it did not discuss the motion and it is still pending.

9.2 Why Nepal should accede to the Rome Statute?

Accession of the statute will contribute to peace and security in Nepal, as it will help to end the culture of impunity for serious crimes both through the threat of international prosecutions and by strengthening country's national capacity to prosecute such crimes in the future.

Accession to the Rome Statute of ICC has a multiplier benefit for Nepal. We can address international and national serious crimes through this instrument. Being state party to the ICC helps us to avert possibilities of future violation of human rights. To manage transitional justice process also, it is important for Nepal to accede to the ICC.

Impunity is one of the biggest problems for rule of law in Nepal and the most important aspect of becoming party to the Rome Statute is ending impunity in the country by reforming domestic laws. As Panel Code has been recently tabled in the legislative parliament, it is time for Nepal to think about acceding to the Statute thereby criminalizing crimes under the jurisdiction of the Statute.

9.3 Why Nepal has not acceded yet to the Rome Statute?

A major reason for the delay in implementing Parliamentary resolution to accede to the Rome Statute appears to be a lack of understanding of the ICC and its mandate. If Nepal accedes to the ICC, its national criminal justice system will be the primary institution to investigate and adjudicate serious crimes.

The first thing that Nepal will have do after the accession is to enable the national criminal justice system that will be able to hold the perpetrators to account and justice will be served to victims of these serious crimes in its domestic courts. The jurisdiction of the ICC can only be activated if Nepal's own domestic justice system proved unable or unwilling to investigate and prosecute the crime of court's jurisdiction. The ICC works on the principle of complementarity. As long as Nepal is willing to investigate and prosecute the crime under the jurisdiction of the court, there is no risk of prosecution at the ICC.

The other misunderstanding about the jurisdiction of the court seems to be on the issue of retroactivity. The ICC has a prospective jurisdiction. The court cannot investigate or prosecute crime committed before the ratification of ICC. Therefore, the Court has no power to investigate cases, which occurred prior to the ratification of the Rome Statute, unless the state makes a specific request to extend the ICC's jurisdiction to an earlier date.

By acceding Rome Statute, Nepal would send a message that it believes in justice, accountability and rule of law, as well as a stable and just system of government.

The Rome Statute created not only a court, but also a new international legal system consisting of the ICC as well as the national jurisdictions of each State Party. Within this system, States have the primary responsibility to investigate and prosecute Rome Statute crimes. In his 2004 report, Mr. Kofi Annan noted that "the Court is already having an important impact by [.] serving as a catalyst for enacting national laws against the gravest international crimes"[71].

71 Report of the Secretary-General, 23 August 2004, S/2004/616, p. 16.

The Assembly of States Parties to the Rome Statute has repeatedly stressed the importance of national implementation of the Statute and of strengthening the capacity of national jurisdictions and has considered ways to achieve those goals.

The Rome Statute system has contributed to reform national justice system, since many national jurisdictions have simultaneously been encouraged and empowered to prevent impunity. As of September 2014, the Rome Statute has 120 State Parties that have fully endorsed the new justice paradigm centered on the ICC[72].

9.4 General obligations to Nepal after acceding to the Rome Statute

Implementing an international treaty means putting the treaty into effect. It goes a bit further than mere observance of the law. It implies that its general aim, the result that was desired by those who adopted the treaty, is achieved or will be achieved, so that the treaty-rules can be said to have been given full effect.

Usually, the obligation to perform a treaty is intrinsic to its accession by the state and therefore is not expressly stipulated. The Vienna Convention on the law of treaties simply states that a treaty must be performed in good faith by the states which are parties to it. Indeed, a state in good faith does want that the treaty to which it has become a party is given full effect.

Hence, implementation covers all those measures which must be taken to ensure that the rules of international criminal law are fully respected. All states have a clear obligation to adopt and apply measures of implementing international criminal law. These measures may be taken by one or more government ministries, the legislature, the courts, the armed forces, or other state organs.

However, it is a State which continues to have the primary responsibility to ensure the effective implementation of international criminal law, and which must first and foremost adopt measures at the national level.

The means of implementation that have a preventive character are, essentially those whereby states have the duty to take measures pertaining to the domestic legal order. These measures are called "national measures of implementation".
Hence, this session will discuss general issues and specific issues of implementation.

9.5 Issues of the implementation

As with any international treaty, States need to consider whether becoming a Party to the Rome Statute will require changes to be made to their national laws or administrative procedures, to enable them to meet all of their obligations under the treaty. For example, some legislative measures may need to be taken to ensure

72 122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.

effective cooperation between states parties and the court during its investigations. If States already have national legislation pertaining to international legal assistance and extradition, there will be little difficulty to introduce these measures.

After the accession to the Statute, Nepal will have to ensure that the crimes under the jurisdiction of the court are criminal acts under panel law. However, Nepalese Criminal Laws have not defined the crimes stated in the Rome Statute.

The Statute imposes several expressed obligations upon States parties. There are basic elements that have to be incorporated into national laws to enable States to exercise their obligations and to ensure that the national laws are consistent with international laws, particularly with the provisions of the Rome Statute.

9.6 What Nepal should do to observe the Rome Statute?

Nepal's obligation after the accession to the Statute will be in the first place to reform the national criminal justice system so as to make sure that the crime under the jurisdiction of the court can be effectively investigated, prosecuted and punished within the domestic courts. In doing so, Nepal will have to, on the one hand amend criminal laws including some of the provisions of the constitution so as to make the domestic laws compatible to the Rome Statute while on the other hand, it will have to build the capacity of police, prosecutors, judges and defense lawyers so that they are trained enough to deal with the crimes under the jurisdiction of the court.

In doing so, Nepal should amend a number of legislations including some of the provisions of the constitution. This includes among other:

1) The ICC crimes are considered non-pardonable crimes, hence, Nepal needs to amend the pardoning power of the President which now empowers the President to pardon any crime tried in Nepal.
2) The Extradition Act needs to be amended so as to make sure that the any Nepali implicated in the crime under the jurisdiction of the court can be extradited in case of prosecution initiated in the court
3) The State Case Act grants power to the Government of Nepal to withdraw the criminal charge, however, crimes under the Statute cannot be withdrawn so this needs to be amended.
4) The statute of limitation in many laws needs to be amended so as to allow the prosecutor or police to investigate and prosecute crimes under the jurisdiction of the court.
5) The Police and Army Acts need to be brought in line with the Statute introducing the provision of command responsibility and no defense for the superior order, including the immunity clauses
6) The current penal law in Nepal does not criminalize crimes under Statute such as crimes against humanity, genocide, war crimes including enforced disappearance and torture, hence, Nepal needs to criminalize those crimes with appropriate punishment

9.7 Conclusion

Nepal now has the opportunity to demonstrate its commitment to the new system of international justice and to lead the fight against the crime of genocide, crimes against humanity and war crimes. Ratification of the Rome Statute would give Nepal an important role as a State Party since it would then be able to participate in the ICC's oversight and governing body (the Assembly of States Parties) and to nominate candidates for judges of the ICC.

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