

# The International Criminal Court

Finding justice  
for victims,  
ending impunity  
for perpetrators



SpecialReport

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**Cover image**

Young girls from Kosovo in a displaced people's camp in Montenegro. "Ethnic cleansing" forced their families to flee; most of the camp children's homes were destroyed and some children witnessed atrocities.

*Photo: Philip Maher/World Vision*

# The International Criminal Court

Finding Justice for Victims,  
Ending Impunity for Perpetrators

Melanie Gow



A World Vision International special report

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## Executive summary

In Rwanda, Bosnia, Uganda, Cambodia, Chile and elsewhere, perpetrators of war crimes, crimes against humanity and genocide have acted with impunity. Innocent civilians, most appallingly children, have been counted among, and even targeted as, their victims. In 2002 an International Criminal Court (ICC), able to try those responsible for such atrocities, was finally born. The ICC took solid shape in 1998 when governments from around the world came together in Rome to draft a statute for the workings of the Court.

But this 1998 conference, and the resulting Rome Statute of the International Criminal Court, have been merely the latest steps in an historical evolution that began much earlier. The World War II trials in Nuremberg and Tokyo, and the ad hoc tribunals of Rwanda and the former Yugoslavia, were also part of the equation.

For World Vision, the establishment of the International Criminal Court is welcome. Too often, our staff have worked directly with the survivors of war crimes and crimes against humanity—in camps for refugees and internally displaced people, with former child soldiers and children who have been sexually abused, raped and exploited. Too often, we have witnessed the long and painful recovery processes that many such survivors must undergo.

World Vision supports the ICC and urges national governments to work to sustain an effective, well-funded and just court. Certainly flaws exist within the Rome Statute; some of these limitations are highlighted here. However, future opportunities to strengthen the Court must be grasped.

Despite the entry-into-force of the Statute in July 2002, debate and contention around the institution have not gone away. In fact, opposition to the Court from some quarters, with the US Government being perhaps the most vocal, has intensified. Issues related to the functioning of the Court range from concerns about despots serving as judges in the trial chamber<sup>1</sup> to concerns about third party hearsay having the weight of evidence. This paper addresses some of these concerns—though it cannot possibly attempt to cover all the new and sometimes onerous accusations made—and suggests ways forward. That the Statute of the ICC could be improved is true; that governments can play a constructive role within the established system to make it so is also true.

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<sup>1</sup> To immediately address this concern, it should be clarified that only States Parties to the Statute (and who had become so before 1 July 2002) are eligible to put forward nominations for any of the positions within the Court. At the time of publication it was likely that the election of judges and the prosecutor would take place in February 2003. Countries that have not ratified the treaty and therefore will not be eligible to nominate Court officials, include China, Iran, Iraq, Israel, Libya, North Korea and the United States of America.

For World Vision, the International Criminal Court represents a potentially effective and powerful framework for justice and protection—a chance for the international community, finally, to offer justice to victims and to end impunity for perpetrators. That the existence and functioning of the Court might one day dissuade would-be violators is not certain, but clearly it offers this hope.

## Major recommendations

- World Vision supports the ICC and, while acknowledging that the existing Rome Statute of the Court is not without flaws, urges all states to ratify the Statute and promote the Court's functioning and jurisdiction.
- World Vision also advocates the full implementation of international human rights and humanitarian law, and urges national governments and the international community to utilise these instruments with complementarity. The Rome Statute should be informed by existing instruments, such as the Convention on the Rights of the Child and its Optional Protocols, and ILO Convention 182.
- World Vision urges Members of the United Nations Security Council to support the ICC as a vital instrument in the maintenance of peace and justice.
- World Vision supports the pre-eminence of national courts, and urges states—especially industrialised states—to support the effective development of just, independent national legal systems.
- World Vision urges Members of the Security Council not to invoke the power granted it under Article 16, to stall any investigation or prosecution that it so determines, except in the most exceptional circumstances.
- World Vision endorses the role of a strong and independent Prosecutor and urges states to cooperate and support the role. World Vision also acknowledges the appropriateness of some levels of constraint upon the office to ensure the highest standards of accountability
- World Vision supports the concept of universal jurisdiction for crimes defined under the Rome Statute.
- World Vision urges governments not to enter into any agreements that may seek to circumvent the jurisdiction of the ICC.
- World Vision recommends that at the first Review Conference of the ICC (in 2009), Article 8 (2) (b) (xxvi) concerning conscription of children into the armed forces be strengthened to reflect recent progress in international law.

- World Vision recommends a review of the definition of genocide at the initial Review Conference and a lowering of the threshold of intent.
- World Vision urges States Parties to the Rome Statute to amend provisions so as to ensure that existing international standards on the use of prohibited weapons such as anti-personnel landmines are appropriately reflected; and in addition, to ensure that such provisions apply equally to armed conflicts of an international and a non-international nature.

# Introduction

*The estimate of 170 million dead in 250 conflicts that have occurred since World War II is a grim testament to the failure of the international community to create a viable mechanism to prevent aggression and enforce International Humanitarian Law.*

— L N Sadat & R S Carden

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

— Preamble to the Rome Statute<sup>2</sup>

For more than fifty years, World Vision has worked with the victims of war and atrocity—from Korea and Cambodia to Afghanistan, Rwanda, Sierra Leone, Kosovo and Guatemala. Most disturbing has been the realisation that as the number of armed conflicts around the world has increased, so too has the number of civilian casualties. Indeed civilians, including children, have become the new targets.

In the decade between 1985 and 1995, as a result of armed conflict some 2 million children were killed, 12 million were made homeless and 1 million were orphaned or separated from their parents.<sup>3</sup>

For too long, perpetrators of crimes against humanity have brutalised, raped and maimed with impunity. In July 2002, the treaty to establish a permanent International Criminal Court (ICC) able to try those charged with committing crimes against humanity, war crimes and genocide,<sup>4</sup> finally entered into force. Perhaps, at last, the victims of these crimes will find justice and the international community will be able to send a clear message that the Pol Pots and Idi Amins of today will not be shielded.

World Vision works directly with victims of war crimes and crimes against humanity in refugee and internally displaced camps, with former child soldiers and children who have been sexually abused, raped and exploited. Under the ICC, these children will have legal recourse against their abusers and access to compensation and support.

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<sup>2</sup> Rome Statute of the International Criminal Court, opened for signature on 17 July 1998, 37 ILM 999 adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, on 17 July 1998. The Statute entered into force on 1 July 2002. As at 24 January 2003, there were 139 signatories and 87 ratifications (<http://www.iccnw.org/countryinfo/worldsigsandratications.html>).

<sup>3</sup> Melanie Gow, Kathy Vandergrift & Randini Wanduragala, *The Right to Peace: Children and Armed Conflict*, Working paper #2, World Vision International, 2000

<sup>4</sup> The Statute entered into force on 1 July 2002, after the deposit of the 60<sup>th</sup> ratification (received 11 April 2002).

In 2001 World Vision launched its campaign “Imagine a World Where Children are Safe”. The campaign seeks to advocate for the rights of children to protection and security, and for a world where violence against them is not tolerated.

The campaign, which draws together independent research by World Vision across a number of countries, including Cambodia, Brazil, Ghana, Kenya, Thailand, Romania, Myanmar and Colombia, highlights the appalling violence to which children are subjected. They are raped, exploited, trafficked, forcibly recruited into armed forces and kept as slaves. All of these forms of violence escalate during protracted conflict.

Governments, UN agencies and others must take decisive action to protect children from such crimes, and to bring perpetrators to justice. Too much time has passed and too many victims have suffered.

While the ICC will not instantly provide an end to atrocities, the Court can serve as a channel for global standards of decency and respect for human rights as part of a wider strategy that promotes respect for the rule of law and addresses poverty, discrimination and inequality.

This discussion paper identifies key strengths and some weaknesses of the existing ICC Statute, especially in terms of the ways in which they will affect children (though under the Statute, alleged perpetrators who were below the age of 18 when the alleged crime was committed cannot be tried before the Court), as well as proposing some core recommendations for action.<sup>5</sup>

World Vision recognises that more must be done to ensure that the ICC is an international court that seeks justice for all. To this end, some of the recommendations made and the issues raised are for consideration when the Rome Statute is due for review seven years after entering into force. In the meantime there are actions that can be taken by nation states and the UN, in particular the Security Council, to support an effective and efficient Court.

The realisation of the ICC has not been an easy process and it continues to be the focus of competing tensions and agendas. Indeed the Rome Statute itself is the product of such tensions—tensions that have produced weaknesses and inadequacies within the Statute and that may well threaten the effective functioning of the Court. These flaws are compounded by the political realities of the day, which see some nations such as the United States seeking to circumvent the Court even before it has come to fruition.<sup>6</sup>

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<sup>5</sup> Defined here as all those under the age of 18.

<sup>6</sup> Recent action by the US to have governments bilaterally sign agreements which will ensure that US nationals are never extradited to The Hague to stand trial before the ICC (permissible under Article 98 of the Rome Statute), is deeply disappointing and will distort the Court’s functioning.

World Vision notes that the concerns and resistance of some governments to the Court is founded on a legitimate desire to protect national citizens from false accusations and dubious show trials. However, a number of safety valves within the Statute make this extremely unlikely.

The Rome Statute endeavours to lay the foundations for an institution that will “...lift the blanket of impunity that now covers atrocities almost everywhere”.<sup>7</sup> With all its weaknesses, the Statute consistently underscores the point that one of the Court’s primary purposes will be to protect victims of the most horrendous crimes. The Statute should not be dismissed as a flawed and unworkable document; rather, it should be supported by states and its strengths should be promoted.

When 120 nations voted for an International Criminal Court on 17 July 1998,<sup>8</sup> they voted for a Statute that, if implemented in good faith, will be an effective mechanism for holding accountable those individuals who commit the worst breaches of international humanitarian law and other specified crimes.

## **Structure of this paper**

This working paper is broadly divided into four sections: a brief reflection on the historical context; an analysis of some of the challenges and strengths of the existing Statute, including trigger mechanisms for the Court and issues of the Court’s jurisdiction; a closer look at the Court’s definitions of crimes; and finally, some key recommendations for action.

The Rome Statute that establishes the ICC is a highly complex and intricate treaty, debated by lawyers and policy makers globally. Here, World Vision does not endeavour to engage in detailed debate and discussion on all such complexities; rather, this paper attempts to highlight some of the most contentious areas of concern that may have a substantive impact on the manner in which the Court is able to function effectively and efficiently.

Daily disputes around the International Criminal Court continue. Recent attention has focused on Article 98 of the Statute and this will be briefly discussed. Healthy debate about the Court should be encouraged, as it will help to ensure that the ICC is a strong, transparent and accountable institution. However, some recent commentaries from the Court’s critics have sought merely to weaken and undermine the workings of the Court. World Vision encourages all governments to work within the system to create a strong and just Court.

As a Christian relief, development and advocacy agency, World Vision seeks justice for society’s most marginalised and vulnerable, including women, children, minorities, refugees and

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<sup>7</sup> Douglas Cassel, “Why We Need the International Criminal Court”, *The Christian Century*, May 12, 1999

<sup>8</sup> Some 20 nations abstained from the vote while seven opposed the establishment of the ICC.

the internally displaced people. Reflecting this, World Vision is concerned to ensure that the ICC provides the highest level of support and protection for all people, equally.

# Part I

## Historical context

### Chapter one: Hard lessons to learn

When discussing the ICC it is important to begin with an analysis of the historical context in which it is placed, for in many ways the Court is the product of a process begun long ago. In some instances the Rome Statute represents a clear advancement in strengthening protections under international humanitarian and indeed human rights law, while in other areas there has been a decided regression.

The parentage of the ICC can be linked to the trials at Nuremberg and Tokyo,<sup>9</sup> but the concepts and codification of the international criminal law system had existed and has been evolving since ancient times.<sup>10</sup> Indeed, while Nuremberg and Tokyo may have given rise to what we identify today as the international humanitarian and human rights systems, they were not the first attempts to establish international criminal tribunals.

In 1872, Gustave Moynier, one of the founding members of the International Committee of the Red Cross, drafted a statute for an independent international criminal tribunal. Moynier's idea was that the tribunal would try violators of the Geneva Conventions of 1864.<sup>11</sup> Although the idea was never realised, it clearly shows that long before Nuremberg there was a desire to bring to justice those guilty of war crimes, and a desire that the international community play a role in this. This early proposal came from a non-governmental source but it was not long after that governments also began to explore the creation of such an institution—at the First International Peace Conference in 1899.<sup>12</sup> In 1937 the League of Nations also tried, with no success, to establish an international court.<sup>13</sup>

Leaping forward to the end of World War II, the victorious Allies established the tribunals of Nuremberg and Tokyo to try the suspected war criminals from the Axis powers. Numerous

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<sup>9</sup> The trials of Nuremberg and Tokyo were held after World War II to try suspected war criminals from the Axis powers. The Allied powers created the Nuremberg tribunal by an international agreement known as the London Accord and its annex the *Charter of the International Military Tribunal*, 82 UNTS 280, entered into force August 8, 1945, Human Rights Library, University of Minnesota.

<sup>10</sup> See for example Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee", in Timothy L.H. McCormack & Gerry J Simpson (eds), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997

<sup>11</sup> Gustave Moynier, *Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Conventions*, Geneva 1872

<sup>12</sup> *Hague Convention for the Pacific Settlement of International Disputes*, 29 July 1899, 1901 UKTS 9,

<sup>13</sup> McCormack in McCormack & Simpson, n. 7 above

discussions have examined these tribunals in detail,<sup>14</sup> but the significance of the two tribunals to the Rome Statute is the clarity they provided around the notion of individual criminal responsibility. “Nation states” as a whole could not be held responsible for war crimes—it was individuals who took deliberate and calculated actions for which they should be held responsible. In line with this, defence claims of “superior orders”<sup>15</sup> were not accepted and this has carried, along with individual criminal responsibility, into the Rome Statute.

In addition, Nuremberg and Tokyo, with all their flaws,<sup>16</sup> established a clear set of “crimes” under international law. Many of these crimes are now reflected, if in slightly different forms, in the current Rome Statute (see chapter five).

It is difficult, in the current political climate surrounding the ICC, not to make some comparison between the actions of some states to compromise the effectiveness of the ICC and claims of “victor’s justice” that emerged from the Nuremberg and Tokyo trials. Some tensions and discrepancies found in the Rome Statute are the result of states’ efforts to ensure that their own nationals do not come under the jurisdiction of the ICC. This is of course precisely what occurred in the aftermath of World War II when none of the Allies’ nationals came before the tribunals.

The significance of Nuremberg and Tokyo in the journey towards the establishment of the ICC should not be underrated; indeed one of the first actions of the United Nations General Assembly after its creation was to adopt the Nuremberg principles.<sup>17</sup> Nuremberg and Tokyo were also instrumental in laying the foundations for the two ad hoc tribunals that have been created in recent times.

The response of the international community to the atrocities in the former Yugoslavia and in Rwanda was to call for the establishment of some kind of international mechanism of justice for the victims. This justice found its form in the shape of two ad hoc International Criminal

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<sup>14</sup> See for example essays included in McCormack & Simpson, n. 7 above

<sup>15</sup> The claim that a soldier only acted because they were ordered by their superiors to do so and that this therefore negates their individual responsibility for those actions

<sup>16</sup> Again it is not possible here to discuss the many weaknesses that have been highlighted with the Nuremberg and especially with the Tokyo war crime trials. However charges of victor’s justice, inadequate provisions for the protection of the rights of defendants, and charging individuals with crimes that were not codified as such before trials began, continue to resound.

<sup>17</sup> Marcus Mumford, “The International Criminal Court: Building Upon a Foundation of Sand: A Commentary on the ICC Treaty”, *Michigan State University–DCL Journal of International Law*, Spring 1999, p. 164

Tribunals (ICTY and ICTR).<sup>18</sup> What the establishment of these tribunals clearly demonstrated was a belief in the international community that the time had come for a more permanent administration of justice.

In 1992, at around the time that the ICTY and the ICTR were being established, the United Nations General Assembly asked the International Law Commission to draft a paper on the concept of a permanent international criminal court.

There are clear links in the Rome Statute to the statutes of both ad hoc tribunals. The links are particularly evident in some procedural aspects of the ICC regarding election of judges, financing, the role of the Prosecutor and so on, and in the definitions of crimes.

In summary, it is clear that the Rome Statute continues an evolutionary process begun many years ago, with links as far back as 1874, if not earlier. The Statute, despite its weaknesses, does represent a significant moment in history. As continuing atrocities claim new victims at a depressing rate, states should move quickly to transform the Rome Statute into a functioning Court.

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<sup>18</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, established pursuant to SC Res. 827: *Statute of the International Tribunal for the Former Yugoslavia*, SC Res. 827, 48 UN SCOR, UN Doc. S/Res/827 (1993) ILM 1203 and International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States, established pursuant to SC Res. 955: *Statute of the International Tribunal for Rwanda*, SC Res. 955, 49 UN SCOR, UN Doc. S/Res/955, 1994, 33ILM 1598.

## Part 2

# Challenges, complexities and ways forward

### Chapter two: Trigger mechanisms

Given the number and range of crimes against humanity that are being committed, how will the International Criminal Court decide which ones to prosecute? Under the Rome Statute, there are three ways in which cases can be referred to the ICC. These “trigger mechanisms” as developed under the Statute and outlined in its Articles 13, 14 and 15, contain both strengths and weaknesses in terms of the Court’s effectiveness in bringing justice speedily to victims.

The jurisdiction of the Court can be triggered:

1. by a State Party to the Statute
2. by the Security Council referring a case to the Court, mandated under its “Chapter VII powers” in the Charter of the United Nations, or
3. by the Prosecutor acting on her/his own independent initiative (*proprio motu*) following an investigation.

The trigger mechanisms for the Court proved among the most contentious issues during the debates at the Rome Conference in 1998, and this reality is reflected in a statute that seeks to balance state concerns around sovereignty and power with an effectively functioning and independent Court. The result is a somewhat uneasy compromise.

### State Party referral

#### Article 13

*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:*

- (a) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14.*<sup>19</sup>

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<sup>19</sup> Article 14 of the *Rome Statute* states: 1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation. Rome Statute

It is difficult to recall an instance under existing international human rights instruments and mechanisms where state-based complaint procedures have been utilised against another state. The reasons for this are evident—the political, economic and diplomatic ramifications could be immense.

Thus, while this is a largely uncontentious article, it is unlikely to be a key source of referrals for the ICC. Had this been the only trigger mechanism under the Rome Statute, it would no doubt have resulted in a largely ineffective and inactive Court—of little comfort to victims of crimes against humanity everywhere.

## **Security Council referral**

### **Article 13**

*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:*

- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations...*

The Security Council, through its mandate in the UN Charter pursuant to Chapter VII, has always had a primary responsibility for the maintenance of international peace and security. Indeed it was through Security Council Resolutions, 827 and 955 respectively, that the ICTY and the ICTR were established.

The Security Council's mandated power to resolve conflicts through use of force gives it pre-eminence over all existing international mechanisms in matters related to armed conflict and international humanitarian law. It has always been clear, then, that the Security Council would have a key role in any evolving permanent criminal court. Precisely what this role would be was not made clear until deliberations in Rome in 1998.

As the debates in Rome began, it became increasingly clear that if the ICC were to be a viable institution, it could in no way undermine the existing authority of the Security Council.

The power accorded to the Security Council under the Statute is a compromise position. This position sees its role substantially weaker than that being advocated by some states—in particular China, the Russian Federation, the USA and France—but affords the Council a level of authority not granted to other entities or states.

That the Security Council should have referral power makes sense; that it should have the veto power requested by some states is completely nonsensical. A strength of the Rome

Statute is that attempts for single state veto power (i.e. by Permanent Member States of the Security Council) were defeated. Had such a mandate been accepted it is clear that the result would have been at best an inactive court, at worst a court representing selective justice.

While the compromise solution suggested by Singapore, and which now forms Article 16 in the Rome Statute, may provide a practical solution to an otherwise gridlocked debate, it is far from an ideal solution. The compromise position states:

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

This provision means that, while individual Members of the Security Council may not halt investigations or prosecutions, the Security Council as a whole has the power to stall any investigation or prosecution that it so determines.

Effectively this puts the onus on the Security Council to take a proactive decision, by passing a resolution, to set aside an investigation. This certainly creates a higher threshold for action by the Security Council and could present an awkward and very public situation if the Security Council does ever decide to act on Article 16.

A strength of Article 16, aside from disallowing individual veto power, is that a decision to invoke it would bring the Security Council under the watchful and at times critical eye of civil society. The role of non-governmental organisations in the Rome debates has been well discussed. The continuing monitoring role played by some individual organisations, and in particular by the International Criminal Court Coalition, means that these organisations will likely demand accountability for any such Security Council decisions. Admittedly, the Security Council is a largely secretive arm of the United Nations, holding most of its meetings *in camera*. It will be interesting to see whether the ICC has any flow-on impacts on the Security Council itself and the way in which it conducts its business.

The existence of Article 16 in the Statute, however, does present a potential weakness. The notion that the Security Council—some of whose Members may not even be States Parties to the Statute—can effectively delay indefinitely any investigation sets the Court up for inaction on investigations that may be perceived as especially sensitive. The investigation of any head of state springs immediately to mind.

Although the provision allowed under Article 16 could be viewed as a weakness in terms of an ideal statute, given the political climate in which it was negotiated, it could be seen as a strength of negotiation.

- **World Vision urges Members of the Security Council to invoke the power granted under Article 16 only in the most exceptional circumstances. In order that justice not only be done, but be seen to be done, an independent institution is imperative.**

## Referral by the Prosecutor

### Article 13

*The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:*

- (c) *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*

The power of the Prosecutor to initiate his or her own investigation—by far the most contentious trigger mechanism under the Rome Statute—must be heralded as one of the Statute’s significant strengths. Four of the five Permanent Members of the Security Council, with the United Kingdom standing as the exception, vehemently opposed *proprio motu* powers for the Prosecutor. However, it is the inclusion of this provision that provides some hope that the ICC may become an effective international criminal court, able to bring to justice violators of international humanitarian law.

As one commentator noted, “Without an independent Prosecutor the ICC’s jurisdiction could have been triggered only by political bodies, that is States Parties and the Security Council.”<sup>20</sup> Indeed, the idea for an independent prosecutor was considered so radical that it was not even entertained in the 1994 Draft Statute.<sup>21</sup>

Nonetheless, the Rome Statute contains a number of restrictions under Article 15 to ensure that an independent Prosecutor is not able to abuse his or her *proprio motu* power. While safeguards are certainly a necessity, some of the requirements are quite stringent and could hinder referral by the Prosecutor.

At the Rome Conference, government delegations from Germany and Argentina introduced the proposal that in order for the Prosecutor to proceed with an investigation, the Pre-Trial Chamber must grant authorisation.<sup>22</sup> This requirement now forms Article 15 (3) under the

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<sup>20</sup> J. Pejic, “The International Criminal Court Statute: An Appraisal of the Rome Package”, *The International Lawyer*, Vol. 34, No. 1, Spring 2000, p. 77

<sup>21</sup> *Ibid.*

<sup>22</sup> Timothy L.H. McCormack & Sue Robertson, “Jurisdictional Aspects of the Rome Statute for the New International Criminal Court”, *Melbourne University Law Review*, Vol. 23, 1999, p. 643

Statute. Although not unreasonable, it does create an additional restriction on the actions of the Prosecutor and could potentially give rise to a situation in which the Pre-Trial Chamber and the Prosecutor are opposing each other. In such an instance, the Pre-Trial Chamber, consisting of a three-judge panel (Article 39 (2) (iii)), has the ultimate decision-making power.

In addition, a further layer of procedure ensures that upon the completion of an investigation, no trial can be held without another prior approval by the three-judge panel, to send the accused to trial (Article 61 (7) (a)). Other procedural constraints in the Statute mean that the Prosecutor cannot begin an investigation before first notifying the states that would normally exercise jurisdiction over the crimes concerned—for example, the state of nationality of the accused—and allowing them to take over the investigation (Article 18 (2)).

On the positive side, under Article 18 (3) the Prosecutor does have the ability to review the investigation conducted by the state in question and to determine whether a state has been unwilling or unable to carry out the investigation. If this is the case, the Pre-Trial Chamber may empower the Prosecutor to undertake an investigation without the consent of the said state (Article 57 (3) (d)). This decision by the Pre-Trial Chamber may be appealed by the state in question (Article 82 (2)) to the full Appeals Chamber—a five-judge panel. These provisions ensure a high threshold both for the protection of state sovereignty and for the rights of the accused.

In the main, the role of the Prosecutor under the Rome Statute should be viewed as a strength in the Statute, and as a real victory for those nations and for civil society that lobbied to ensure that this provision was realised.

- **World Vision endorses the role of a strong and independent Prosecutor and urges states to cooperate and support the role. World Vision also acknowledges the appropriateness of some levels of constraint upon the office to ensure the highest standards of accountability.**

The Prosecutor's mandate to hear evidence from a variety of sources, including civil society organisations, means that non-governmental organisations may become an important source of support for the Prosecutor. This may be especially true in war zones where NGOs can be unwilling witnesses of abuse and atrocity. Tensions between supplying evidence to the ICC and protecting staff, recipients or programmes, may well create new and legitimate concerns for some.

This testament of direct evidence by civil society is different from charges by some critics that secondary hearsay evidence will lead to the indictment of individuals. Kenneth Roth, Executive Director of Human Rights Watch, wrote recently of such claims in relation to the International Tribunal for the Former Yugoslavia,

*the prosecutor might pursue...unnamed 'nongovernmental organizations' that challenged NATO's attacks on Serbia's fuel supplies and the bridges over the Danube. Human Rights Watch did question why NATO bombed Belgrade's central heating facility when the effect was to destroy heavy heating oil that was needed to keep Belgrade's civilians warm but was worthless for running tanks or military vehicles. Similarly, it asked why NATO bombed bridges that were far from the Kosovo battlefield, blocking civilian commerce but doing nothing to stop the flow of troops and arms to the front. It suggested that these poor military judgments might well have violated international humanitarian law but never that they were criminal.*<sup>23</sup>

Furthermore, Roth notes that the Prosecutor for that Tribunal was quick to throw out on legal grounds spurious charges against the US and other NATO forces. There is no reason to assume that a Prosecutor for the ICC would be any less a legal expert or any less reasonable.<sup>24</sup>

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<sup>23</sup> NGO Coalition for the International Criminal Court, *ICC News*, August 2002, email newsletter

<sup>24</sup> *Ibid.*

## Chapter three: Other aspects of ICC jurisdiction under the Rome Statute

The issue of the Court's jurisdiction has proved highly divisive. In debates at Rome, proposals that the ICC should be able to exercise retrospective jurisdiction were supported by some states and a number of NGOs, but were eventually dismissed, and the impact of the Rome Statute on non–States Parties continues to be debated. The seeming lack of clarity on the issue of universal jurisdiction (and therefore its applicability to non–States Parties) under the Statute continues to cloud the future workability of the Court. This issue has been further complicated by recent debate and discussion around Article 98 of the Statute.

### The question of universal jurisdiction

#### Article 12

##### Preconditions to the exercise of jurisdiction

1. *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
2. *In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
  - (a) *The 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;*
  - (b) *The State of which the person accused of the crime is a national*

Some of the jurisdictional issues with regard to the powers of the Prosecutor have already been discussed but the question of the jurisdiction of the Court under the Rome Statute requires greater analysis. Article 12 proved one of the most contested sections of the Statute and one that the United States Government, in particular, refused to accept. Indeed, the final version of Article 12 is again a product of compromise.

There were certainly less stringent recommendations made by a number of government delegations, in particular the Korean suggestion and, even more broadly, the proposal of the German delegation, that the Court have universal jurisdiction.<sup>25</sup> As it was, the final provision was considered radical enough and there was slim chance of getting anything broader into the text. For many, however, particularly those in civil society, including World Vision, Article 12 is one of the most troublesome Statute provisions. Article 12 does not clearly state that the

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<sup>25</sup> See McCormack & Robertson, n. 19 above, p. 643, on the Korean proposal and Cassel, n. 4 above, on the German proposal

Court has universal jurisdiction, and as discussed below this will most likely mean that some despots always remain beyond the reach of the Court.

Under existing international treaty and customary law, states have for some time had universal jurisdiction over a number of crimes, including piracy, genocide, torture and serious war crimes. At the Rome Conference, the German Government argued that if individual states have individual universal jurisdiction over such crimes, it seems odd that they refuse to share this universality through an international court.

Universal jurisdiction would most certainly have provided for a strengthened court. Indeed it seems that the state consent element of the Statute will seriously limit the investigation of alleged crimes except by Security Council mandate (which does not require state consent).

While the current jurisdictional limitations in the Statute could be overcome in one of two ways, neither seems highly likely—at least in the Court’s immediate future. The first is through ensuring universal ratification of the Statute—thereby creating universal jurisdiction. The second is through amending the current Statute to enable the custodial state (i.e. the state holding the alleged perpetrator) or the state of nationality of the victim to serve as additional jurisdictional links—effectively the original proposal made by the Korean delegation.

Michael Scharf takes a slightly different interpretation of the decisions in Rome and one that is worth quoting here:

*No one at the Rome Diplomatic Conference disputed that the core crimes within the ICC’s jurisdiction—genocide, crimes against humanity and war crimes—were crimes of universal jurisdiction under customary international law (although there were debates about the scope and definitions of those crimes). Thus the drafters did not view the consent of the State of territoriality or nationality as necessary [under] international law to confer jurisdiction on the court. Rather, they adopted the consent regime as a limit to the exercise of the court’s inherent jurisdiction as a politically expedient concession to the sovereignty of states in order to garner broad support for the Statute.<sup>26</sup>*

Scharf is effectively saying that universal jurisdiction was already, and continues to be, valid for the above-mentioned crimes and that therefore it is not necessary for the Rome Statute to confer it. Melissa Marler makes a similar argument, noting that individual states will still be able to try those accused of war crimes in their own domestic courts under universal jurisdiction and where necessary utilising extradition agreements.<sup>27</sup> The real point is: will they?

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<sup>26</sup> Michael P Scharf, *The United States and the International Criminal Court: “The International Criminal Court’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the US Position”*, *Law and Contemporary Problems*, Winter, 2000, p. 7

<sup>27</sup> Melissa K Marler, *“The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute”*, *Duke Law Journal*, December 1999, p. 42

Few would be convinced that over past years, more criminals have been tried for war crimes under international law than have not been tried. Many examples exist of the dictators of Uganda, Cambodia and elsewhere effectively getting away with massive violations of international humanitarian law. To rely solely on states acting on their own initiatives to domestically apply the principle of universal jurisdiction is clearly inadequate. It also ignores the fact that those perpetrators, most especially those in positions of political power, who commit crimes within their own countries and who never travel beyond the shores of their own countries, may never be brought to justice. Even the Korean proposal would not have been able to prosecute under these conditions; a prosecution would require a statute that gives the Prosecutor much greater independence to investigate and ensures that the ICC has primacy over domestic courts.

## **Heads of state not immune**

Aside from the weaknesses of Article 12, there are some positive aspects to the Court's jurisdiction under the Rome Statute. One of these is that the Statute does not recognise immunity for heads of state or other dignitaries (Article 27). If a person commits atrocities whilst in power as head of state, this will not limit the ability of the Court to prosecute. The old defence of actions undertaken as part of official duties no longer holds. Certainly this has been an evolving principle in international law, exemplified most recently in regard to Chile's former president, General Augusto Pinochet. Pinochet's lawyers at one point claimed immunity from prosecution for the General, on the grounds that his actions were part of official state practice, but the extraditing domestic Courts of the United Kingdom did not accept this. This principle has been emulated in the Rome Statute, causing concern to some governments, including the United States.

## **Retrospective prosecution**

Will the Court be able to bring to justice those responsible for the infamous crimes against humanity committed in the 20th century?

### **Article 11**

- 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.*
  - 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State...*
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Article 11 of the Rome Statute is held in some tension. As the jurisdiction of the Statute does not apply to offences committed before its entry into force, there is some sense of paradox that the very tyrants whose violations inspired the creation of the ICC will never be brought to justice before it.

In summary, the jurisdictional breadth of the ICC proved a major area of debate and disagreement during the Rome deliberations. Not surprisingly, many states were opposed to any statute that appeared to undermine their national sovereignty. Disappointingly, this has resulted in a Statute that will not ensure that all those who commit atrocities in any country will be brought to trial. Whilst the jurisdictional elements of the Rome Statute are not unworkable, they are far from ideal.

- **World Vision supports the concept of universal jurisdiction for crimes defined under the Statute.**

## **Efforts to circumvent ICC jurisdiction**

Now that the Statute has entered into force, and given the debate about its universal jurisdiction, how are non–States Parties reacting?

### **Article 98**

#### **Cooperation with respect to waiver of immunity and consent to surrender**

*98.2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.*

Recent debate around Article 98 (2) has arisen following moves by the United States Government to seek bilateral agreements with nations that have ratified the Rome Statute to ensure that US nationals are not given up to the Court's jurisdiction.

Arguments against such moves have been put forward on both legal and moral grounds, with organisations such as the European Commission and Human Rights Watch arguing that such agreements are in fact in contravention of both international law and the Rome Statute.

According to *The Financial Times*, the European Commission’s legal service stated that “...a contracting party to the statute concluding such an agreement with the US acts against the object and purpose of the obligations of the statutes in good faith”.<sup>28</sup>

Human Rights Watch, in its own comprehensive assessment, maintain among other charges that such agreements are not valid because such understandings can only apply between States Parties to the Rome Statute and would contravene the object and purpose of the Statute, and that the Article must be defined narrowly and in line with the broader jurisdictional regime of the Court.<sup>29</sup>

Clearly these legal debates will continue and it may be some time before they are tested. More broadly, the agreements have the disappointing likelihood of hindering the effectiveness of the Court or even leading to a perception—not least among victims of crimes against humanity—that the Court is selective in its application of justice. While concerns about ensuring the protection of citizens are acknowledged, as highlighted earlier there are a number of safeguards within the provisions of the Statute itself. Agreements currently being negotiated between individual countries should be discouraged.

- **World Vision urges governments not to enter into any agreements that may seek to circumvent the jurisdiction of the ICC.**

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<sup>28</sup> *The Financial Times* (London), Wednesday 28 August 2002, p. 1

<sup>29</sup> Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 Agreements*, Press Release, August 2, 2002

## Chapter four: The relationship of the ICC to national courts

Linked directly to discussions of jurisdiction is the nature of the relationship between the ICC and national courts. The Rome Statute provides clarity on this issue, though there is some room for interpretation. What are the strengths and weaknesses of the arrangement established by the Statute, in terms of respecting national sovereignty while also ensuring that perpetrators of horrendous crimes do not escape justice?

The Statute in its opening paragraphs makes very clear that the ICC does not replace but rather complements national systems of justice:

### Preamble

*Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions...*

The ICTY and the ICTR provided a potential precedent for this relationship—that the national legal systems could accede primary jurisdiction to these ad hoc tribunals—but those negotiating the Rome Statute agreed early on not to accept this option.

Instead, Article 17 (1) (a) and (b) ensures that a state with jurisdiction over a case has the first right to begin proceedings. The exception is where the ICC is able to determine that the state is “unwilling or unable genuinely to carry out the investigation or prosecution”. The threshold for determining unwillingness or inability are quite high (Article 17 (2) (3)), underscoring the fact that the ICC is not intended to replace national judicial systems. Rather, the ICC is to provide an alternative to what has often existed until this time: impunity. For at times, when national courts have been unable to fulfil their primary tasks, the alternative has been nothing—no legal process; no recourse to justice for the victims. The Rome Statute attempts to create an institution capable of filling this gap.

It is in fact a strength of the Statute that national courts have primary jurisdiction, because it may encourage more effective national procedures and implementation. For example, if a state does not have domestic legislation covering the crimes listed under the Rome Statute, it would not be able to try individuals accused of these crimes; the ICC would therefore assume jurisdiction because the state was “unable genuinely” to try the case. To avoid such a situation, states would be encouraged to ensure that their own national legislation complies with the Statute. This is a positive and progressive development for many national legal systems that are currently inadequate to deal with breaches of international humanitarian law.

At other times it may be more politically expedient for a state to choose not to exercise its right to primary jurisdiction and for the ICC to initiate an investigation and prosecution.

Article 20 of the Rome Statute imposes a “double jeopardy” limitation on national jurisdiction. This means that if an individual has been found guilty or has been acquitted under the ICC, they cannot be tried under another court.

Conversely, for those states concerned that their nationals may be subjected to vindictive show trials in distant countries, the Statute provides for a level of protection. Again under Article 20 (3) (b), if it can be shown that a trial has not been conducted “*independently or impartially in accordance with the norms of due process recognised by international law*”, an individual has the right to a re-trial under the ICC.

The complementary relationship between the ICC and domestic courts is appropriate, and the provisions within the Statute should be seen as a strength that promotes both national courts and international justice. In those countries with independent, transparent and accountable judicial systems, prosecution of their nationals before the ICC is highly improbable unless they decide to defer to the jurisdiction of the Court.

- **World Vision supports the pre-eminence of national courts and urges states to support the effective development of just, independent national legal systems.**

## **Part 3**

### **Definitions of crimes**

#### **Chapter five:**

#### **Crimes under the Rome Statute**

We will now examine the crimes listed under the jurisdiction of the court: genocide, crimes against humanity, war crimes and the crime of aggression. Genocide was a relatively straightforward inclusion in the Rome Statute (though the definition was not), while crimes against humanity were widely debated. There are significant improvements in the Statute in relation to crimes against humanity, particularly regarding crimes of a sexual nature, the recruitment of children as soldiers, and an acceptance that a crime against humanity may occur outside of armed conflict as well as within it.

The definition of war crimes is disappointing in relation to its threshold criteria and to the use of prohibited weapons, and it contains one of the most ludicrous provisions in the Statute—the “opt-out” clause. There are, however, some strengths in the war crimes provision. The definition of the crime of aggression remains unfinished, creating an additional complexity in the Statute.

Discussion on the subject of which crimes would fall under the jurisdiction of the ICC was always going to be contentious. Some governments were insistent that the crimes of aggression, terrorism and drug trafficking should also be included in the Rome Statute, along with genocide, crimes against humanity and war crimes.

States negotiating the Statute eventually accepted the inclusion of genocide, crimes against humanity, war crimes and the crime of aggression. However, some governments have already insisted that at the Review Conference, to be held seven years after the Statute enters into operation (in 2009), they will again push for inclusion of other crimes.

Interestingly, the Rome Statute is a clear blend of international humanitarian and human rights law.<sup>30</sup> A number of its provisions, especially in relation to individual responsibility for the crimes, indicate the increasing impact of international human rights law on humanitarian law. In addition, the breaking of the previously required nexus between armed conflict and crimes against humanity intensifies the Statute’s connection with international human rights law.

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<sup>30</sup> McCormack & Robertson, n. 19 above, p. 646

## Genocide

While the inclusion of genocide was the least controversial of the crimes to be listed in the Statute it did not occur without some debate. The major issue for delegates at Rome was whether or not the definition of genocide should adhere strictly to the definition developed under the Genocide Convention,<sup>31</sup> or whether it should be broader.

In the interests of political expediency it was eventually determined that the ICC definition of genocide would follow that in Article 2 of the Genocide Convention. In addition, both statutes for the ad hoc tribunals (ICTY and ICTR) had also used the conventional definition for genocide and so the precedent had been formed.

The predominant concerns around the definition of genocide as appears in the Genocide Convention were the limited list of groups protected under that definition, and the high threshold required to indicate an act of genocide.

The Genocide Convention, developed in the aftermath of World War II, was drafted to effectively deal with the crimes arising from that time. Since then, however, there has been an understanding that persecution can also occur on other grounds and that a wider understanding of genocide would assist in protecting more people. It is a weakness of the Rome Statute that the definition of genocide was not broadened to be deliberately more inclusive and protective. Nevertheless, delegates in Rome did attempt to ensure that other groups might be protected by extending the list of crimes defined in the Statute as crimes against humanity.<sup>32</sup>

In addition, and in line with the threshold requirement for determining genocide under Article 2 of the Genocide Convention, the Rome Statute again requires a relatively high threshold of determination. Under the Rome Statute, Article 6 states:

*For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy...*

The key word here is “intent”. Determining the intent of an action, as distinct from the action itself, is not easy. Since 1951 there has only been one successful international prosecution of genocide, where “intent” was able to be determined.<sup>33</sup>

Recent conflicts have gruesomely demonstrated that one of the most horrifying ways to attack an enemy is through women and children. Rwanda, Sierra Leone and the former Yugoslavia

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<sup>31</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, UNTS 277, entered into force 12 January 1951

<sup>32</sup> McCormack & Robertson, n. 19 above, p. 651

<sup>33</sup> The *Prosecutor v Akayesu* trial was held under the ICTR. See McCormack & Robertson, n. 19 above, p. 649 for a commentary.

have all seen children deliberately targeted for abuse—forced to fight, attacked with machetes, raped, terrorised and murdered. Women have been raped—sometimes gang-raped—and mutilated. Pregnant women have been assailed and brutalised through forced abortions followed by sterilisation.

For children, two provisions are of particular import under the Rome Statute’s genocide definition. Under Article 6 (d) and (e), the Statute recognises measures intended to prevent births within groups, and the forcible transfer of children of one group to another group, as constituting genocide. Disappointingly these are limited by the traditional definitions of groups based on national, ethnic, racial or religious lines.

Nonetheless, because of the progress made in the Statute’s definition of crimes against humanity, the weakness in its definition of genocide should not serve to undermine the effective functioning of the Court and its attempt to seek justice for victims of atrocities.

## **Crimes against humanity**

The protections provided under Article 7 are most certainly a strength of the Rome Statute. They represent clear advances—not only greater protection for more people in more diverse circumstances, but also, finally, an agreed codification of those crimes determined to be crimes against humanity. While these crimes were certainly addressed under the earlier tribunals, the definitions had not evolved as they now have through international community debate.<sup>34</sup>

At last, the nexus between crimes against humanity and armed conflict has been broken. For example, while terrorism is not defined as a crime under the Rome Statute, there can be little doubt that the acts committed in New York City on 11 September 2001 constitute crimes against humanity, given the fulfilment of other threshold requirements for crimes against humanity.

It was originally Control Council Law 10, following World War II,<sup>35</sup> that opened the hornet’s nest of controversy around the separation between crimes against humanity and armed conflict, but this controversy was not settled until the finalisation of the Rome Statute. To the credit of the international community, there is increased acceptance that atrocities must be prosecuted wherever and whenever they occur.

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<sup>34</sup> McCormack & Robertson, n. 17 above, p. 651

<sup>35</sup> Control Council Law 10 established the various smaller tribunals that arose out of Nuremberg and Tokyo – in Australia and elsewhere. *Trials of the War Criminals Before Nuremberg Military Tribunal under Control Council Law 10*, Washington Government printing Office, XIV, Article 11C

The list of crimes under Article 7 is considerably expanded compared to those under either of the ad hoc tribunals, or under Nuremberg and Tokyo. In particular, the Rome Statute's codification of sexual and gender crimes represents a clear advance. While both the ICTR and Control Council Law 10 did provide some legal precedent on sexual offences as crimes against humanity, the Statute has cemented and surpassed both of these precedents. Article 7 (1) (g), for example, not only includes rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparative gravity. This relatively broad provision is a welcome inclusion and is certainly long overdue.

These provisions are important not only for women, the traditionally understood victims of such abuses, but also children, most particularly girls, who increasingly find themselves the victims of sexual violence and trapped in the commercial sex trade. Evidence from countries such as Sudan and Uganda indicates that young girls are—with horrifying frequency—raped and forced to become “wives” of soldiers, sexually violated, trafficked across borders and enslaved.

Another two inclusions under Article 7 that are particularly significant are those of apartheid and enforced “disappearances”, both of which are essentially new to the list of crimes against humanity.<sup>36</sup>

The expanded definition given to torture under Article 7 (2) (e) now means that anyone can be found guilty of torture and need not be undertaking the action as a public official. Given that the more limited definition in the Torture Convention itself is now recognised to be ineffective to deal with the realities of our time, this improvement within the Rome Statute is a significant strength.

Further strengths exist in the two catch-all provisions under crimes against humanity, Article 7 (2) (g) and 7 (1) (k). The first relates to grounds of persecution; it may help in allaying some of the concerns around the limited list of groups under the genocide provision. The second is broader; it will enable the Court to hear allegations of crimes not explicitly listed in Article 7.

There are, however, some concerns with Article 7. One is the increased threshold for evidence that a crime against humanity has been committed: “*widespread or systematic*” attack (7 (1)). While at least it does not require proof of widespread *and* systematic attacks, there is a further complexity under Article 7 (2) (a), which requires that widespread or systematic attacks be shown to be also *multiple* acts and “*committed in furtherance of a State or organisational policy...*”. This increases the threshold requirements and could be quite difficult for a victim of such attacks to prove.

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<sup>36</sup> McCormack & Robertson, n. 19 above, p. 654

The Statute is also unclear on what standard of evidence will be required to prove “*knowledge of an attack*” (Article 7 (1)). This element has not previously been included in international provisions around crimes against humanity.<sup>37</sup>

## **War crimes**

Though not as contentious as discussions around crimes against humanity, the deliberations around war crimes were also complex. Delegates at Rome agreed on “grave breaches” of the four Geneva Conventions of 1949 as their starting point for negotiation of war crimes definitions.<sup>38</sup>

Beyond this agreement, delegates were divided on what, if any, other issues should be included under war crimes in international conflicts and in non-international conflicts. Reflecting this, Article 8 of the Rome Statute, which contains the main war crimes provisions, is a mixture of progressive strengths in international law and regressive reversions.

Very positively, Article 8 (2) (c) and (e) clearly articulate that individuals can be found guilty of war crimes in both internal and international armed conflicts. Although the list of offences under non-international armed conflict is less extensive, this is still an advance. Precedent for this position was found in the ad hoc tribunals of both Rwanda and the Former Yugoslavia. Indeed, the Rome Statute would be a deeply flawed instrument if it did not reflect the reality of modern day warfare—that is, that the vast majority of conflicts are of a non-international character, even though they may certainly threaten international peace and security.

### **Child soldiers and sexual crimes**

The expanded list of war crimes should also be seen as a strength of the Statute – potentially extending its protection to more people. Now criminalised as war crimes are acts against UN peacekeepers (Article 8 (2) (b) (iii) and (2) (e) (iii)); the conscription or enlistment of children under 15 into military service (8 (2) (b) (xxvi)); and—as under crimes against humanity—a number of sexual crimes (8 (2) (b) (xxii) and (2) (e) (vi)).

These are indeed progressive elements. However, since the adoption of the Rome Statute in 1998, international legal standards governing the conscription or enlistment of children into national armed forces have been strengthened. Under the Optional Protocol to the Convention on the Rights of the Child, concerning the use of children in armed conflict, it is now forbidden for States Parties to conscript children under the age of 18. The stories captured be-

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<sup>37</sup> Pejic, n. 17 above, p. 74

<sup>38</sup> McCormack & Robertson, n. 19 above, p. 662

low<sup>39</sup> are from children who were abducted in Northern Uganda by the rebel force known as the Lord's Resistance Army.

### **Estella, 15**

*“When rebels came, I came out from our home trembling with my heart in my mouth fearing that I would be killed any minute. It was tough. Some children who were too weak to walk were just chopped up with pangas and left to die on the way. This scared me so much. In the bush I was allocated to a man to be his second wife. If you refused to show respect...you were beaten thoroughly...”*

### **Janet, 16**

*“The rebels were murderous and merciless. I saw a young boy with swollen feet from walking long distances knifed to death because he was so weak and tired he could not walk anymore. He pleaded for mercy but they just laughed. I was then forced to step on his dead body. I was warned that if I ever got tired or tried to escape, I would be treated in the same manner.”*

These children, and thousands of others like them, have been brutalised and forced to fight, often facing death. Under the Rome Statute, those responsible for such violence against children may be brought to justice.

- **World Vision recommends that at the first Review Conference of the ICC, Article 8 (2) (b) (xxvi) be strengthened to reflect the progress made in international law.**

In addition, under Article 8 (2) (b) (ix), and reflecting existing international humanitarian law, the intentional targeting of buildings used for religion, education, art, science, charitable purposes, historic monuments and hospitals is a crime against humanity. Too often societies are decimated because of war: schools are burnt, hospitals gutted and buildings of religious or historical significance erased. Economically as well as psychologically this can be a further overwhelming burden for communities trying to rebuild.

Of some controversy at the Rome Conference was the innovation to include in Article 8 (b) (viii) the words “*directly or indirectly*”, which expanded the definition of the existing war crime

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<sup>39</sup> From *Where is my Home? Children in War*, AVSI, GUSCO, Red Barnet, UNICEF & World Vision, Kampala, Uganda, 1998

prohibiting the transfer by an occupying power of its civilian population to an occupied territory.<sup>40</sup> Israel, amongst other states, argued vehemently against this expansion of definition.

## Prohibited weapons

There are some serious anomalies in the Rome Statute around the use of prohibited weapons. Article 8 (2) (b) (xvii)–(xx) are the key provisions and are decidedly inadequate. Major concerns around these clauses include the list of prohibited weapons, which is limited and not reflective of current military realities nor of existing multilateral agreements. A number of banned weapons such as anti-personnel landmines, blinding lasers or chemical weapons (especially strange given the sanctions against Iraq), are not included at all.

In addition, it seems inexplicable that the Statute's provisions against the use of prohibited weapons would be only applicable during international armed conflict, but since there is no mirroring clause under the non-international conflict provisions, this is certainly the case.

World Vision has seen first-hand the devastating effects of weapons of destruction such as anti-personnel landmines, which maim innocent civilians long after wars have ended.

### **Mao Sopheap, 16**

#### **Thngoeur Village, Battambang, Cambodia**

*Sopheap's father was killed by a mine while fighting against the Khmer Rouge in Battambang province. Her mother died a few days later, leaving Sopheap and her younger sisters orphaned. Sopheap went to work on her vegetable plot that is about 3 km from the village. She walked along a narrow path that is used by villagers every day. There she stood on a mine that had been laid recently. She was rescued and taken to Battambang hospital for treatment and her left leg had to be amputated.*

*During the interview she was crying: "I wanted to study for some professional skill to support myself and my little sister in the future, but now that is impossible. I don't think anyone will want to marry a disabled person like me. Society will not help me. That mine has given me a future of tears until the end of my life."*

Source: International Campaign to Ban Landmines, Youth Action Forum, 'Landmines and youth', <http://www.icbl.org/youth/issue/youth.html>, 2002

- **In partnership with a large number of organisations worldwide, World Vision campaigned for the prohibition under international law of these weapons. World Vision believes that the Rome Statute's failure to recognise existing**

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<sup>40</sup>Gennady M Danilenko, "The Statute of the International Criminal Court and Third States", *Michigan Journal of International Law*, Spring 2000, p. 90

**standards on a number of inhumane weapons is a weakness that should be reviewed.**

### **The “opt-out” clause**

Article 124 of the Statute is one of the clauses that substantially undermine the potential effectiveness of the Court. Under this Article, States Parties are able to “opt out” of war crimes jurisdiction for a period of seven years. This effectively gives states impunity from international justice on war crimes. One critique has referred to the opt-out clause as a “licence to kill for seven years.”<sup>41</sup>

In short, the clause is ludicrous. However, it may be possible for the ICC to prosecute a state that has opted out of the war crimes jurisdiction if that state commits acts that can be characterised as crimes against humanity. In addition, the ICC’s jurisdiction may prevail if either the territorial or national state in the case is a State Party that has not opted out.

Disturbingly, states may also determine to extend the opt-out provision at the seven-year review conference—they are under no obligation to delete it.<sup>42</sup>

### **The crime of aggression**

While the crime of aggression is listed under Article 5 (d) as being within the jurisdiction of the ICC, it is yet to be defined. Again, this is the result of compromise: some governments insisted that aggression be included within the Rome Statute but there was a general inability to agree on a definition.

Interestingly, a consensus definition of aggression was agreed in 1974 by the United Nations General Assembly through Resolution 3314.<sup>43</sup> At the time the definition was thought to have great significance, but analysis since has led commentators to perceive it as vague and unenforceable.<sup>44</sup> It is also noted that as early as 1928, The General Treaty for the Renunciation of War (known as the Kellogg–Briand Pact) gave a legitimate and codified basis to the crime of aggression.

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<sup>41</sup> Marler, n. 22 above, p. 41

<sup>42</sup> McCormack & Robertson, n. 19 above, p. 666

<sup>43</sup> *UNGA Resolution 3314*, UNGAOR 29<sup>th</sup> Session, Supp. No. 31 at 142-144, UN Doc. A/9631, 1974

<sup>44</sup> B. Ferencz, “An International Criminal Code and Court: Where They Stand and Where They’re Going”, *Columbia Journal of Transnational Law*, Vol. 30, No. 375, 1992, p. 375

Attempts to define the crime of aggression, a crime for which defendants were found guilty in both Nuremberg and Tokyo (though it was referred to as crimes against peace), have been frustrated for many years. At Nuremberg, crimes against peace were defined as

*Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing, namely war crimes or crimes against humanity.*<sup>45</sup>

Yet even within this definition, the word “aggression” itself was never explained. It seems odd if the international community is unable to define “aggression” that it can exist in law.

In 1954 the General Assembly decided that any discussions on a permanent international criminal court must be suspended, because “there was no purpose in trying to reach agreement about an international court as long as the principal international crime, aggression, was not yet defined.”<sup>46</sup> Thankfully, this position is no longer held, but the tension around “aggression” remains.

Under the Rome Statute the court will not be able to exercise jurisdiction over the crime of aggression until at least seven years after it enters into force—at the review conference—when amendments to the Statute will be considered. Even then, any definition of the crime of aggression would need to be adopted by a two-thirds majority of the States Parties. In view of this, it seems somewhat unlikely that the crime of aggression will become a crime prosecuted by the ICC.

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<sup>45</sup> n. 6 above

<sup>46</sup> *Ibid.*, p. 377

## **Chapter six: Further ramifications**

Finally, let us look at some of the broader issues of the Rome Statute that may ultimately impact the effectiveness of the Court: non-enforcement of the ICC decisions, some of the administrative functions provided in the Statute, and the reality of financial funding necessity.

### **Enforcement mechanisms under the Statute**

Compared with any national court, enforcement mechanisms under the Rome Statute are weak. Most obviously, the ICC has no police force. But some have argued that the Court's enforcement jurisdiction under the Statute is so feeble that it has the potential to completely undermine the efficacy of the Court.

Under the Rome Statute, the Court may not compel state compliance with its orders. It may not compel the appearance of witnesses, the execution of arrest warrants, nor may it seize bank accounts or government documents of its own accord. What, then, can the Court do, and how will it be effective?

Under the Statute, non-compliance with the ICC can be brought before the UN General Assembly or the Security Council. It is not entirely clear what this will mean in reality, but it is clear that at the very least it will result in a "name and shame" exercise. While this is hardly the ideal, even the most hardened state does not enjoy being embarrassed in an international context. Anyone who has spent time at any of the reporting processes of the UN, such as the Commission on Human Rights or the Committee on the Rights of the Child, would know examples of states defensively changing positions or taking domestic action to make changes<sup>47</sup> after being internationally embarrassed.

In addition, the Security Council does have the power to enforce its resolutions with the use of force, although it is not yet clear what this will mean for the Court.

It is not ideal that the enforcement procedures under the Rome Statute are weak, but it is certain that few states would have accepted anything more stringent than is currently in the Statute.

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<sup>47</sup> Countries such as Australia, Myanmar and the United Kingdom have ensured changes in domestic policy or legislation after recommendations by UN mechanisms.

## Penalties

It is a strength of the Rome Statute that under Article 77 (Applicable penalties), the death penalty is not an option. However, as with the ad hoc tribunals, in particular the ICTR, it establishes a less than satisfactory situation in which those found guilty of crimes under the Statute may be put to death in a state that still permits the death penalty under domestic legislation.

It may also create situations, as again with ICTR, where some criminals are tried under an international jurisdiction that will not apply the death penalty while others are convicted for the same crimes under state jurisdiction but are put to death. Such instances can send mixed messages about justice and retribution.

This is especially of concern with regard to those states that continue to invoke the death penalty for those under the age of 18. Since the Rome Statute does not hear cases of crimes committed by those below 18, domestic courts remain the only option.

In countries with poor or non-existent juvenile justice systems, children can be exposed to adult jails, with little or no support as minors. The scenes in jails in Rwanda and elsewhere of minors crammed into prisons with adults awaiting trial is far from satisfactory and contravenes the principle of “best interests” as expressed in the Convention on the Rights of the Child.

In those situations where justice is determined to be best served by trying those under 18 for war crimes, crimes against humanity or genocide, it should only be done in systems specifically designed to support children and where rehabilitation rather than retribution is the focus. Amnesties, truth commissions and alternative forms of justice may better serve both children and communities in the long term.

## Gender

The codification of sexual and gender crimes has already been mentioned in Chapter five, but other aspects of the Rome Statute should also be viewed as strengthened commitment to gender sensitivity and equality.

The Statute also includes significant procedural safeguards aimed at ensuring the effective investigation and prosecution of sexual and gender crimes. For example, under Article 36 (8) (a) (iii), when selecting judges “*a fair representation of female and male judges*” should be taken into account by states. While this does not ensure that female judges will have a place on the panel it does remind states of the need for gender balance.

In addition, when considering the skills and qualifications judges should bring to the ICC, the Statute encourages the inclusion of judges with particular skills. Noted among these is specific

experience in responding to situations of violence against women or children (Article 36 (8) (b)). Further, the Statute obliges the Prosecutor and Registrar to apply these qualifications when setting the criteria for staff selection.

## **Victims of atrocities**

Another significant progression and strength of the Rome Statute is its provisions on reparations to victims of crimes and their families. In a groundbreaking international law development, the Statute can order that a convicted person make reparation to victims or their families, which can include restitution, compensation or rehabilitation (Article 75).

Further, under Article 79, the Rome Statute provides for a Trust Fund to assist victims and their families. Money for the Trust Fund will be gathered from fines or forfeiture collected by the Court. The Statute certainly ensures a number of protections and rights for victims of atrocities—which indicates that the international community may take the plight of these people seriously.

## Conclusion and recommendations

*Justice, sound human reasoning and the eternal aims of the law of nations demands that these norms, old and new, must apply to the strong as well as to the weak if they are to be felt to be law...*

— Dr Hans Ehard, a German lawyer, reflecting on Nuremberg in the 1950s<sup>48</sup>

As the international community establishes the International Criminal Court, the words of Dr Ehard resound. Those who gravely breach international humanitarian law should not be protected on the basis of their nationality nor by the international might of the country in which they are citizens.

Until all of us are held accountable under a fair, equitable system of law, international justice cannot be said to be done. It is appropriate that the Rome Statute creates a complementary role with national legal systems. However, where the latter are prejudiced, non-existent or unable genuinely to ensure that justice is done, there must be an effective alternative.

Although not a perfect instrument, the Rome Statute does represent a substantial and positive development in international law. With three concrete underpinnings—deterrence, prosecution of alleged perpetrators and justice for victims—the Statute is a viable mechanism. While criminal justice will not of itself be sufficient to heal either victims or society, it can form an important part of the process.

A beneficial aspect of the Rome Statute is its promotion of international cooperation. Essentially, the Statute ensures that the Court is controlled by a large number of states, thereby providing appropriate checks and balances to ensure that abuses of justice are not committed in the interests of a single state or small group of states.

However, if the ICC is to be an effective measure of justice for victims of atrocities, and to serve as any kind of deterrent for would-be perpetrators, it will require substantial political commitment from the international community, backed with adequate funds and resources.

The Rome Statute is flawed, with weaknesses in a number of key areas, yet the international community is the better for its development. Given the Statute's entry into force in July 2002, it is likely that the ICC, housed in The Hague, will be operational by 2003.

In 2009 there will be a review conference at which the international community will have the potential to address some of the current weaknesses. It is hoped that at that time the international community has the courage and commitment to do so.

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<sup>48</sup> Hans Ehard, "The Nuremberg Trial Against the Major War Criminals and International Law", *American Journal of International Law* 43 (1949), 223

## Recommendations

- **World Vision supports the establishment of the ICC and, while acknowledging that the existing Rome Statute of the Court is not without flaws, urges all states to ratify the Statute and promote the Court's functioning and jurisdiction.**
- **World Vision also advocates the full implementation of international human rights and humanitarian law, and urges national governments and the international community to utilise these instruments with complementarity. The Statute of the ICC should be informed by existing instruments such as the Convention on the Rights of the Child and its Optional Protocols, and ILO Convention 182.**
- **World Vision urges Members of the United Nations Security Council to support the ICC as a vital instrument in the maintenance of peace and justice.**
- **World Vision urges Members of the Security Council not to invoke the power granted under Article 16 except in the most exceptional circumstances.**
- **World Vision supports the pre-eminence of national courts and urges states, especially industrialised states, to support the effective development of just, independent national legal systems.**
- **World Vision endorses the role of a strong and independent Prosecutor and urges states to cooperate and support the role. World Vision also acknowledges the appropriateness of some levels of constraint upon the office to ensure the highest standards of accountability**
- **World Vision supports the concept of universal jurisdiction for crimes defined under the Statute.**
- **World Vision urges governments not to enter into any agreements that may seek to circumvent the jurisdiction of the ICC.**
- **World Vision recommends that at the first Review Conference of the ICC, Article 8 (2) (b) (xxvi) concerning conscription of children into the armed forces be strengthened to reflect the progress made in international law.**
- **World Vision recommends a review of the definition of genocide at the initial Review Conference and a lowering of the threshold of intent.**

- **World Vision urges States Parties to the Rome Statute to amend provisions so as to ensure that existing international standards on the use of prohibited weapons such as anti-personnel landmines are appropriately reflected. In addition, World Vision urges that such provisions apply equally to armed conflicts of both an international and non-international nature.**

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**World Vision** is a Christian relief and development partnership which serves more than 85 million people in some 80 countries. World Vision seeks to follow Christ's example by working with the poor and oppressed in the pursuit of justice and human transformation.

Children are often most vulnerable to the effects of poverty. World Vision works with each partner community to ensure that children are able to enjoy improved nutrition, health and education. Where children live in especially difficult circumstances, surviving on the streets, suffering in exploitative labour, or exposed to the abuse and trauma of conflict, World Vision works to restore hope and to bring justice.

World Vision recognises that poverty is not inevitable. Our Mission Statement calls us to challenge those unjust structures, which constrain the poor in a world of false priorities, gross inequalities and distorted values. World Vision desires that all people are able to reach their God-given potential, and thus works for a world which no longer tolerates poverty.