

WOMEN'S CAUCUS  
FOR GENDER JUSTICE  
IN THE  
INTERNATIONAL  
CRIMINAL  
COURT

Recommendations and Commentary  
For December 1997 PrepCom  
On The Establishment of An  
International Criminal court  
United Nations Headquarters  
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PART I  
INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

ARTICLES 51-57

Introduction:

Part 7 of the draft Statute is critical because it cuts to the heart of the Court's ability to function effectively and independently. While States have the primary duty to bring those responsible for grave crimes under international law to justice, the Court is charged with acting as an effective

complement where this does not occur. Without an airtight requirement that States cooperate with it, virtually every stage of the investigation and prosecution of a particular crime could be undermined by the non-cooperation of a State.

The Women's Caucus has four major concerns:

1. All States' assistance to and cooperation with the Court must be full, timely and mandatory with respect to all crimes of universal jurisdiction.
2. The Court must be empowered to deal directly and independently with non-cooperating States -- that is, where the Court concludes, upon a State's challenge to a request for cooperation, that such State has unjustifiably refused to cooperate, the Court and States Parties should be able to take appropriate action against that State without having to rely on the Security Council.
3. Where provisions in Part 7 directly or indirectly affect victims or witnesses, including those subjected to sexual or gender violence, confidentiality must be protected to ensure their safety and their willingness to cooperate with the investigation in accordance with Articles 26 and 43.
4. States should be required to assist the Court in ensuring its ability to impose penalties and to provide reparations to victims.

Note: The following proposals reflect priority concerns of the Women's Caucus\ and are based on the abbreviated compilation of proposals on international cooperation and judicial assistance ("abbreviated compilation") that was released following the November 1997 meeting of experts in Siracusa, Italy.

Proposed additions are indicated in capital letters. Deletions are bracketed and preceded by the word DELETE. Bracketed text is identified by DELETE or RETAIN where the Women's Caucus considers it important to take a position.

Article 51  
General Obligation to Cooperate

Recommendation 1: Amend Article 51(1) to strengthen all States' obligation to cooperate fully and without delay with the ICC.

51(1) Suggested Text:

1. States, [DELETE: Parties] WHETHER OR NOT STATES PARTIES TO THIS STATUTE, in accordance with the provisions of this [DELETE: Part] [RETAIN: Statute], shall [cooperate with] [afford the widest possible measure of assistance to] the Court in its investigation and prosecution of crimes under this Statute. [DELETE: A State Party shall not deny a request for cooperation except as specifically provided in this Part.]
2. States [DELETE: Parties] shall [DELETE: respond to] [RETAIN: comply with] without [DELETE: undue] delay any request OR ORDER for cooperation by the Court.

Commentary:

- a. It is important that the Statute include a general provision affirming the general obligation of all States to cooperate with the Court in all cases involving crimes of universal jurisdiction. Article 51 thus should refer to "States" rather than to "States Parties."
- b. The effective functioning of the Court requires a definitive obligation on States to cooperate fully and without delay. This obligation must not be undercut by either internal law or international law or obligations, whether pre-existing or developed subsequent to the ratification of this treaty. To sanction by treaty States' discretion not to cooperate in the investigation and prosecution of the international crimes over which the Court has jurisdiction would undermine the principle of universal jurisdiction over genocide, war crimes, and crimes against humanity..
- c. Under international law, the core crimes within the Court's jurisdiction are subject to universal jurisdiction and all States should be required to cooperate in bringing violators to justice, including by cooperating with the Court. This obligation is codified in the UN Charter. In addition, the Convention on the Prevention and Punishment of the Crime of Genocide and the

Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment require international cooperation upon acceptance of the treaty.<sup>1/</sup> Cooperation is also necessary to the effective functioning of regional human rights systems.<sup>2/</sup> A number of international treaties have also established States' obligations to cooperate with and assist one another in general criminal matters.<sup>3/</sup>

d. Other international tribunals also have had to depend upon State cooperation to carry out their mandates effectively. For example, Article 49 of the Statute of the International Court of Justice provides that the Court may call upon the agents of the State Parties to a dispute before it to produce any document or to supply explanations. There, since States are parties to matters before the ICJ, it is in their interests to comply in order to avoid the negative effect a refusal may have on the outcome of the case. In the case of international criminal tribunals dealing with individual, as opposed to State transgressions of international law, States' incentive to comply with requests for cooperation and assistance may be diminished.

e. Article 51(1) should specify that cooperation shall be in accordance with the provisions of the ICC Statute, not just Part 7. States must be bound to adhere to other provisions that necessarily affect its cooperation. For example, Article 43 dealing with the protection of victims and witnesses must bind States as they carry out requests for assistance.

f. Because the Women's Caucus opposes recognition of any grounds upon which States may refuse to cooperate with the ICC, the last sentence of Article 51(1) should be deleted.

g. Article 51(2) should be strengthened by affirming States' obligation to comply with, not simply to respond to requests for cooperation. "Undue" should also be deleted to emphasize that any delay in cooperation is not acceptable.

## Article 52

### Requests for Cooperation: General Provisions

Recommendation 2: Revise Article 52(4) to reaffirm the obligation of non-States Parties to cooperate as well as to recognize that they may do so based on comity, and to identify various mechanisms, such as ad hoc arrangement or agreement, for such cooperation.

52(4) Suggested Text:

The Court may call on any State not party to this Statute to provide assistance provided for in this Part on the basis of OBLIGATION, comity, an ad hoc arrangement, or through entry into agreement with such State.

Commentary:

The Women's Caucus favors unequivocal affirmation of all States' obligation to cooperate in Article 51(1). See Commentary to Recommendation 1 above. This provision should be retained to acknowledge that States may want to characterize their cooperation as based on comity and to identify the mechanism for carrying out this obligation. If Article 51(1) does not cover non-States Parties, this provision will be essential to establish the Court's explicit authority to require such cooperation.

Recommendation 3: Amend Article 52(5) to give the Court the alternative of seeking the assistance of the States' Parties (through whatever means they should designate) or of the Security Council to deal with the refusal of a State to fully comply with its obligations under this Part. This process should be equally applicable to both State Parties and non-State Parties.

52(5) Suggested Text:

[RETAIN: States'] [DELETE: States Parties] failure to cooperate.

THE COURT HAS THE POWER TO ISSUE BINDING ORDERS TO COOPERATE TO STATES, THEIR OFFICIALS, AND INDIVIDUALS IN THE TERRITORY OR JURISDICTION OF SUCH STATE. Where non-cooperation by [RETAIN: States] [DELETE: States Parties] with requests by the Court prevents the Court from performing its duties under this Statute, the Court may SEEK ASSISTANCE FROM A BODY OF STATES' PARTIES TO BE DESIGNATED BY THE STATES' PARTIES AND/OR [DELETE: refer the non-cooperation to the Security Council] [RETAIN: request the Security Council to take the measures necessary to enable the Court to exercise its jurisdiction.

Commentary:

a. Our proposed addition to 52(5) affirms the Court's power to issue binding orders when the Court concludes that a State is not fulfilling its obligation to cooperate.

b. Recent jurisprudence at the ICTY underscores the necessity of enabling the Court to deal directly and independently with cooperation issues. An Appeals Chamber of the ICTY recently interpreted Article 29(2) of the ICTY Statute, which sets out the general obligation to cooperate, to mean that while the Tribunal may issue binding orders and requests to States (though not to its officials) pursuant to that provision, it lacks independent power to do so under threat of penalty to either the State or to its officials. Instead, upon a specific judicial finding of non-compliance to a request, the Tribunal may refer the matter to the Security Council.<sup>4/</sup> Given that the Appeals Chamber concluded that the ICTY Statute does not empower the Tribunal to take enforcement measures against States and that an express provision granting the ICTY such enforcement powers was lacking,<sup>5/</sup> it is imperative that the ICC Statute explicitly affirm the Court's power to exercise enforcement powers with the support of States Parties where it concludes that a State is unjustifiably refusing to cooperate or assist the Court.

c. The Statute should empower the Court to take appropriate measures against a recalcitrant State, without necessarily having to rely upon the Security Council to take action. This article suggests the creation of a mechanism, in addition to the Security Council, consisting of States' Parties and to be determined by them, to assist the Court in dealing with recalcitrant states. In all cases, the Court may rely on either the Security Council or the mechanism of the States' Parties. This alternative mechanism is particularly necessary where the Security Council may not be an effective mechanism, where, for example, a permanent member of the Security Council is the recalcitrant State.

d. The Women's Caucus proposal would enable the Court to decide whether to refer the matter to the Security Council or to consult with States Parties to determine how to pressure a State to comply. Where a State is a Party to the Statute, such action could involve penalizing the State Party by denying it any role under the Statute. Alternatively, where a non-State Party is involved, States Parties could assert diplomatic or economic pressure of various forms. The Court's Rules of Procedure would specify the details of the Court's notification to either the mechanism of States Parties or the Security Council of its

request for action in the event of non-compliance.

#### Article 53

[RETAIN: Surrender] OR [DELETE: Extradition] [RETAIN: Transfer] of Accused or Convicted Persons to the Court

Recommendation 4: The Statute should contemplate a sui generis process for the surrender or transfer of accused or convicted persons outside of existing bilateral and multilateral agreements. Thus, the word extradition should be avoided.

Recommendation 5: Amend Article 53(1) to specify that only procedures and not substantive conditions for extradition established by national law shall govern a surrender or transfer request.

53(1) Suggested Text:

Transmittal of requests; obligation of States

(a) The [Court] [Prosecutor] [Registrar] shall transmit to any State on the territory of which the accused or convicted person may be found, a request for the [RETAIN: surrender] OR [RETAIN: transfer] of that person, along with the supporting material outlined in Article 54, and shall request the cooperation of that State in the arrest and [RETAIN: surrender] OR [RETAIN: transfer] of such person. States Parties shall, in accordance with the provisions of this Article [RETAIN: and the] [DELETE: or] APPROPRIATE national PROCEDURES, [DELETE: law], comply with requests for [surrender] [transfer] without delay.

(b) [DELETE: The extradition legislation of a requested State shall govern the conditions for granting or denying a request for [surrender] [transfer]].

Commentary:

The ICC Statute will underlie a unique system of international cooperation related to serious crimes of universal jurisdiction. Traditional impediments to extradition between and among States should not apply to violations of international law of this magnitude. Accordingly, all provisions that contemplate grounds for refusal, pursuant to extradition law or otherwise, should be deleted. National law should apply only to the extent of providing the procedure for the transfer or surrender.

Recommendation 6: Adopt Option 1 with respect to Article 53(2) to make clear that there are no grounds upon which States may refuse to comply with an order of the Court to surrender or transfer an accused or convicted person.

53(2) Suggested Text:

RETAIN: Option 1: No Grounds for Refusal

Commentary:

No grounds for refusal should be enumerated. If the Court has sanctioned surrender of an accused or convicted person, the Court's proper jurisdiction over the case must be assumed and grounds for refusal to comply with a request for surrender should not be enumerated. See Commentary to Article 53(1) above.

Recommendation 7: Adopt Option 2 to Article 53(4) to establish the priority of requests from the Court over requests for extradition from other States.

53(4) Suggested Text:

Parallel requests from the Court and State(s)  
[RETAIN: Option 2]

A State Party [DELETE: , if it is a party to the treaty covered by Article 20(e) and has accepted the jurisdiction of the Court,] shall [DELETE: undertake to] give priority to a request from the Court under paragraph 1 over requests for extradition from other States. [DELETE: Parties.]

Commentary:

In accordance with the proposals above, Option 2 should be adopted because it establishes the primacy of the Court's requests for surrender in light of its jurisdiction over universal crimes properly before it. The Statute should provide that States have a clear obligation to surrender an accused or convicted person to it--an alternative request should be presumed improper absent a Court finding to the contrary. The Court's jurisdiction over core crimes should always take priority over a trial or the serving of a sentence for a lesser crime.



Recommendation 8: The Court should have exclusive jurisdiction to consider challenges to its requests for surrender.

53(5) Suggested text:

Delete proposed Article 53(5).

Commentary:

See commentary related to Articles 53(2) and 53(4) above. A person sought by the Court should not be entitled to delay surrender by challenging the Court's request in the requested State's court. In light of the crimes at issue, and the danger of States' overt or covert involvement with an accused or convicted person, only the Court should be empowered to review challenges related to jurisdiction, non bis in idem and sufficiency of evidence by the person sought. State laws permitting challenge in its courts prior to transfer are subservient to the ICC's jurisdiction to decide such challenges. National implementing legislation would need to reflect this.

Recommendation 9: States should not be able to impede the ICC's exercise of jurisdiction by refusing to surrender or transfer a person who is charged with other offenses or who has been convicted under domestic law. The principle of complementarity requires deference only to state proceedings that involve the crimes within the jurisdiction of the ICC.

53(6) Suggested text:

Delete proposed Article 53(6).

Alternatively, include the bracketed language empowering the Pre-Trial Chamber to consent to a delay.

Commentary:

Because the Court will try only the gravest international crimes, it should take priority over the prosecution of other "offenses." The prosecution of any offense, including comparatively minor ones, should not permit a State to unreasonably delay the transfer or surrender of the accused. The Court must also be able to pursue a case against an individual even if he or she is serving a sentence for a crime. There is a significant danger

that if this provision stands, a State could use the imposition of a criminal sentence of whatever gravity to shield its national from transfer or surrender to the Court.

#### Article 53bis

#### Contents of Request for Surrender or Transfer

Recommendation 10: Article 53bis(2) should be amended to make clear that the Court must always refuse to provide States with information which would threaten the safety, well-being, dignity and privacy of victims and witnesses or their families or close associates.

53bis(2) Suggested Text:

2. THE INFORMATION PURSUANT TO SECTION 1 OF THIS ARTICLE MAY BE PROVIDED ON A CONFIDENTIAL BASIS AND SHALL BE PROVIDED IN SUCH A MANNER, AS, AT ALL TIMES, PROTECTS THE SAFETY, WELL-BEING, DIGNITY AND PRIVACY OF VICTIMS AND POTENTIAL WITNESSES, INCLUDING THEIR FAMILIES AND CLOSE ASSOCIATES, CONSISTENT WITH ARTICLES 26 AND 43. Where the requested State [DELETE: Party] considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information CONSISTENT WITH THIS PRINCIPLE.

#### Commentary:

a. In this article, which sets forth what a State may expect to receive from the Court in connection with a request for surrender or transfer, it is essential to reinforce the provisions in Article 26(2) and 43 which outline the Prosecutor's and Court's duty to protect victims and witnesses by keeping certain information confidential when necessary. Thus, the information required to be set forth in the Court's requests should be qualified by a proviso requiring protection of the safety, well-being, dignity and privacy of victims and potential witnesses, including their families and close associates.

b. It is crucial to reflect this requirement in all provisions in Part 7 that specify what information the Court must provide to States in requests for either transfer/surrender, provisional arrest, or other forms of assistance./6/ Since Part 7 exhaustively sets out the parameters concerning States'

obligation to cooperate, failure to include provisions in this Article and in Articles 54 and 55(7) could result in a State refusing cooperation because the technicalities of these provisions have not been adhered to, notwithstanding the Prosecutor's view that such adherence could compromise victim and witness protection. Indeed, it could be that the requested State or its agents pose real danger to victims and witnesses and to disclose information to the State could prove extremely dangerous.

#### Article 54 Provisional Arrest

Recommendation 11: Article 54 should be amended to make clear that the Court must always refuse to provide States with information which would threaten the safety, well-being, dignity and privacy of victims and witnesses or their families or close associates, similar to Article 53bis(2) above.

54(2) Suggested Text:

2. The request for provisional arrest shall.....contain.....

(v) THE INFORMATION PURSUANT TO SECTION 1 OF THIS ARTICLE MAY BE PROVIDED ON A CONFIDENTIAL BASIS AND SHALL BE PROVIDED IN SUCH A MANNER, AS, AT ALL TIMES, PROTECTS THE SAFETY, WELL-BEING, DIGNITY AND PRIVACY OF VICTIMS AND POTENTIAL WITNESSES, INCLUDING THEIR FAMILIES AND CLOSE ASSOCIATES, CONSISTENT WITH ARTICLES 26(2) AND 43.

Commentary:

See Commentary to Article 53bis (2) above.

#### Article 55 Other Forms of Cooperation

Recommendation 12: Amend the list of types of assistance (1) to strengthen the language with respect to victim and witness protection; (2) to add provisions to permit the Court and Prosecutor to conduct proceedings or investigations in a State's territory ; and (3) to implement orders related to the rights of victims and those entitled to claim through them to reparations, including seizure and distribution of property or funds.

55(1) Suggested Text:

1. States Parties shall, in accordance with the provisions of this Article [RETAIN: and the [DELETE: or] APPROPRIATE national PROCEDURES [DELETE: laws]], comply with requests for judicial and legal [mutual] assistance by the court, ...

.....

(i)bis: PERMITTING THE COURT TO SIT ON ITS TERRITORY FOR THE PURPOSE OF TAKING OF EVIDENCE OR OF CONDUCTING A PROCEEDING BEFORE THE COURT;

..

(k) ENSURING the protection of THE SAFETY, PHYSICAL AND PSYCHOLOGICAL WELL-BEING, DIGNITY AND PRIVACY of victims and witnesses AS WELL AS THEIR FAMILIES OR CLOSE ASSOCIATES, and the integrity of evidence;

(l)bis IMPLEMENTING ANY ORDERS OF THE COURT RESPECTING VICTIMS' AND THEIR SURVIVORS' RIGHTS TO ALL FORMS OF REPARATIONS ;

(l)ter PERMITTING THE PROSECUTOR OR MEMBERS OF THE PROCURACY TO ENTER THE STATES' TERRITORY TO CONDUCT ONE OR MORE OF THE ACTS LISTED HEREIN, EITHER IN CONJUNCTION WITH STATE AUTHORITIES OR INDEPENDENTLY; AND]

#### Commentary:

a. It is essential that States' obligation to protect victims' and witnesses' confidentiality be express. The statute should recognize that to encourage the participation of victims and witnesses, protection must include consideration of danger to their families and close associates as a result of the witness' participation in proceedings related to the ICC. Issues related to the protection of their physical and psychological well-being have been a significant factor in the inability of the ICTY and the ICTR to pursue claims related to sexual and gender violence and other gender crimes, such as rape or forced impregnation. In addition to ensuring that the ICC be authorized and equipped to provide effective witness protection, the Statute must bind States likewise to provide the needed protection.

b. States also should be expressly required to permit the Court to sit in its territory if necessary to supervise a proceeding where it chooses to do it itself rather than request the cooperation of the State's judiciary. The moral and legal imperative to bring violators of the core crimes to justice warrant inclusion of this provision for extraordinary situations.

c. The current ILC draft contemplates primarily the scenario where the Prosecutor is enlisting a State to undertake certain tasks related to an investigation. In many cases, however, it may not be prudent or practical for the Prosecutor to enlist a State to take the lead--State authorities may be overtly or covertly involved in the crimes under investigation. Thus, Part 7 should clarify a State's obligation to cooperate in the manner requested; for example, by allowing the Prosecutor and her/his colleagues to enter the State and pursue the gathering of evidence or by assisting the Prosecutor through its own officials.

Recommendation 13: Retain Option 1B for Article 55(2), making clear that a State may not refuse to cooperate with a request for assistance from the Court.

55(2) Suggested Text:

[RETAIN: Option 1B]

A State [DELETE: Party] shall not deny a request for assistance from the Court.

Commentary:

States' obligation to assist the Court in the investigation of the universal core crimes under its jurisdiction should be absolute. See Commentary to Article 53(2) above.

Recommendation 14: Add an additional sub-paragraph (c) following Article 55(7)(b) to make clear that the Court must always refuse to provide States with information which would threaten the safety, well-being, dignity and privacy of victims and witnesses or their families or close associates, similar to Articles 53bis(2) and 54 above.

55(7)(c) Suggested Text:

Requests for judicial and legal [mutual] assistance shall:

..

(b) contain the following....

...

(c) THE INFORMATION PURSUANT TO SUB-PARAGRAPH (b) OF THIS ARTICLE MAY BE PROVIDED ON A CONFIDENTIAL BASIS AND SHALL BE PROVIDED IN SUCH A MANNER, AS, AT ALL TIMES, PROTECTS THE

SAFETY, WELL-BEING, DIGNITY AND PRIVACY OF VICTIMS AND POTENTIAL WITNESSES, INCLUDING THEIR FAMILIES AND CLOSE ASSOCIATES, CONSISTENT WITH ARTICLES 26(2) AND 43.

Commentary:

See Commentary to Article 53bis (2) above.

Article 56

Execution of Requests under Article 55

Recommendation 15: Retain Article 56(6), particularly Article 56(6)(c) as modified in the compilation in order to enable the Court to use all appropriate means to protect the safety, well-being, dignity and privacy of witnesses as well as member of their families and close associates.

56(6) Suggested Text:

[RETAIN: (a) - (b), (d)].

[RETAIN: (c) In order to guarantee the safety of witnesses and experts, INCLUDING MEMBERS OF THEIR FAMILIES AND CLOSE ASSOCIATES, any means of communication may be used to take their testimony while preserving their anonymity OR CONFIDENTIALITY IN ACCORDANCE WITH ARTICLES 26 AND 43.

Commentary:

To facilitate the participation of victims and witnesses, including experts, requests for state assistance related to the taking of testimony must be executed so as to protect their physical and psychological well-being and that of their families and close associates. Available measures should include the ability to protect their anonymity or confidentiality.

PART 8: ENFORCEMENT

Article 58

Recognition of Judgements

Recommendation 16: Strengthen the obligation of all States to enforce the judgments and orders of the Court.

58 Suggested Text:

States [DELETE: Parties] [DELETE: undertake to recognize] SHALL [RETAIN: ABIDE BY] AND [RETAIN: ENFORCE DIRECTLY ON THEIR TERRITORY] the judgments AND ORDERS of the Court [DELETE: AS JUDGMENTS RENDERED BY THEIR NATIONAL AUTHORITIES. [RETAIN: in accordance with the provisions of this Part]

Commentary:

States' Parties obligation to respect and enforce all judgments and orders issued by the Court must be absolute.

## PART II GENERAL PRINCIPLES OF LAW

### ARTICLES L-T & SECTION 2

#### General Considerations

1. A non-exhaustive list of general principles should be outlined in the ICC Statute but the detailed development of them should be left to the Judges in the Rules of the Court. The Court, comprised of judges from different judicial systems, should have the flexibility to revise and develop the general principles in light of the experience of the Court and in ways that are appropriate to the crimes within the jurisdiction of the Court. To do otherwise, might require constant amendment of the Statute and obstruct the effective functioning of the Court.
2. An overarching direction to eliminate discrimination and gender-based stereotypes in the discernment and application of the general principles should be articulated in the Statute.  
The Statute should contain a direction that the development and application of general principles of law must eliminate discrimination and gender stereotypes pursuant to international law. This direction could appropriately be contained in section 2(2) regarding the "Further Elaboration by the Court of General Principles..." or in a chapeau to the section on general principles.

3. To the extent that the PrepCom decides to negotiate general principles arts. L-T in the draft statute, the Women's Caucus makes pertinent suggestions below.

Note: The following recommendations are based on the compilation contained in Volume II.

Format Note: Additions are in capital letters and, if already bracketed, will be preceded by "DELETE BRACKETS"; deletions are bracketed and preceded by "DELETE". Recommendations and Commentaries (GP-#) are numbered consecutively throughout this part.

Recommendation 1: Add a chapeau to ensure that general principles are applied consistent with international standards, including the prohibition of discrimination of any kind with particular attention to the elimination of gender discrimination and stereotyped assumptions.

Suggested text: Chapeau to General Principles

THE APPLICATION AND INTERPRETATION OF THE GENERAL PRINCIPLES OF LAW MUST BE CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS STANDARDS AND THE PROGRESSIVE DEVELOPMENT THEREOF, WHICH ENCOMPASSES THE PROHIBITION ON ADVERSE DISCRIMINATION OF ANY KIND, INCLUDING DISCRIMINATION BASED ON GENDER AND GENDER-STEREOTYPED ASSUMPTIONS.

Commentary:

GP. 1 Adverse Discrimination includes discrimination based on race, colour, sex language, religion or belief, political or other opinion, national or social origin, wealth, birth, sexual orientation, health or other similar status or criteria and which encompasses sexual and gender violence within all the enumerated crimes against physical or mental integrity or health. [See Women's Caucus, War Crimes - Suggestions and Commentary, Recommendation 5.]

GP.2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and particularly articles 1-5, should provide direction as to the



interpretation of "discrimination" Accordingly, discrimination includes distinctions which have either the purpose or effect of impairing or nullifying the rights of women to the equal protection of the law as well as to their enjoyment of equality in both the public and private spheres of life (CEDAW, art. 1); the need to take affirmative measures to ensure the realization of equality which is consistent with the Geneva Conventions and this proposal's prohibition on adverse discrimination (CEDAW, art. 2,3); and the rejection of prejudices, customs or practices which are based on the idea of the inferiority or the superiority of either of the sexes or on gender- stereotyped roles or assumptions (CEDAW, art. 5).

#### Article L: Insanity

Recommendation 1: The Statute should adopt a strict test of insanity requiring that the person suffers from a mental disease or defect which destroys the capacity to appreciate the unlawfulness of one's conduct or to conform one's conduct to the law. Article L(1), as set out in draft proposal 1, is acceptable so long as the standard requires a complete loss of capacity.

#### Suggested text:

1. A person is not criminally responsible [DELETE: is legally insane] if at the time of that person's conduct that [DELETE: would otherwise] constitute a crime, the person suffers from a mental disease or mental defect that results in the person lacking ANY [DELETE: substantial] capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to conform his or her conduct to the requirements of the law [, DELETE BRACKETS: AND SUCH MENTAL DISEASE OR MENTAL DEFECT CAUSED THE CONDUCT CONSTITUTING THE CRIME.].

#### TEMPORARY LACK OF [DELETE: Diminished] Mental Capacity

Recommendation 2: Article L(2) should be amended to clarify that complete temporary lack of capacity rather than the vaguer term "diminished capacity" should be required in law. Otherwise the article is acceptable insofar as it gives the Court discretion to treat diminished mental capacity as a mitigating circumstance.

Suggested text:

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but TEMPORARILY LACKS ANY such capacity [DELETE: is nevertheless diminished] at the time of the person's conduct, the sentence [DELETE: shall] [RETAIN: MAY] be reduced.

Recommendation 3: Neither the defense of insanity nor mitigation of punishment for diminished responsibility should be available to a defendant who exercises command or superior responsibility or who directed others to commit the crimes at issue.

Suggested text:

2 bis: THE DEFENSE OF INSANITY OR CONSIDERATION OF DIMINISHED MENTAL CAPACITY SHALL NOT APPLY TO THOSE INVOLVED IN THE FORMULATION OF POLICY THAT RESULTED IN THE VIOLATIONS, OR TO THOSE WHO DIRECTED OR ORDERED SUCH CRIMES, OR TO THOSE IN A POSITION OF SUPERIOR OR COMMAND RESPONSIBILITY FOR SUCH CRIMES.

Commentary:

GP.2 Those who play a leadership role should be held to a higher standard. The Women's Caucus suggests that these defenses be available only to those charged with individual acts and who have no responsibility, for formulating or directing the crimes charged nor command or superior responsibility therefor.

Article M:  
Intoxication

Recommendation 3: Adopt Proposal 2 precluding the defence of voluntary intoxication.

Suggested text:

A state of drunkenness caused by the voluntary consumption of alcohol or state of intoxication caused by voluntary taking of a narcotic product may in no case

be regarded as grounds for exemption from OR REDUCTION OF THE DEGREE OF CRIMINAL RESPONSIBILITY.

Commentary:

GP.3 Voluntary intoxication should not be available to negate mens rea or as a mitigating circumstance with regard to any of the atrocities within the jurisdiction of the Court. The fact that abuse of alcohol or drugs may enable a person to commit otherwise unimaginable atrocities should not relieve that person of criminal responsibility. This is of particular significance in cases of sexual and gender violence, since intoxication is advanced by batterers and rapists as a common, although not a legitimate, excuse for violence against women. In times of warfare, over-consumption of alcohol and drugs is common and accepted in military culture. Overconsumption increases the probability that voluntary intoxication will be involved in and enable people to commit numerous crimes, especially in crimes of a sexual or gender nature. It would violate the principle against discrimination to permit this defense as that would leave women less protected by the law than men. Of course, if a person is forcibly intoxicated, the person responsible for creating that condition is fully responsible for the consequences of their act.

Article N:

Self-Defense/Defense of Others/Defense of Property

Recommendation 4: The definition of self-defense ought to take into account the reasonableness of the perceptions of the defendant so as to prevent discrimination against female defendants who may be differently situated with respect to the need for self- defense.

Suggested text (adopted from Proposal 1):

2. A person acts in self-defence, or in the defence of others, if the person acts [DELETE: reasonably] [DELETE: and as necessary] [DELETE BRACKETS: WITH THE REASONABLE BELIEF THAT FORCE IS NECESSARY] to defend himself or herself, or another person, against a [delete:n] [delete brackets: REASONABLE APPREHENSION OF] [DELETE BRACKETS: IMMINENT] [DELETE: PRESENT] OR [DELETE BRACKETS: OTHERWISE UNAVOIDABLE] unlawful force or threatened unlawful force [DELETE BRACKETS: IN A MANNER WHICH IS REASONABLY PROPORTIONATE TO THE THREAT

OR USE OF FORCE]. THIS DEFENCE IS NOT AVAILABLE TO A PERSON REACTING TO A THREAT OF FORCE THAT IS THE RESULT OF THEIR PRESENT WRONGFUL CONDUCT.

Commentary:

GP.4.1 The Women's Caucus suggests retaining the language that permits consideration of the reasonableness of one's belief that self-defence is necessary and the reasonableness of proportionality, as opposed to an abstract or objective standard of reasonableness, which could fail to take account of the particular perceptions, situations, capacities (for example, physical size, strength and training) and vulnerabilities of women and others who may not fit the traditional male norm. For example, women may perceive danger differently and may, based on their particular gender conditions, have a greater need to act preemptively. Likewise, the Women's Caucus recommends retaining the alternatives that would require the threatened unlawful force to be imminent or otherwise unavoidable to make it clear that the standard is strict but that preemptive action may be legitimate where an alternative does not exist.

GP.4.2 The Women's Caucus adds the last sentence to this article to make clear that those who may find themselves under attack as a result of their own illegal conduct cannot benefit from this defence, unless they are at the time hors du combat or prisoners of war.

Recommendation 5: The Statute should not recognize protection of property as a defence or mitigating circumstance.

Suggested text:

THE PROTECTION OF PROPERTY SHALL NOT BE A DEFENCE OR MITIGATING CIRCUMSTANCE.

Commentary:

GP. 6 The Women's Caucus agrees with the delegations who have questioned the acceptability of a defence of property to the crimes involved.

Recommendation 6: The Statute should not recognize necessity as a the defence or mitigating circumstance.

Suggested text:

NECESSITY SHOULD NOT BE A DEFENCE OR MITIGATING CIRCUMSTANCE.

Commentary:

GP. 6 It is can never be "necessary" to commit the atrocious crimes within the jursdiction of the Court. Given the recognition in the Statute of self-defence and duress or coercion as legitimate defences, there is no basis for further excuse from culpability.

Article P:  
Duress/Coercion

Recommendation 7: Amend Article P to limit this defence to very limited circumstances and foreclose its use to circumvent the unavailability of any defence of superior orders.

Suggested text (from Proposal 2):

2. A person acts under duress or coercion if:

[delete first alternative a]

[DELETE BRACKETS FOR SECOND ALTERNATIVE: (a) [DELETE: the person reasonably believes that] There is a threat of [DELETE BRACKETS: IMMINENT] [DELETE: present] AND [DELETE: or] [DELETE BRACKETS: OTHERWISE UNAVOIDABLE] death or serious bodily harm to that person or another person];

(b) [DELETE: the person acts reasonably in response to that threat] [DELETE BRACKETS: THE THREAT COULD NOT REASONABLY HAVE BEEN RESISTED BY [DELETE: an ordinary] [DELETE BRACKETS: THE PERSON]; and

[(c) delete brackets: THE COERCED CONDUCT DOES NOT PRODUCE A GREATER HARM THAT THE ONE LIKELY TO BE SUFFERED AND IS NOT LIKELY TO PRODUCE DEATH]

[3. DELETE BRACKETS: A PERSON DOES NOT ACT UNDER DURESS OR COERCION IF THAT PERSON KNOWINGLY AND WITHOUT REASONABLE EXCUSE HAS EXPOSED HIMSELF OR HERSELF TO THAT DURESS OR COERCION]

3 bis: THE DEFENCE OF DURESS OR COERCION SHALL NOT BE APPLIED TO UNDERMINE THE PROHIBITION ON THE DEFENCE BASED ON SUPERIOR ORDERS.

Commentary:

GP 7.1 The text proposed for 2(a)-(c) and 3 are designed to narrow the circumstances in which this defence is proper.

GP 7.2 The text proposed as 3 bis is designed to make clear that duress or coercion cannot be confused with superior orders and the legitimate threat of punishment for disobedience thereof.

Article Q:  
Superior Orders

Recommendation 8: It should be unequivocal that there is no defence of superior orders to the commission of crimes within the jurisdiction of the ICC and that the preclusion of this defence applies to claimed orders of military or political superiors as well as those acting on behalf of governments, intergovernmental bodies, and non-state actors. The suggestion that those who act under the mandate of the Security Council should not be responsible for such crimes must be rejected.

Suggested text (based on proposal 1):

1. The fact that a person acted pursuant to an order of a Government or of a superior, [delete brackets: WHETHER MILITARY OR POLITICAL], or of THE SECURITY COUNCIL, OR OTHER INTERGOVERNMENTAL BODY, INCLUDING THOSE ENGAGED IN UN PEACEKEEPING MISSIONS, shall not relieve the person of criminal responsibility [delete to end].

Commentary:

GP 8.1 The proposed changes are designed to encompass all possible situations of superior authority - military and political,

governmental and private. It is important that the preclusion of defence be clear; qualifiers like "manifestly unlawful", "absence of no alternative but to obey", or "no other moral choice" would effectively undermine the preclusion or convert it into a defence of coercion or duress.

GP 8.2 It is very important that intergovernmental bodies and particularly those acting under the mandate of the Security Council be subject to the jurisdiction of the ICC and be precluded from claiming impunity based on their status as such. There have been instances where those acting under Security Council mandate have committed crimes that rival those they are supposedly there to prevent. This is particularly true with respect to sexual crimes, including sexual slavery, serial rape and forced prostitution against women.

Article R:  
Possible Defenses Specifically Relating to  
War Crimes and Grave Breaches of the  
Geneva Conventions of 1949.

Recommendation 9: The Statute should exclude defenses of reprisal and military necessity.

Suggested text:

THERE SHALL BE NO DEFENSE OF REPRISAL OR MILITARY NECESSITY TO GENOCIDE, CRIMES AGAINST HUMANITY OR WAR CRIMES.

Commentary :

GP. 9 The Women's Caucus proposes that these defences be excluded from the Statute, in part, because they relate to State, and not individual, responsibility. Further, these are not legitimate defences to the core crimes under the jurisdiction of this Court.

Article S:  
Exhaustive or Enumerative List of Defences.

Recommendation 10: It is appropriate for the Court to consider additional defences, so long as this section is not a vehicle to re-introduce the defences insofar as they are specifically excluded; do not introduce gender discrimination

and stereotypes; and so long as the defendant provides advance notice thereof in accordance with section 2.

Suggested text (from proposal 1):

1. At trial the court may consider a defence not specifically enumerated in this chapter if the defence:

...

(b) ...; AND

(c) DOES NOT INTRODUCE DISCRIMINATORY OR GENDER-STEREOTYPED ASSUMPTIONS.

Commentary: See Commentary to Recommendation 12 below

Section 2:

Further Elaboration by the Court of General Principles of Criminal Law, Including the Question of Applicable Law AND THE PROHIBITION ON DISCRIMINATION.

Recommendation 12: The Women's Caucus supports Proposal b with the following amendments designed to make clear the authority of the ICC to discern general principles and its obligation to prevent discrimination in the application of all sources of law.

Suggested text: from Vol. II at 106:

(1) The Court shall apply:

..

(c) General principles of criminal law AS DISCERNED BY IT [ delete: identified by it and approved by States parties to the statute].

(d)...; [delete: and]

(e)...

Suggested text: from Vol. II at 106-continued:

2. THE APPLICATION AND INTERPRETATION OF THE ABOVE GENERAL SOURCES OF LAW MUST BE CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS STANDARDS AND THE PROGRESSIVE DEVELOPMENT THEREOF, WHICH ENCOMPASSES THE PROHIBITION ON ADVERSE DISCRIMINATION OF ANY KIND, INCLUDING DISCRIMINATION BASED ON GENDER AND GENDER-STEREOTYPED



## ASSUMPTIONS.

### Commentary:

GP 12.1 The Women's Caucus opposes the suggestion that the approval of States Parties to the statute is required before the Court can apply general principles of law not provided for in the Statute. Such a limitation on the authority of the Court to adjudicate would complicate and potentially paralyze the Court in its operation. The Court must have the authority to decide the cases before it as they arise. Reflecting the views of jurists from the world's different systems, the ICC is well-suited to participate in the discernment and progressive development of general principles. If a majority or consensus of nations disagrees with the Court, there are existing means at their disposal, including the adoption of resolutions in the General Assembly, for disapproving the criteria adopted of the Court and thereby affecting the progressive development of general principles.

GP 12.2 At the same time, the Court's discernment of general principles, and indeed its application of all the enumerated sources of law, must be consistent with the international standards and including the core prohibition on discrimination as discussed in Recommendation 5 to war crimes. In addition, it should be explicitly recognized in the ICC statute that the prohibition on adverse discrimination and reliance on stereotypes based on gender is of particular importance to the integrity of the ICC and its capacity to render universal justice. This is especially significant with regard to the process of discernment of general principles of law which, in relating to crimes of sexual violence and the credibility of women as witnesses. The fact that some states still adhere to gender-discriminatory or -stereotyped rules which are prohibited by international human rights standards--such as the requirement of chastity or virginity for a victim of rape or the view that a woman is not raped if she does not risk her life to resist it--should not disrupt the orderly development of non-discriminatory general principles.

### Part III WAR CRIMES

The Women's Caucus has three primary concerns regarding the jurisdiction of the ICC over war crimes at the same time as

we express our opposition to the legalization of war that is accomplished by humanitarian law:

#### I. Non-dilution of war crimes in humanitarian law.

Recommendation 1: War crimes should encompass, without dilution, all violations in internal as well as international armed conflict.

Recommendation 2: The proposed chapeau, conditioning jurisdiction over war crimes on their being systematic or large-scale, should be rejected in any form.

Recommendation 3: The scope of war crimes should encompass all those recognized in the Geneva Conventions, Protocols I and II and the progressive developments in the laws and customs of war.

#### II. Non-discriminatory incorporation of rape and other sexual and gender violence.

Recommendation 4: The chapeau should incorporate the principle of humanitarian law against adverse discrimination in relation to the prosecution of war crimes, particularly as it affects sexual and gender violence.

Recommendation 5: The chapeau should recodify the non-discrimination principle in customary law by recognizing that sexual and gender violence take many forms and are constituent acts of one or more of the enumerated crimes against the person (such as torture, mutilation, enslavement, inhuman treatment, depending upon the character of the violence at issue) in all armed conflict.

Recommendation 6: The Statute should clearly reject the prior treatment of rape and other sexual violence as simply "humiliating and degrading treatment" or as linked to a particular offense by eliminating the reference to rape and other sexual violence in this regard.

Recommendation 7: Following the approach of the article on crimes against humanity, the enumeration of war crimes in both internal and international armed conflict should include a subparagraph identifying rape, sexual slavery, enforced prostitution, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.

#### III. Explicit recognition of additional war crimes of customary dimension.

Recommendation 8: The Statute should recognize enslavement

and slavery-like practices as a violation in all war, internal and international.

Recommendation 9: The Statute should prohibit the recruitment of children under 18 for military service or participation in hostilities.

Format Note: All suggestions are based on the Chair's text contained in the Report of the February PrepCom. A/AC.249/1997/L.5. Additions are in CAPITAL LETTERS; deletions are bracketed and preceded by "DELETE;" already bracketed text is to be omitted when preceded by DELETE, and retained when preceded by DELETE BRACKETS.

I. Non-Dilution of Humanitarian Law: Applicability to Internal Armed Conflict and Scope of Enumerated Crimes.

Recommendation 1: Given the proliferation of internal armed conflict today, the Women's Caucus urges that the ICC have jurisdiction over the full range of war crimes recognized under international humanitarian law in both international and internal war.

Suggested text: Remove brackets from crimes listed in section C of the Chair's draft.

Commentary:

WC.1 Accountability for violations of international humanitarian law in internal armed conflict is crucial to prevent as well as punish impermissible attacks in war. The victims of war crimes--largely the civilian population--do not experience such attacks in internal war as any less devastating than those which occur in international war. Indeed, recent experience suggests that the civilian population is likely to be a greater target in civil as opposed to international wars.

Recommendation 2: The ICC Statute should not impose criteria appropriate to crimes against humanity either in the chapeau to the definition of war crimes or elsewhere.

Suggested Text: delete from chapeau::

[DELETE: For the purpose of the present Statute, any of the following war crimes constitutes a crime within the jurisdiction of the court when committed as part of a systematic plan or policy or as part of a large-scale commission of such crimes:]

Commentary:

WC.2.1 The proposed addition to the chapeau (or its placement elsewhere) would seriously dilute humanitarian law by conflating the jurisdiction over war crimes with that over crimes against humanity. Given the resources and mandate of the ICC, it is unlikely that isolated war crimes would be investigated or prosecuted unless they were particularly grave in and of themselves.

WC.2.2 The bracketed chapeau would require a new and difficult element of proof. Would, for example, the massacre of one small village or isolated assassinations designed to terrorize the civilian population be prosecutable as a war crime? If it is impossible to show that these acts are part of a larger plan and if a small number of people are killed, the ICC might not have jurisdiction.

WC.2.3 With respect to the prosecution of sexual and gender violence, it may be impossible to prove that sexual violence is part of a plan. Rape has been so common and so "accepted" in war that it often occurs as a result of marauding soldiers' or paramilitaries' belief in their own entitlement. Moreover, proving that sexual violence is large-scale (or widespread) is also difficult given the reluctance of people to testify due to insensitive investigatory methods, the dangers of re-traumatization, loss of privacy, potential stigma, and the danger of retaliation. Proper investigation and prosecution of sexual violence (involving personnel, training, methodologies designed to minimize trauma, and protection of identity and safety) is still far from a routine matter. Recently, in the Akayesu trial in the ICTR, rampant sexual violence would not even have been charged but for the consistent and expensive monitoring, documentation and interventions, ultimately as *amicus curiae*, by women's human rights NGOs. And still, rape continues to be omitted from other indictments. In the Tadic trial before the ICTY, several women who were expected to testify about sexual violence at Omarska--where rape and the threat of rape were routine-- declined because of the risks of exposure.

Recommendation 3: The enumeration of war crimes in both internal and international law should encompass all the crimes listed in the Geneva Conventions and Protocols I and

II thereto as well as the laws and customs of war.

Suggested text:

Remove brackets from all war crimes enumerated in the Chair's draft in accordance with the amendments and inclusions proposed by the Women's Caucus.

Commentary:

WC.3 The Women's Caucus opposes diluting or eliminating any of the currently recognized crimes under the Geneva Conventions or the Protocols or the customary humanitarian law. The Conventions and the Protocols are widely ratified and therefore reflect international customary law. This is reinforced by progressive developments since the Protocols in international human rights law, which like Protocol II, apply to the actions of states in regard to their own citizens. To eliminate or dilute the force of these Conventions or Protocols in the ICC Statute would cast these progressive developments, particularly as to internal armed conflict, into question and render the ICC Statute consonant with the position of the most recalcitrant States.

II. Incorporating the Non-Discrimination Principle and Progressive Developments Respecting Sexual and Gender Violence as War Crimes.

Introductory note

Throughout the history of war, women have suffered, largely ignored and in silence, the extreme and long-lasting physical and mental effects of sexual violence, while the perpetrators have enjoyed a near total impunity. The failure--until recently-- of international law to recognize the severity of sexual and gender violence has contributed to that invisibility and silence. The characterization of rape, for example, as a "crime against honor and dignity" or as simply "humiliating and degrading treatment" has reinforced the stigma that society attaches and that women suffer as a result of sexual and gender violence.

The ICC treaty must codify the progressive developments in international humanitarian law and the pertinent developments in human rights law which recognize sexual

and gender violence as among the gravest violations, e.g., torture, enslavement etc. It would be a retrogression for the ICC Statute to reiterate the approach to sexual and gender crimes contained in the Geneva Conventions and the Protocols. It is no longer acceptable--nor in accord with customary law-- to treat rape and other sexual violence as an inevitable byproduct rather than a central weapon of war, as conduct which cannot be controlled rather than conduct that should be punished, as conduct which merely "degrades" rather than brutalizes. The minimization of sexual violence and the failure to condemn gender violence violate humanitarian law's core principle against discrimination based on sex. Sexual and gender violence must be explicitly recognized as among and forms of the gravest violence within the substantive jurisdiction of the ICC, if the ICC is to be an institution of universal as opposed to partial justice.

NOTE: In this section, Recommendations 4-7 and the suggested are presented together at the outset and the commentaries to the four sections follow.

Recommendation 4: The chapeau should incorporate the fundamental principle of humanitarian law against adverse discrimination in relation to the prosecution of war crimes, particularly in regard to sexual and gender violence

Recommendation 5: The chapeau should codify the progressive implementation of the non-discrimination principle in customary law and recognize that sexual and gender violence takes many forms and are constituent acts of one or more of the enumerated crimes against the person in all armed conflict.

Suggested text --revised chapeau:

For the purpose of the present Statute, "war crimes" SHALL BE PROSECUTED WITHOUT ANY ADVERSE DISCRIMINATION BASED ON RACE, COLOUR, SEX, LANGUAGE, RELIGION OR BELIEF, POLITICAL OR OTHER OPINION, NATIONAL OR SOCIAL ORIGIN, WEALTH, BIRTH, SEXUAL ORIENTATION, HEALTH OR OTHER SIMILAR STATUS OR CRITERIA; AND SHALL ENCOMPASSES SEXUAL AND GENDER VIOLENCE WITHIN ALL THE ENUMERATED CRIMES AGAINST PHYSICAL OR MENTAL INTEGRITY OR HEALTH; AND means:

Recommendation 6: The Statute should clearly reject the previous treatment of rape and other sexual violence as simply humiliating and degrading treatment or as any particular war crime by eliminating the reference to rape and other sexual violence in regard to specific war crimes..

Suggested text--deletion re B(3)(n):

(n) outrages upon personal dignity [DELETE: in particular, rape, enforced prostitution and other sexual violence of comparable gravity.]

Suggested text-deletion re C(1)(c)

(c) [DELETE BRACKETS: outrages upon personal dignity, in particularly humiliating and degrading treatment [DELETE BRACKETED TEXT: [rape and enforced prostitution or in the alternative: in particular rape, enforced prostitution and other sexual violence of comparable gravity.]

Suggested text-deletion re A(c)

(c)[DELETE BRACKETS: wilfully causing great suffering, or serious injury to body or health][DELETE: wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other sexual violence of comparable gravity.]

Recommendation 7: The enumeration of war crimes should include a subparagraph identifying, as examples, rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual and gender violence as war crimes in themselves.

Suggested text: With regard to each distinct category of crimes accepted by the Conference, and with respect to both international and internal armed conflict there should be added the following language immediately after the listing of crimes against physical or mental integrity or health:

Add as: A. (b) bis; B.4 (a) bis; and C.(1)(a) bis:

()RAPE, SEXUAL SLAVERY, FORCED PROSTITUTION, FORCED PREGNANCY, FORCED STERILIZATION AND OTHER SEXUAL AND GENDER VIOLENCE OR ABUSE.

\*\*\*\*\*

Commentary to Recommendation 4:  
Incorporating the principle against discrimination of any kind.

WC.4.1 The principle against adverse discrimination is fundamental to the Geneva Conventions and the Protocols. It is repeated in all four Conventions as well as contained in Protocols I AND II./7/ Moreover, as stated in the Commentary to Art. 27 of the Fourth Convention, the protection against discrimination implies active steps such as the elimination of discriminatory laws./8/

WC.4.2 This negotiation must be guided by the 1993 Conference on Human Rights in Vienna (Vienna Conference) which declared that women's rights are an "inalienable, integral, indivisible and interdependent part of all human rights" and emphasized the need to condemn and prevent "violations of the human rights of women in situations of armed conflict." IIB, par. 38. See also, I, par. 28. The Vienna Conference's call for the mainstreaming of gender throughout the human rights system, has been frequently reiterated by the Human Rights Commission and its constituent bodies, most recently in the Commission's 1997 resolution on the ICC which called upon states negotiating the ICC statute "to give full consideration to integrating a gender perspective. . . ." This requires, among other things, explicit and non-discriminatory integration of sexual and gender crimes in the ICC treaty.

WC.4.3 Application of the principle against adverse discrimination requires recognition that the enumerated war crimes, including both grave breaches and violations of fundamental guarantees, may consist of sexual or gender violence. Thus, as discussed below, the more recent progressive developments in international humanitarian and pertinent human rights law recognizing sexual and gender violence as forms of the enumerated war crimes (such as torture), and as crimes in and of themselves (such as rape),



are firmly and centrally rooted in conventional humanitarian law.

WC.4.4 Gender violence is the most extreme form of gender discrimination. By gender violence or violations, the Women's Caucus means violence or violations which target or affect women exclusively or disproportionately because they are women. Gender violence also includes violence or violations which are based on or perpetuate socially constructed or stereotyped gender roles, or the power differential between men and women. /9/ Sexual violence, whether directed to women or men, is usually a form of gender violence, since it is an attack on one's gender identity, whether masculine or feminine. That is, women are raped, for example, to control and destroy them as women and to signal male ownership over them as property; men are raped to humiliate them through forcing them in the position of women and, thereby, rendering them, according to the prevailing stereotypes, weak and inferior. Gender violence also includes non-sexual attacks on women or on men based on their gender-defined roles; the physical or psychological targeting of women or their livelihoods to undermine the civilian population during war; attacks on reproductive integrity such as forced pregnancy or forced sterilization; the enslavement of women through forced marriage or otherwise for domestic as well as sexual service; and intentional or negligent disregard for the consequences of warfare on women--e.g. the impacts of chemical warfare.

WC.4.5 The text of the Conventions and Protocols as well as the ICRC Commentaries repeatedly make clear that the prohibited grounds of discrimination listed or referred to in the different provisions are not intended to be inclusive. As the Commentary to art. 27(3) of the Fourth Convention states: "...[A]ny discriminatory measure whatsoever is banned, unless it results from the application of the Convention."/10/ The recommended list is drawn from article 75 of Protocol I which is the most recent and complete list and reflects the breadth of discrimination also recognized in the Universal Declaration.

WC.4.6 Recognizing that the existing list is non-exhaustive, the Women's Caucus nonetheless recommends adding sexual orientation and health status given the discriminatory and atrocious treatment that remains largely unacknowledged and unredressed. In the Nazi Holocaust, for example, gay people were targeted for incarceration and mass murder in the concentration camps; and, especially torturous means of extermination were used. Yet, the genocide against them has been ignored by history and was not even recognized in the

codification of genocide. Moreover, the inclusion of health status is particularly important today given the prevalence of HIV infection and AIDS in all parts of the world and the tendency, even in the civilian context, to isolate and discriminate against people with these diseases notwithstanding that they are not infectious.

Commentary to Recommendation 5:  
Mainstreaming sexual and gender violence and abuse.

WC.5.1 Recommendation 5 calls for codifying the recent progressive developments by explicitly integrating sexual and gender violence and abuse into all the enumerated crimes of violence against physical and mental integrity and health where such treatment meets the elements of those offenses. This enables the prosecutor, on a case-by-case basis, to evaluate the facts and charge the range of sexual and gender violence as one or more of these traditionally enumerated crimes. Together with Recommendation 7 which calls for the listing of rape and other forms of sexual and gender violence as crimes in themselves, Recommendation 5 is designed to ensure the full prosecution of sexual and gender violence: -  
-e.g., rape, is punishable as torture as defined by CAT, at the same as rape is punishable as a forcible sexual assault.

WC.5.2 One of the essential and defining characteristics of criminal law is gradation in the characterization or naming and punishment of crimes. In this way, society differentially condemns the perpetrator and recognizes the suffering of the victim. This is why, as discussed below, the Geneva Convention's treatment of rape and other forms of sexual violence as simply "attacks against honor"/11/ and "degrading and humiliating treatment" and not as forms of the gravest violence is discriminatory as well as a profound insult to women. While the ICRC has made a partial advance in linking rape solely to "wilfully causing great suffering or serious injury to body or health," this still underestimates the severity and character of various forms of sexual and gender violence as the practice of the OTP and the progressive developments, discussed below, reflect.

WC.5.3 It is now a matter of customary international law that rape and other forms of sexual and gender violence constitute grave breaches of humanitarian law. As discussed below, sexual and gender violence have been widely recognized as forms of torture, the wilful infliction of severe mental or physical suffering, inhuman treatment, slavery and mutilation as well as methods for causing death.

WC.5.4 The chapeau proposed in Recommendation 5 provides a simple and efficient method for incorporating the progressive developments in international law and implementing the non-discrimination principle with respect to sexual and gender violence. It calls for the "mainstreaming" of sexual and gender violence in all the appropriate categories of war crimes. Thereby, it avoids the need to repeat the same idea in every pertinent subparagraph (See Annex I, for example) and enables the prosecutor to treat sexual violence as any one or more of the range of enumerated war crimes, when the elements of those offenses are met. /12/

WC.5.5 Codification of the recognition in customary international law that sexual and gender violence should be understood as constitutive of the already recognized and enumerated war crimes is supported by the theory and practice adopted by the ICTY and the ICTR. The first Chief Prosecutor, Judge Richard Goldstone, explained the position:

Our policy...[is to] equat[e] rape to other serious transgressions of international law. Apart from the relevance to charges of genocide and crimes against humanity, rape and other sexual assaults will be prosecuted under the Statute's provisions for torture, inhumane treatment, wilfully causing great suffering or serious injury to body, and inhumane acts, and other provisions that adequately encompass the nature of the acts committed and the intent formulated./13/

This position is further explained and illustrated in an expert paper prepared by Patricia Viseur-Sellers, the Legal Advisor on Gender in the Office of the Prosecutor (OTP) for the Expert Meeting on Gender-Based Persecution convened by the Division for the Advancement of Women:

In the general allegations [of the Gagovic (or Foca)] indictment, the Prosecutor stated that sexual assaults were to be alleged as evidence of divers provisions of the ICTY statute. The deconstructed conduct of the perpetrators consisted mainly of forcible sexual penetration, molestation, and forced nudity. The Prosecutor offered sexual violence as supporting evidence, not only of rape, but of torture and enslavement....

Deconstruction removes the fixation on rape and replaces it with the recognition of sexually violent

conduct as evidence of several serious violations of international humanitarian law....

Currently, the Prosecutor has submitted testimony of sexual assaults before the ad hoc Tribunals. Pending cases before the Rwandan Tribunal of the accused Rutaganda, Kayishema and Ruzidana, and Akayesu, together with the ICTY proceedings against Delalic et al., have each presented evidence of sexually violent conduct. The Prosecutor's characterization of the conduct varied according to the factual circumstances. Charges thus consisted of the crimes: torture, inhumane treatment; killing; genocide; cruel treatment; as well as, acts that satisfy the crime of rape under the statutes.

Deconstruction of sexual violence fosters mainstreaming of such conduct throughout the provisions of the statutes of the ad hoc Tribunals. The implementation of international humanitarian law through a sexual violence lens is a worthy response to gender based crimes.... /14/

The OTP and the current ad hoc Tribunals have charged and confirmed indictments for and/or presented evidence of sexual violence as torture, genocide, inhuman treatment and humiliating and degrading treatment depending on the conduct involved and the proof available.

WC.5.6 To illustrate the operation of the proposed chapeau, the following commentary outlines the factual and legal basis for the incorporation of sexual and gender violence into the major enumerated categories of war crimes against the person that are recognized in the ICC draft statute:

WC.5.6-1 Wilful killing. Rape and other forms of sexual mutilation and violence may be the vehicle of wilful killing. As the commentary to Protocol II makes clear, "[m]urder covers not only cases of homicide, but also intentional omissions that may lead to death. . ."/15/ The sexual mutilation of a man in Prosecutor v. Tadic was charged and confirmed by the ICTY as such./16/ In Rwanda, women were brutally raped and left to die. According to Shattered Lives:

Sexual violence, like other forms of torture, can precede or be a medium of extrajudicial execution. . . .[I]n Rwanda, acts of sexual mutilation and other life-threatening violence were

inflicted in pursuit of the victims' eventual death. Women were gang raped, raped repeatedly with objects, and subjected to outrageous brutality, some of which involved mutilating women's sexual organs. . . Many victims of sexual assault died in the course of or consequent to an attack. Sexual violence in such cases was a direct part of the killing. In other cases. . . , women survived sexual violence because their assailants left them for dead, believing they were mortally injured. /17/

In the case of Prosecutor v. Kayeshima, the Prosecutor has presented evidence to the ICTR that sexual mutilations, a breast-slashing and the impaling of a woman through her vagina, were a means to cause death. In addition, rape is today a method of willful killing in war because it is a means to transmit HIV infection.

WC.5.6-2 Torture. As a matter of customary law, rape and sexual violence, and the threat thereof, have been widely recognized by UN Rapporteurs, the Inter-American and European Human Rights bodies, and the ad hoc Tribunals as forms of torture./18/ The codification of these developments through the proposed chapeau to the ICC Statute of these developments is particularly significant to the Women's Caucus because it would formally acknowledge the gravity of rape.

WC.5.6-3 In every regard, rape and other serious sexual violence meet the international legal definition of torture, set forth in the Convention Against Torture, given the severity of physical and mental suffering inflicted,/19/ and the demonstrable purpose of sexual violence to punish, intimidate and discriminate against women on the basis of gender as well as against the group with which they are identified./20/ Reflecting these developments in customary international law, the ICTY has affirmed the Gagovic and Delalic indictments charging rape and other forms of sexual violence as torture. In places which have suffered these atrocities, this is clear. Rwanda has codified the crime "sexual torture" and the Haitian Truth Commission has called for criminalizing rape as torture. The recognition of rape as a form of torture is echoed in the opinion of jurists as well as human rights experts./21/

WC.5.6-4 The recent ruling of the European Court on Human Rights in Aydin v. Turkey described the torture of the petitioner, which included one act of rape. In concluding that the petitioner was subjected to torture (and not simply inhuman treatment), the Court emphasized the particularly cruel character of rape as a form of

torture./22/ The Inter-American Commission on Human Rights likewise has emphasized the severe impact which rape and sexual violence have on victims by stating that "it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture that produce some of the most severe and long-lasting traumatic effects."/23/

WC.5.6-5 Mutilation. Sexual and gender violence too frequently take the form of mutilation. (Chair's draft, B(3)(a), C(1)(a)). In *Prosecutor v. Tadic*, the ICTY charged the sexual mutilation of a man as torture. As the documentation of the violence against women in Rwanda illustrates, attacking or impaling women through their sexual organs, slashing breasts, as well as cutting out pregnant women's uterus were common forms of mutilation. /24/ Rape itself is also frequently a form of mutilation. Because much of the damage of rape is ultimately internal and, therefore, invisible, however, this is often ignored. These brutal forms of violence not only invade the body, they often result in the loss of sexual function and infertility.

According to *Shattered Lives*:

"Some of these [sexual] attacks left women so physically injured that they may never be able to bear children."

WC.5.6-6 Sexual and Gender Slavery. Depending upon the context, rape, forced pregnancy and other serious sexual violence and abuse have also been recognized as sexual slavery. Enslavement and slavery-like conditions are enumerated as a war crime in the Chair's draft at para. C(1)(g) and should, as indicated in our Recommendation 7, be in every category. Slavery and enslavement are the exercise of control over another person as chattel. Kidnapping, deceiving or coercing a woman, under threat of death, bodily injury, starvation to herself or others, to submit to serial rape as "comfort women" or to be "temporary wives," providing both sexual and domestic services is, in the terms of article 1(1) of the 1926 Slavery Convention, placing her in "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." It may also qualify as a condition of "serfdom" under article 1(b) of the Supplementary Convention on the Abolition of Slavery. /25/

WC.5.6-7 Under international law, it does not matter whether a slave-like status was initiated by an "agreement" or involved some exchange. Sexual slavery involves the treatment of a person as chattel for the purpose of performing any sexual conduct whatsoever, whether for reward or not./26/ In the context of the atrocities and genocide in the former Yugoslavia and Rwanda, women were subjected to sexual slavery in a variety of ways: in prisons, occupied towns, and rape camps

where they were held and repeatedly raped or subject to the threat thereof. In *Prosecutor v. Gagovic*, the Prosecutor charged and the Trial Chamber accepted that holding women in a house that quartered paramilitary soldiers, and forcing them to perform a range of sexual acts as well as submit to rape constituted a form of enslavement and, under art. 5 of the ICTY statute, a crime against humanity. In Rwanda, Algeria and other parts of the world, the practice of taking women as "temporary wives" or in forced "temporary marriage" is also sexual enslavement.

WC.5.6-8 Where impregnation or enforced pregnancy results, the invasion of the body and self is total. Women are being treated as chattel for the purpose of reproduction; this is another form of gender enslavement. Either a woman must submit to an abortion, which in circumstances of war and/or clandestinity can be fatal or debilitating, or she must suffer the continuation of a hated pregnancy. A more invasive form of violence is hardly imaginable: the pregnancy of rape is intended to and does take over a woman's body for nine months, at the end of which she faces the intolerable "choice" of keeping a child of rape, abandoning it, and, in some contexts, giving it up for adoption.<sup>/27/</sup> The profound violence of forced pregnancy is, in fact, illustrated by the numbers of Rwandan women who abandoned the infants of rape despite a powerful cultural tradition of keeping and taking in unwanted children under normal circumstances.

WC.5.6-9 Just as the severity of rape has been diminished by calling it humiliating and degrading treatment, as discussed in WC.6.1-6.3, below, sexual enslavement has been diminished by calling it only "enforced prostitution." The term "enforced prostitution" lacks a clear legal definition and has been misapplied in the past to situations of sexual slavery and serial rape. It was originally coined early this century to describe the phenomenon of the coercing of young girls and women into brothels. It was adopted in the Geneva Conventions, and later repeated in the Protocols in response to the use of women to "service" armies during the Second World War. Despite very strong condemnation in the Commentary, it was still treated as different from physical violence.<sup>/28/</sup>

WC.5.6-10 The term "enforced prostitution" muffles the degree of violence, coercion and control that is characteristic of sexual slavery. It suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. When, as in the Geneva Conventions, forced prostitution is equated with the "performance" of degrading acts, the term also suggests

that sexual services are offered rather than brutally exacted. It hides the fact that this is rape, serial rape, physically invasive and psychologically debilitating in the extreme, and that women are reduced to and sexually bludgeoned as property, and that they are completely under the control of the perpetrator.

WC.5.6-11 More recent attention to the situation of the euphemistically named "comfort women" who were kidnapped or deceived into sexual slavery by the Japanese Army during World War II has revealed and engendered recognition of the essential slave-like conditions under which they were detained, repeatedly raped and often killed or left to die. As the Special Rapporteur on Violence Against Women has found:

"...[T]he practice of "comfort women" should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms....[T]he Special Rapporteur concurs entirely with the view held by the members of the Working Group on Contemporary Forms of Slavery, as well as by representatives of non-governmental organizations and some academics, that the phrase "comfort women" does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with conviction that the phrase "military sexual slaves" represents a much more accurate and appropriate terminology." /29/

Today the situation of such victims would be described as sexual slavery, consisting of slavery or slave-like conditions, serial rape, torture, and forced labor, even if the victims are paid for their "labor." Similarly, women and girls who are forced to be subjected to serial rape in conditions of armed conflict are sexual slaves. History has taught us that most so-called "forced prostitution" during armed conflict constitutes sexual slavery.

WC.5.6-12 Nonetheless, the Women's Caucus recognizes that a category of forced prostitution may exist involving less than slave-like conditions. Women may be forced to submit to serial rape in exchange for their safety or that of others or the means of survival. Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for



one or more men in a dominant position of power. But even in cases where women are free to go home at night or even to escape, the conditions of warfare might nonetheless be so overwhelming and controlling as to render them little more than sex slaves. The decision whether to charge someone with forced prostitution, sexual slavery or serial rape, would depend upon a thorough analysis of the facts in each case from the perspective of the woman.

WC.5.6-13 Enslavement is also gendered when it exploits women's or men's traditional roles. When, as discussed above, women are impressed into maternity, this is a form of gender enslavement. The same is true when women are impressed into providing domestic services whether on a large-scale or individualized (forced temporary marriage) basis. The same is true when minors are impressed into military service, discussed below.

WC.5.6-14 Wilfully causing great suffering or serious injury to body or health and inhuman treatment. Both these grave breaches encompass physical and psychological violence of a sexual or gender character which may not meet all the elements of torture, enslavement or mutilation. "Wilfully causing great suffering" was, in fact, written into the Fourth Geneva Convention when torture was understood to apply only to extraction of information or confession through the use of violence.<sup>/30/</sup> While the line between torture and inhuman treatment is not a sharp one, it exists to encompass cases of sexual and gender violence which may not rise to the level of torture. The Women's Caucus cautions, however, that it is inappropriate to substitute these categories for rape and other sexual and gender violence which does and should properly be recognized and prosecuted as torture.<sup>/31/</sup> For this reason, Recommendation 6 calls for deletion of the exclusive linkage of rape and other sexual violence to "wilfully causing great suffering..." in paragraph A(c) of the grave breaches section of the Chair's text.

Commentary to Recommendation 6:  
Delinking sexual and gender violence from humiliating and degrading treatment.

WC.6.1 In light of the importance of the gradation of crimes and punishment in criminal law, the linkage of sexual violence with "outrages upon personal dignity" should be deleted. The ICRC Commentaries make clear the difference between violence and an

offense against honor or degrading treatment: The Commentary to the Fourth Convention explains: "Honor is a moral and social quality. . .[It includes] protection against slander, calumny, insults or any other action impugning...honor or affecting...reputation."/32/ The Commentary to article 75 Protocol I, explains that "humiliating and degrading treatment" with which enforced prostitution and indecent assault is explicitly linked, "refers to acts which, without directly causing harm to the integrity, physical and mental well-being of persons, are aimed at humiliating and ridiculing them, or even forcing them to perform degrading acts."/33/ (italics supplied).

WC.6.2 This underestimation of both the purpose and effect of sexual violence is shocking today and deeply discriminatory now that the violent, terrible nature of rape and other sexual violence against women has finally been recognized. The ICC Statute must not repeat this error. The reference to rape and enforced prostitution in the Chair's draft, paragraph B(4)(n) and C(1)(c), must be deleted. To continue the linkage of rape, enforced prostitution (which, as discussed below, is usually at least serial rape) with "ridicule," "calumny" or "being forced to perform degrading acts" when what is being punished is the infliction of some of the most extreme and traumatizing forms of physical and psychological violence, amounting to sexual torture or slavery, is itself humiliating and degrading to women and reinforces the stigma that it is the purpose of justice to prevent.

WC.6.3 Nonetheless, the war crime of "humiliating or degrading treatment" should be included in the Statute, but not as the catchall for sexual violence. There are some acts of sexual abuse which might be appropriately charged as degrading treatment depending on the context. Thus, for example, forced nudity or sexual performance will, in some contexts, be a form of torture or inhumane treatment; in others, it will be appropriately charged as degrading or humiliating treatment. There are also forms of sexual harassment that could appropriately, in the context, be so charged. But rape and other forms of sexual violence, used so disproportionately against women, have been and must, in the ICC Statute, be clearly recognized as grave violence and as an instrument of war whether their purpose is to reward soldiers, brutally mark the victory, punish resisters, cause the civilian population to flee or disintegrate, or destroy a people in whole or in part.

WC.6-4 Similarly, Recommendation 6 calls for deletion of the mention of sexual violence in regard to international armed conflict in regard only to "willfully causing great suffering...." because it potentially could undermine the progressive developments and limit the Prosecutor and the Court to charging sexual violence only in this category. For all these reasons, the Women's Caucus urges adoption of the chapeau as the more efficient and appropriate means of incorporating sexual and gender violence that has previously gone unpunished or under-punished.

Commentary to Recommendation 7:  
Enumerating sexual and gender violence as crimes.

WC.7.1 The Women's Caucus recommends following the precedent set in the definition provided by ICTY, and ICTR Art. 5(g) of Crimes Against Humanity where sexual violence is identified in a separate paragraph as well as potentially chargeable as other enumerated crimes. It is necessary to add this paragraph enumerating forms of sexual and gender violence as well as to mainstream sexual violence for a number of reasons. Sexual and gender violence are severe and particular and their particularities should not be lost by mainstreaming. Where not explicit, they are too often ignored, even today. Moreover, even while sexual violence can meet the elements of the other enumerated crimes, criminal law provides definitions of rape, enforced prostitution, and forced sterilization and other forms of violence and abuse that are different from that of the enumerated crimes. The Prosecutor should be able to choose among the various options what is most appropriate to the case.

WC.7.2 The Women's Caucus recommends adding sexual slavery to this list of illustrative forms of sexual and gender violence to highlight the importance, discussed in WC.5.6-6 – 5.6-13, of distinguishing sexual slavery from enforced prostitution which requires different, and a lesser degree of proof than slavery or serial rape.

WC.7.3 The Women's Caucus also urges deletion of the words "of comparable gravity" which qualify sexual violence in the Chair's draft para. A(c); B(3)(n) and C(1)(c). These terms were suggested and bracketed by the February PrepCom. In our view, they will sow confusion and potentially limit the range of sexual and gender violence and abuse to which the jurisdiction of the ICC, like that of the ICTY and the ICTR, should extend.

It raises questions such as what is meant by comparable? does it require some degree of penetration or attempted penetration? As reflected in the indictments and evidence before the ad hoc Tribunals, the range of sexual and gender violence or abuse in war will always constitute as well one or more of the traditionally enumerated violations and thus be of the requisite seriousness to warrant prosecution by the ICC.

### III. Other Gender-Based Crimes.

Recommendation 8: Enslavement and slavery-like practices, now recognized only under para. C.(1)(g) of the Chair's draft should be enumerated as a crime in all wars and should clearly encompass modern forms of sexual and gender enslavements.

Suggested text:

Add to : A. a bis and 2.9

Amend C. 2.g:

ENSLAVEMENT AND SLAVERY-LIKE PRACTICES IN ALL THEIR FORMS, INCLUDING BY SALE, DECEPTION, COERCION OR THREAT.

Commentary:

WC.8.1 The absence of enslavement and slavery-like practices as enumerated crimes in all categories, affecting international and internal war and based on the Conventions or customary law, would be an unjustifiable oversight in the ICC Statute. Slavery and slave-like practices are *ius cogens*. The most recent ICRC Commentary, discussing the enumeration of slavery and the slave-trade in Protocol II, relies on article 8 of the International Covenant on Civil and Political Rights, art. 1 of the 1926 Slavery Convention, and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, and supports this view:/34/

[Slavery and the slave trade are] one of the "hard core" fundamental guarantees . . . .The prohibition on slavery is now universally accepted; therefore the adoption of this sub-paragraph did not give rise to any discussion. . . .[T]he phrase "slavery and the slave trade in all their forms". . . .[includes, but is not limited to] certain institutions and practices

comparable to slavery, such as servitude for the payment of debts, serfdom, the purchase of wives and the exploitation of child labor . . . ."

WC.8.2 The Women's Caucus recommends adding the terms "INCLUDING BY SALE, DECEPTION, COERCION OR THREAT" to ensure the application of slavery-like practices to the full range of its forms. For example, women and girls are not only sold into forced marriage, but also kidnapped, coerced, threatened or deceived into "accepting" it.

WC.8.3 As discussed above in para. WC.6.5-6 et seq., enslavement and slavery-like practices encompass sexual and gender violence and oppression, which is made explicit through the chapeau as well as in para A. (b) bis; B. 4 (a) bis; and C.(1)(a) bis. These include being impressed into maternity service through forced impregnation and pregnancy, and into domestic service through institutionalized and individualized enslavement. It also includes the involuntary recruitment of children for military service discussed below.

Recommendation 9: Prohibit recruitment of or allowing people under 18 to participate in hostilities.

Suggested text:

Amend B(3)(s) and C(1)(p):

() to recruit children under the age of [DELETE: fifteen] EIGHTEEN years in the armed forces, or to allow them to take part in hostilities.

Commentary:

WC.9.1 Studies estimate that 250,000 people under 18 are serving in the armed forces of governments and dissident groups. Children may be forcibly recruited through gangs and kidnapping or manipulated into participating. They are especially malleable and often the ones who are used to carry out extreme acts of violence, often directed against their own families or communities./35/

WC.9.2 Beyond the gross manipulation of children in hostilities, there is a pervasive gender impact of the fact and potential of military service generally and, particularly, for the young. Overwhelmingly, those who are forced or recruited for hostilities are boys. The

combination of the gender-specific nature of the military and the equation of military service with heroism, excitement, and masculinity have a profoundly detrimental effect on both boys and girls from the earliest years of childhood through adulthood. Military service, despite its pervasive glorification in many societies, is often profoundly traumatizing for those who perform it either because they must or cannot become inured to killing and to death. Military recruitment and service thus operate to divide society by gender and reinforce stereotypes about strength and weakness, protection and dependency, superiority and inferiority in violation of international norms designed to eliminate discrimination against women. Most members of the Women's Caucus do not believe that non-discriminatory recruitment will address the damaging gender-impact of the military. The role of the military perpetuates patriarchal values, reinforcing the view that violence and obedience to or assertion of authority are necessary and acceptable means of solving problems, and equipping people to use violence. Women are frequently the victims of this militarization, as targets of sexual and gender violence when used or tolerated as instruments of war. They are also targets of violence in war's aftermath: women suffer equivalent forms of violence in refugee camps created by war and are battered and raped--tortured in fact--by intimate partners and family members in their homes

WC.9.3 The Women's Caucus believes that, at the least, recruitment for or service in the hostilities, whether forced or voluntary, should not occur during a person's minority, at a time when malleability and impressionability are at a height. While older documents have recognized 15 as the age limit, there is, on the basis of current experience and study, a progressive trend toward setting the age at 18 which the Women's Caucus supports./36/

## ANNEX I

A. grave breaches of the Geneva Conventions of 12 August 1949, namely, the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing, INCLUDING SEXUAL VIOLENCE CAUSING DEATH;

(a) bis: ALL FORMS OF ENSLAVEMENT, INCLUDING SEXUAL OR DOMESTIC ENSLAVEMENT AND FORCED MARRIAGE, by SALE, DECEPTION, COERCION OR THREAT;

(b) torture or inhuman treatment, including biological experiments, INCLUDING RAPE AND OTHER SEXUAL OR GENDER TORTURE, INCLUDING VIOLENCE AGAINST REPRODUCTIVE INTEGRITY;

(c) [DELETE: wilfully causing great suffering, or serious injury to body or health] [ PRESERVE: wilfully causing great suffering, serious injury to body or health, including rape, enforced prostitution and other [DELETE: sexual violence of comparable gravity] SEXUAL OR GENDER VIOLENCE

OR ASSAULT.

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, INCLUDING ATTACKS ON THE HOME OR LIVELIHOODS;

(e) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power, INCLUDING COERCED SEXUAL OR DOMESTIC SERVICE;

(f) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial FREE OF DISCRIMINATION AND STEREOTYPES OF ANY KIND;

(g) unlawful deportation or transfer or unlawful confinement;

(h) taking of hostages.

#### PART IV PENALTIES & REPARATIONS

##### Article 47

The Women's Caucus has the following priorities with respect to penalties and reparations:

\_ Ensure that the Court has the power to order and award

reparations to victims including restitution, compensation and rehabilitation, and that victims, their families and close associates, are the preferred recipients.

— Ensure, before enlisting the cooperation of the state in disbursing funds or property acquired by the Court as a result of penalties imposed, that the State receiving the funds or property has established an effective and accessible mechanism to ensure distribution to them

— Authorize the Court to order the forfeiture and seizure of monies and property, or the proceeds or monetary equivalent thereof, used in, intended to be used in or acquired as a result of the criminal activity.

— Authorize the Court to impose disqualification from political office or political or professional activity.

— Reaffirm the international legal obligation of the responsible State to provide reparations for conduct engaging the responsibility of the State.

#### Article 47 Applicable Penalties

[basis is ILC Chair's text A/AC.249/1997/WG.6/CRP.1]

Recommendation 1: Allow Court to order disqualification from political office or political or professional activity.

Suggested Text:

(B) [DELETE BRACKETS: disqualification, dismissal or suspension from office or employment], INCLUDING A PROHIBITION ON POLITICAL INVOLVEMENT OF ANY KIND OR OF PROFESSIONAL, ECONOMIC OR SOCIAL ACTIVITIES; (DELETE REMAINDER)

Commentary:

47.1 Disqualification from holding any public office as well as from engagement in political activities is crucial if those convicted of the worst crimes are not to continue to influence politics. The difficulty of accomplishing this is illustrated by the fact that in the territory controlled by the Bosnian-Serbs,



Radovan Karadzic remained the shadow president up to and through the elections and continues to control politics albeit now in an apparent power struggle with the elected president. It should be noted that an additional article would be necessary to make this disqualification take effect upon the confirmation of an indictment by the Court.

Recommendation 2: Allow the Court to order confiscation of a convicted defendant's property, or its equivalent in value, used in, intended to be used in, or acquired as a result of the unlawful activity charged .

Suggested Text:

(C) [DELETE: a forfeiture] [DELETE: or] [DELETE: a seizure of instruments and objects of the crime] [RETAIN: CONFISCATION OF ANY OBJECT WHICH] [DELETE BRACKETS: has been used or was intended to be used in the commission of the criminal conduct] or [DELETE: has served to commit the crime and/or] [RETAIN: ANY] [DELETE: object or profit] [RETAIN: PROPERTY AND PROCEEDS] OR THEIR EQUIVALENT [RETAIN: OBTAINED BY CRIMINAL CONDUCT]. (DELETE REMAINDER).

Commentary:

47.2.1 The proposed subparagraph (c) would, like the ICTY and ICTR Statutes and rules, enable the ICC to order confiscation of property, or its equivalent in money or other property used in or acquired as a result of the convicted criminal's illegal activity and to effect the return of this property to the victims or their survivors.<sup>37/</sup> Defendants all too commonly seize the property in connection with the commission of crimes within the jurisdiction of the ICC. This seizure may also be itself such a crime.<sup>38/</sup>

47.2.2 The penalty of confiscation is necessary to give effect to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter Justice for Victims). The Declaration provides in para. 8 that "offenders or third parties responsible for their behavior should... make fair restitution to victims, their families or dependents" and that such restitution should include, inter alia, "the return of property or payment for the harm or loss suffered". Giving this power to the ICC rather than requiring victims to seek restitution before state tribunals is also in line with the mandate contained in para. 6(e) of the Declaration which provides that the tribunal should "avoid

unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims". The ICC should also be able to seek state cooperation to effect the confiscation or return of property. (See Women's Caucus Proposals re art. 51).

Recommendation 3: Amend Article 47 to specifically allow the Court to order reparations to the victims or their survivors of the crimes adjudicated at the conclusion of a criminal trial.

(d) APPROPRIATE FORMS OF REPARATIONS, INCLUDING BUT NOT LIMITED TO, RESTITUTION, COMPENSATION AND REHABILITATION [RETAIN: without prejudice to the obligation on every State to provide reparations in respect of conduct engaging the responsibility of the State] AND TO REMEDIES AVAILABLE UNDER STATE LAW AND OTHER INTERNATIONAL ARRANGEMENTS.

Commentary:

47.3.1 It is impossible to countenance an ICC which does not have the power to order compensation and other forms of reparation after a conviction. The obligation of the criminal tribunal to award compensation is widely recognized in civil law systems and has been adopted in many common law systems as well. It demonstrates that the ICC is committed to personal as well as abstract justice; it saves the victims and their survivors the potentially impossible step of beginning a proceeding in a state court or administrative body. In return, the survivor community is more likely to support the work of the ICC. The Women's Caucus urges that the treaty not repeat the mistake of the ICTY and ICTR statutes in failing to give the Court power to award compensation for personal injury at the same time as it reaffirms the obligation of the responsible State to provide reparations.

47.3.2 International law recognizes a right of reparation for victims that arises from the violation of their human rights. (See Declaration of Justice for Victims, supra.) According to the Special Rapporteur on Restitution, "it cannot be stressed enough that more systematic attention has to be given at national and international levels, to the implementation of the right to reparation for victims of gross violations of human rights".<sup>39/</sup> Moreover, the Special Rapporteur's report states: "reparation for human rights violations has the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations".<sup>40/</sup> The proposed section

borrowed from and goes beyond proposed section Article 45bis in giving the Trial Chamber authority to order not only compensation but also restitution and rehabilitation; to fix awards where appropriate as well as to set principles for awards; and to provide this recovery directly to victims as well as through state processes.

47.3.3 Reparations encompass, at least, restitution, compensation and rehabilitation. The Court should also be enabled to award punitive damages given the heinousness of the offenses over which the Court has jurisdiction. Any award the court makes should not preclude any means of redress victims may have in their national systems. The Special Rapporteur's Report offers guidance on how each form of reparation should be approached:

[R]estitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, inter alia, restoration of liberty, citizenship or residence, employment or property./41/

Compensation "shall be provided for any economically assessable damage resulting from human rights violations," such as: "(a) physical or mental harm; (b) pain, suffering and emotional distress; (c) lost opportunities, including education; (d) loss of earnings and earning capacity; m(e) reasonable medical and other expenses of rehabilitation; (f) harm to property or business, including lost profits; (g) harm to reputation or dignity; (h) reasonable costs and fees of legal or expert assistance to obtain a remedy."/42/

Rehabilitation shall include "legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims."/43/

Recommendation 6: Use Option 1 which tracks the language of article 46(2) and which takes into account the impact on the victim at the sentencing phase of trial.

Suggested Text:

(2) In determining the sentence, the Trial Chamber [RETAIN: may] [RETAIN: take into account such factors as the gravity of the crime, [DELETE: the extent and severity of the damage or injury caused] [RETAIN: the impact of the crime on the victims] OR THEIR FAMILIES AND CLOSE ASSOCIATES and the individual circumstances of the convicted person. (DELETE REMAINDER).

Commentary:

46.1 Giving victims or their survivors a voice and a presence at sentencing serves the practical and profound goals of justice in three ways: First, it enables them to ensure that the scope of their injury is taken into account in sentencing, which, as recommended in respect to Article 47(1), should include penalties as well as reparations. Second, it provides an opportunity for the community of survivors to be heard, thereby contributing to the healing process and to the rebuilding of their lives. Third, active participation, even through representative voices, can help avoid the trauma and re-victimization of being ignored by the justice system.

Recommendation 7: Amend section 3 to explicitly reflect the evolution of international law standards of sentencing against which State customs or practices are judged.

Suggested Text:

3. In determining the sentence, the Trial Chamber [RETAIN: may] SO LONG AS THE PENALTIES ARE NOT INCONSISTENT WITH THE GRAVITY OF THE OFFENSE AND APPLICABLE INTERNATIONAL LAW, [delete: In] WHEN determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

- (a.) the State of which the convicted person is a national;
- (b.) the State where the crime was committed;
- (c.) the State which had custody of and jurisdiction over the accused.

Commentary:

47.1 The development and evolution of international law standards of sentencing need to be acknowledged in this section. While a reference to state laws and customs of sentencing is consistent with the concept of General Principles of Law, such general principles of sentencing are likely to fall far short of the mark when the crimes committed include those of sexual violence and atrocities traditionally under-punished in many state arenas.

Recommendation 8: Amend Article 47 ter. to place the victims or survivors first in order of directly obtaining proceeds from the fines.

Suggested Text:

[RETAIN: Fines paid and assets confiscated by the Court] may be transferred, by order of the Court, to one or more of the following:

[DELETE: (a) the Registrar, to defray the cost of the trial;]  
(A.) bis: THE VICTIMS OR THEIR FAMILIES AND CLOSE ASSOCIATES, [DELETE (c)]  
(B) a trust fund [RETAIN: established by the Secretary – General of the United Nations] or [RETAIN: administered by the Court] for the benefit of victims of crime.  
[DELETE:(b.)]  
(C) a State, the nationals of which were the victims of the crime;  
(D) The Registry, [DELETE: to defray the costs of trial] TO BE DIRECTED TO THE VICTIMS AND WITNESSES UNIT.

Commentary:

48.1 Monies or property acquired as a penalty should first be available to the victims of crimes for which the defendant is convicted. Making victims a priority in this manner is consistent with the emphasis placed on the role of, and respect for, victims in the criminal justice process by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Beyond that, it is a small way in which the ICC can demonstrate that it has specific concern for the impact of the crimes on the lives of survivors. When such monies are not needed for that purpose or cannot be effectively distributed by the Tribunal, subsections (b) and (c) would apply. If the funds are to be turned over to a national system of compensation, the ICC should have the responsibility of ascertaining whether the national system has adequate or effective means of providing reparations. Additionally, because the need for compensation will likely be so vast, such monies should not be used to fund the court. Rather, such monies should be directed through the Registry to the Victims and Witnesses Unit.

Recommendation 9: Ensure that language of this section encompasses principles regarding all forms of reparations for which the Court's judgment shall be binding.

Suggested Text:

4. Effect of Judgment, Compliance and Implementation

[RETAIN: (a) The judgment of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted [DELETE: and] AS WELL AS [RETAIN: OTHER] WITHOUT PREJUDICE TO OTHER REMEDIES AVAILABLE UNDER STATE LAW.

(b) For the purpose of enforcement of fines [DELETE: or] AND [RETAIN: reparations] imposed by the Court, the Presidency may order the force sale of any property of the person sentenced which is on the territory of a State Party.

For the same purpose, the Presidency may order the confiscation of any sum of money or securities belonging to the person sentenced.

Decisions by the Presidency [DELETE: may] MUST BE implemented by States Parties in conformity with [DELETE: their domestic laws] ARTICLE 53 PERTAINING TO STATE COOPERATION AND JUDICIAL ASSISTANCE.

#### Part V: PROCEDURES Articles 44-50bis

Article 44  
Evidence  
(Text is A/AC.249/1997/WG.4/DP.2)

Recommendation 1: Provide for the protection of witnesses in the course of trial, including measures designed to protect their identity from revelation and to reduce the danger of retraumatization.

Suggested text:

1...

[DELETE BRACKETS on paragraph:  
1. bis. [DELETE: In principle, the Trial Chamber shall hear witnesses in person.] [DELETE: In exceptional circumstances, it] [DELETE BRACKETS: The Trial Chamber] may order, of its own motion or at the request of the prosecutor or the accused, such measures as are necessary in the interest of justice or for the protection of witnesses. In these cases,

the Trial Chamber may provide for an alternative for obtaining the testimony of the witness for use at trial [DELETE BRACKETS: permit a witness to testify without revealing personal data.]

Commentary:

44.1 The Women's Caucus supports this proposed revision to the statute which makes clear the power of the Court to take measures to protect the physical and mental integrity of witnesses during trial. We support the discretion in the Court to permit the use of a prior deposition at trial to save the witness from having to repeat the testimony previously given. Where the defendant had a prior opportunity to cross-examine the deponent, the deposition could substitute entirely for the witness' testimony. Where this was not the case, the use of deposition testimony does not foreclose defendant from cross-examination or the eliciting by any party of new information, but it does save the witness from needless trauma. Given the circumstances surrounding witness testimony and the methods of communication as yet unenvisioned, it is inadvisable to condition this power by requiring a showing of "exceptional circumstances." The decision about fair and protective measures should be within the discretion of the Court.

44.2 The Women's Caucus also supports discretion in the Court to take measures to protect the witness' identity and key identifying information such as occupation and domicile or place of residence. We understand these concerns to be incorporated in the terms "personal" data. It is our experience, working with and speaking with witnesses before the existing Tribunals that, in many cases, the protection of identity is the *sine qua non* of a witness' willingness to testify. In some cases, it will be appropriate for the Court to protect either the confidentiality or the anonymity of the witness. There are circumstances where danger to the witness, their family or close associates as a result of testifying, lack of alternative effective safeguards, the Court's ability to determine other indicia of the reliability of the witness' testimony or the lack of prejudice to the accused of not having the witness' identity, for example, make the receipt of anonymous testimony fair and appropriate.

44.3 The Women's Caucus notes that the taking of anonymous testimony under such circumstances is accepted in many civil law systems as well as, under very controlled circumstances,

in some common law systems. It is, in our view, critical to leave the power to make these decisions with the Court which will represent the different systems and be best able to evaluate the need and risks of anonymous testimony in the individual case. We believe that the ICTY decision in the Tadic case on witness protection represents an important step in this regard.

Recommendation 2: The Court should have the option of punishing witnesses for false written or oral testimony which should be defined as given under oath or under explicit penalty .

Suggested text:

2. IN ADDITION TO THE POWER OF THE COURT TO PUNISH DIRECTLY PURSUANT TO ARTICLE 47, States parties shall extend their laws of perjury [DELETE BRACKETS: OR FALSE TESTIMONY to cover evidence given under this Statute by their nationals, and shall cooperate with this Court in investigating and where appropriate prosecuting any case of suspected perjury or [DELETE BRACKETS: FALSE TESTIMONY] ] EITHER SWORN OR GIVEN EXPLICITLY UNDER PENALTY OF PERJURY IN CONNECTION WITH A PROCEEDING IN THE COURT.

Commentary:

44.4 The Women's Caucus urges that the Court have direct power to punish for perjury as proposed in Recommendation 7 below. It is also recommended that perjury or false testimony for the purposes of proceedings before the ICC be more clearly defined, as above. The PrepCom could consider moving this to Chapter 7 on State Cooperation and Judicial Assistance.

Recommendation 3: The Court should be able to ensure the completeness of the evidence and regulate the manner of its introduction, including the holding of in camera hearings to review its relevance and admissibility.

Recommendation 4: The Court should be able to monitor the fairness of the trial, excluding evidence whose probative value is inconsistent with fairness. In particular, the Court should not permit the admission of evidence which discriminates against women or is based of gender stereotypes.



Suggested text:

3. [DELETE BRACKETS: the court has the authority and duty to call all evidence that it considers necessary for the determination of the truth.] [IT][DELETE: The Court] may [DELETE BRACKETS: also] require to be informed of any evidence before it is offered so that it may rule on its relevance or admissibility [DELETE BRACKET: after hearing the parties to the case] SO LONG AS CONSISTENT WITH THE APPROPRIATE PROTECTION OF THE IDENTITY OF WITNESSES.

3bis. THE COURT SHOULD EXCLUDE EVIDENCE WHERE ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE NEED TO ENSURE A FAIR TRIAL, AND GIVE PARTICULAR ATTENTION TO ELIMINATING GENDER DISCRIMINATION AND STEREOTYPED ASSUMPTIONS IN THE ADMISSION OF EVIDENCE.

Commentary:

44.5 The Women's Caucus supports giving the Court the power it has in the civil law system to supplement the presentation of evidence by the adversaries with other evidence which it solicits from the parties or obtains on its own motion. This parallels the Rules of the ICTY and the ICTR which give the Trial Chamber the power to order the parties to produce additional evidence or to call its own witnesses.

44.6 This power has already been particularly important to ensuring the full prosecution of sexual violence. The power of the ICTR to inquire into the sufficiency of the Prosecutor's evidence or charges recently contributed significantly to causing the Prosecutor to amend the indictment in the Akayesu trial before the ICTR. There, evidence of sexual violence against women as part of the genocide in Rwanda was brought out at trial, for the first time, when two of the judges questioned two witnesses. Thereafter, following the submission of an amicus curiae brief, filed by women's rights NGOs and experts, questioning the prosecutor's failure to indict the defendant for sexual violence, the Prosecutor amended the indictment, opened a new investigation and presented evidence at trial which six months earlier it had been contended did not exist. Had the Prosecutor not responded as she did, it would have been appropriate and necessary for the Court to call its own witnesses. This is particularly true where universal justice and the integrity of the process are at stake.

44.7 It is also appropriate that the Court be able to require that the party seeking to present evidence present or defend it first to the Court. From the perspective of the Women's Caucus, this is a potentially significant safeguard in cases of sexual violence where the prejudicial and traumatizing impact of testimony may outweigh its probative value. The Court should be able to exclude the evidence or admit it with certain safeguards where this is or might be the case. For this purpose, it is necessary to permit an early in camera hearing which might be ex parte in cases where the protection of witnesses is at stake. These safeguards are essential to avoid surprise and the abuse of witnesses at trial and to ensure the exclusion of irrelevant and traumatizing evidence often premised on discriminatory and gender-stereotyped assumptions.

44.8 This principle, contained in ICTY Rule 89(D) and the ICTR parallel rule and in the Proposal of Australia and the Netherlands for Rule 105(C) (Vol. II at 214), should be explicit in the statute along with the elimination of specific mention of the problem of gender discriminatory and stereotyped assumptions. The Women's Caucus emphasizes the importance of avoiding prejudice particularly given the sex-stereotyped assumptions which undermine the fair prosecution of sexual and gender violence as well as traumatize the victims. For example, the proposed section lays the foundation for excluding evidence of prior sexual conduct--as do the ICTY and ICTR Rules,--which has, in many jurisdictions, been admitted to challenge a woman's character and suggest her consent. It also lays the foundation for permitting testimony of and conviction on sexual abuse without the requirement of corroboration, also prohibited by the current Tribunals' Rules. This sentence thus codifies progressive developments in domestic state practice and is designed to exclude evidentiary practices which would be in violation of the international standard against sex discrimination as articulated by the Convention on the Elimination of all Forms of Discrimination Against Women and the UN Declaration on the Elimination of Violence Against Women.

Recommendation 5: Amend draft 44(4) to clarify the effect of judicial notice.

Suggested text:

4. The Court .... may take judicial notice of facts of common knowledge WHICH FACTS WILL THEN BE TREATED AS PROVEN.

Recommendation 6: The ICC should have the power to determine the reliability and weight of the evidence with exclusions for violations of the Statute, international rules and international human rights, including of third parties, or other very serious bases for disqualification.

Suggested text:

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law [DELETE: or by means which cast substantial doubt on its reliability] [DELETE: or whose admission is antithetical to, and would seriously damage, the integrity of the proceedings] [DELETE BRACKETS: or by means which constitute a violation of internationally protected human rights] [DELETE: or which have been collected in violation of the rights of the defence] shall not be admissible.

Commentary:

44.9 The Women's Caucus understands that the weight and reliability of the evidence should be determined by the Trial Chamber with limited grounds for exclusion of evidence. These grounds should include not only the violation of defendant's rights, such as provided for in the International Covenant on Civil and Political Rights, but also the violation of the rights of victims and witnesses since, in some cases, the defendants will be state officials who have used the power of the state to violate the rights of third parties. The mandatory grounds for exclusion should be narrow; the Court, of course will have the discretion to refuse or ignore evidence which raises grave questions as to the integrity of the Court or which is unreliable. The latter considerations will also affect the judges' consideration of the weight of the evidence.

Article 44bis

Evidence obtained by national authorities

Recommendation 7: That the ICC have regard for but not be irrevocably bound by national standards for the collection of evidence.

Suggested text:

1. The Court [DELETE: has] SHALL, in THE case of evidence obtained by national authorities, [DELETE: to] presume [DELETE: irrebuttably] that the national authorities acted in accordance with domestic provisions.
2. In the case of a plea on behalf of the accused to the contrary of this presumption the Court SHALL DECIDE THE ISSUE IN ACCORDANCE WITH ART. 44(5). IT may refer the accused in that respect to the national procedures of the administering State to [DELETE: decide on] REVIEW that plea. [DELETE REMAINDER].
3. [DELETE: In the case...for discontinuation] The accused shall have the right of appeal FROM THE DECISION OF THE COURT [DELETE REMAINDER].
4. [DELETE: In the case...paragraph 2] The Prosecutor shall have the right of appeal FROM THE DECISION OF THE COURT [DELETE REMAINDER].

Commentary:

44.10 While the ICC should have regard for the legality of the collection of evidence under national law, this should not be dispositive of admissibility before the ICC. Rather both compliance with and violation of state procedures should ultimately be examined in light of mandatory international standards articulated in article 44(5) as well as the discretionary concern to protect the integrity of the Court. This enables the Court, for example, to give appropriate weight to conformity with state procedures which may not arise to international law violations. Both parties should have the right to challenge the legality of state-collected evidence and to appeal the Court's determination. The Court should be able to decide the legality of the evidence under state procedures or to refer the issue to the state for determination. It should not, as proposed by art. 44bis be required to refer the case to the state. In many cases, it will be more expeditious to invite the state to present its views directly to the Trial Chamber.

Article 44ter

Recommendation 8: The ICC should have the power not only to ask the state concerned to confirm any assertion of privilege in the interest of national defence, but should be able to determine the legitimacy of such claims when balanced against the need for the evidence in camera proceedings where appropriate.

Suggested text:

1. . .

2. . .

2bis. THE ICC SHALL THEN DETERMINE, IN CAMERA PROCEEDINGS WHERE APPROPRIATE, WHETHER THE CLAIMED NEED FOR SECRECY BASED ON THE NATIONAL DEFENCE IS LEGITIMATE AND SUBSTANTIAL; WHETHER IT IS CLAIMED FOR THE PURPOSE OF SHIELDING A WRONGDOER FROM ACCOUNTABILITY; AND WHETHER THE NEED FOR THE EVIDENCE OUTWEIGHS THE CLAIM OF SECRECY.

3....

Commentary:

44.11 The Women's Caucus opposes giving absolute deference to the secrecy claims interposed by witnesses or by states. The suggested text provides criteria by which the ICC can determine the legitimacy of a state's claim of secrecy. Without power in the ICC to review these claims of privilege, states would be able to obstruct the process of justice, shield the perpetrators of crimes from justice, and undermine the integrity of the Court.

Article 45

Quorum and Judgment

Recommendation 9: Clarify that the inability to agree requires the Court to order a new trial once and, that subsequent disagreement should result in an acquittal.

Suggested text:

1...

2...

3. If after sufficient time for deliberation a chamber which has been reduced to four judges is unable to agree on a decision, it [DELETE: may] SHALL order a new trial. IF THIS OCCURS ON RETRIAL, IT SHALL ORDER AN ACQUITTAL.

Recommendation 10: The Statute should provide for the filing of dissenting opinions.

Suggested text:

4...

5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions BY THE MAJORITY AND THE DISSENT, IF THERE IS ONE. It [DELETE: shall be the sole judgment issued, and] shall be issued in open court.

Commentary:

45.1 It is most desirable, as reflected in the practice of the ad hoc Tribunals to permit the judges to express their dissenting opinions on the judgment, and indeed, upon any matter before the Court. Recognizing and requiring the filing of dissenting opinions both protects the integrity of the process and contributes to the progressive development of international law. It is also important for both defendants, victims and the public to understand the basis of the disagreement within the Trial Chamber.

Article 45 bis

Compensation to Victims

Recommendation 11: If Article 47 contains a provision granting the Court power to order and award reparations, Article 45 bis must state that the provisions of 45 bis are in addition to that of Article 47. See Option 1. If Article 47 does not contain a provision granting the Court power to order reparations directly, then Article 45 bis must contain an explicit grant of such power and Option 2 would apply.

Suggested Text:

1. [DELETE: Where necessary,] The Trial Chamber shall also determine the scope and extent of the victimization and establish principles relating to [DELETE: compensation for damage caused to the victims and to restitution of property unlawfully acquired by the person convicted, TO] AND ORDER AN AWARD OF RESTITUTION, COMPENSATION, REHABILITATION AND OTHER FORMS OF REPARATIONS, TO THE VICTIM OR

VICTIM'S FAMILY OR CLOSE ASSOCIATES PURSUANT TO ARTICLE 47 AND to allow victims to rely on that judgment for the pursuit of civil remedies, including compensation, either in national courts or through their governments, in accordance with national law.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgment by which the accused was found guilty of an offence which caused damage to the victim.

3. The victim or his successors and may, in accordance with the applicable national law, institute proceedings in a national jurisdiction or any other competent institution in order to obtain compensation for the prejudice caused to them.

4. The judgment of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property unlawfully acquired by the person convicted WITHOUT PREJUDICE TO BROADER REMEDIES AVAILABLE FROM THE NATIONAL AUTHORITY.

Commentary:

45.2. The Women's Caucus underscores the importance of giving the International Criminal Court the power not only to establish principles for reparations but also to award reparations in appropriate cases, particularly where there is not an effective or accessible remedy on the national level. We also underscore the importance of listing restitution, compensation and reparations here as well as in 47. See Commentary to article 47. Conversely, we are also concerned that the principles or award determined by the Court not preempt broader remedies available on the national level.

Article 46  
Sentencing

Recommendation 12: That Article 46 be amended to allow the victim, victim's survivors or victim's representative to make submissions during the sentencing phase.

Suggested Text:

(1) In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence; to allow the Prosecutor [delete: and] the defence, AND THE VICTIMS OR THEIR SURVIVORS to make submissions; and to consider the appropriate sentence to be imposed, INCLUDING REPARATIONS.

Commentary:

46.1 In accordance with section 6(b) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the views and concerns of victims and survivors should be taken into account in the sentencing process.<sup>44</sup> The UN Special Rapporteur on Restitution has also recommended that "agencies and mechanisms dealing with human rights and humanitarian issues at national and international levels should be mindful of the perspective of victims, and of the fact that victims often suffer long-term consequences of the wrongs inflicted on them".<sup>45</sup>

Recommendation 13: The statute should specifically include the injury to the victim or victim's survivors as among the factors to be taken into account in sentencing.

Suggested Text:

(2) In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime, THE INJURY TO THE VICTIM OR THEIR SURVIVORS, and the individual circumstances of the convicted person.

Commentary:

46.2 Giving victims or their survivors a voice and a presence at sentencing serves the practical and profound goals of justice in three ways: First, it enables them to ensure that the scope of their injury is taken into account in sentencing, which, as recommended in respect to Article 47 should include penalties as well as reparations. Second, it contributes to the healing process and to the rebuilding of their lives. Third, active participation, even through representative voices, can help avoid the trauma and re-victimization of being ignored by the justice system.

ARTICLE 48



## APPEAL

Recommendation 14: Victims should be able to appeal a decision in respect of their right to reparations pursuant to proposed art. 47.

Suggested text:

A VICTIM AND/OR ANYONE CLAIMING THROUGH HER/HIM OR THEIR REPRESENTATIVE SHALL BE ENTITLED TO APPEAL THE JUDGEMENT INSOFAR AS IT CONCERNS THEIR RIGHT TO REPARATION.

Commentary:

48.1 While it is appropriate to limit the appeal of the judgment of responsibility to the parties to the case, victims or those claiming through them have a strong interest in reparations and, therefore, should have a right to appeal those aspects of the judgment which bear upon their right to reparations.

ARTICLE 50 bis  
AMICUS CURIAE

(This proposal could also be incorporated as Article 38(5)bis)

Recommendation 15: The Court should, at any stage be able to request or receive amicus curiae briefs respecting the proceedings before the Court.

Suggested text:

THE COURT MAY, AT ANY TIME OR STAGE OF THE PROCEEDINGS, RECEIVE OR REQUEST AN AMICUS CURIAE BRIEF ADDRESSED TO ISSUES BEFORE THE COURT.

Commentary:

50.1 The amicus--or "friend of the court"--brief is a very important device for permitting the views of experts, NGOs, and others affected by the decisions of the Court to make their views known and ensures that the process is permeable to the concerns of those who are not parties. The Court should be able both to request the filing of amicus briefs or receive unsolicited briefs on issues before the Court.

50.2 The amicus brief has already played a very significant role in the proceedings before the current ad hoc Tribunals, particularly in relation to gender concerns. In the decision of the Trial Chamber on witness protection in the Tadic case, the court recognized and relied significantly on the contributions of the briefs amicus curiae. In both Tribunals, amicus curiae briefs were also filed to signal concern and focus both the Chamber's and the Prosecutor's attention on the failure to give appropriate attention to the issue of sexual violence. In the Tadic case, an amicus brief, filed in response to the Prosecutor's deferral motion, called attention to the failure to identify rape and the continual threat of rape against women as among the violations to be investigated. The concerns of the amici were echoed by one of the members of the Trial Chamber and were acknowledged by the Prosecutor. Subsequently, the indictment contained charges of rape and other sexual violence directed at women. Most recently, in the Akayesu trial before the ICTR, an amicus brief was filed calling attention to the failure of the prosecutor to charge rape and other sexual violence as a crime despite the fact that questioning by two of the trial judges had evoked testimony of gross sexual violence for which the defendant, as mayor of the commune, was responsible. Two weeks later, the Prosecutor amended the indictment to include charges of sexual violence. Subsequently, as a result of concerted attention to the investigation of sexual violence, the prosecutor presented the testimony of five victims and witnesses to support these charges.

## ENDNOTES

/1/ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on 10 Dec. 1984, (Annex G.A. Res. 46 (XXXIX 1984), U.N. Doc. A/39/708 (1984), art. 9. Article 9 provides that "States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings." See Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted

by the Gen. Assembly on 9 Dec. 1948, G.A. Res. 2670, 3 GAOR, Part I, U.N. Doc. A/810, at 174, art. VII. This treaty provides that States must agree to pledge themselves to grant extradition in accordance with their laws and treaties in force and that genocide may not be considered as a political crime for purposes of extradition.

/2/ See, e.g., Statute of the European Court of Human Rights, art. 21; American Convention on Human Rights, OAS Official Record, OEA, SER. K/xvi/1.1, DOC. 65, REV. 1. CORR. 1, Jan. 7, 1970, 9 I.L.M. 101 (1970), art. 48.

/3/ See, e.g., European Convention on Mutual Assistance in Criminal Matters (Done at Strausbourg, 20 April 1959); Economic Community of West African States Convention A/P.1/7/92 on Mutual Assistance in Criminal Matters (1992); Inter-American Convention on Mutual Assistance in Criminal Matters (1992).

/4/ See Prosecutor v. Blaskic, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Appeals Chamber) (Oct. 29, 1997).

/5/ Id. at para. 25.

/6/ As long as there are three distinct provisions in Part 7 dealing with the contents of requests for assistance (Articles 53bis, 54 and 55), it seems preferable to qualify each specifically. Alternatively, a single general provision could be added to Article 52, provided it is clear that the provision applies to all forms of assistance, including surrender and transfer.

/7/ See, art. 12, para. 2 of the First and Second Geneva Conventions; Art. 16 of the Third Convention; Art. 27(3) of the Fourth Convention; Art. 75 of Protocol I; and Protocol II Art. 2, 4(1).

/8/ Pictet, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ICRC, 1958) art. 27(3) at 207 (hereinafter "Pictet Commentary").

/9/ See, UN Declaration on the Elimination of Violence Against Women; Convention on the Elimination of All Forms of Discrimination Against Women, arts. 1-5; CEDAW Recommendation No.

19 on Violence Against Women in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev.2 (1996) at 112-118 (hereinafter "Human Rights Compilation")

/10/ Pictet Commentary, art. 27(3) at 206.

/11/ The Fourth Geneva Convention, art. 27, provides "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

/12/ Instead of a chapeau, this approach could be articulated in the subparagraph relating to sexual and gender violence discussed in Recommendation 7. But the Women's Caucus finds this a less effective means to emphasize the importance of mainstreaming. Thus the suggested text to Recommendation 7 would provide:

()RAPE, SEXUAL SLAVERY, ENFORCED PROSTITUTION, FORCED STERILIZATION AND OTHER SEXUAL OR GENDER VIOLENCE OR ABUSE WHICH MAY ALSO MEET THE ELEMENTS OF ONE OR MORE OF THE CRIMES AGAINST PHYSICAL OR MENTAL INTEGRITY OR HEALTH ENUMERATED IN THIS ARTICLE AS "WAR CRIMES."

/13/ Letter from Judge Richard Goldstone to Rhonda Copelon, Felice Gaer and Jennifer Green (Nov. 22, 1994).

/14/ Patricia Viseur-Sellers, Gender-Based Persecution, prepared for the UN Expert Group Meeting on Gender-Based Persecution, Toronto, Canada 9-12 November 1997, UN Doc. EGM/GBP/1997/EP.3 (6 November 1997) at pp. 3- 4. (hereinafter "Sellers"). Pillay, Gender -Based Persecution, prepared for the UN Expert Group Meeting on Gender-Based Persecution, Toronto, Canada 9-12 November 1997, UN Doc. EGM/GBP/1997/EP. (6 November 1997)(hereinafter "Pillay" who is a judge of the ICTR).

/15/ Pilloud Commentary on the Additional Protocols (ICRC 1986) para. 4532 at 1373(hereinafter "Pilloud Commentary").

/16/. The defendant was not convicted for wilful killing because the Trial Chamber found that the proof was insufficient to find that the sexual mutilation actually caused the death of the prisoner. Prosecutor v. Tadic.

/17/ Shattered Lives, Sexual Violence during the Rwandan Genocide and Its Aftermath (Human Rights Watch, September 1996)(hereinafter

"Shattered Lives") at 35-36. The Commentaries also recognize that torture can be physical or psychological. See Pilloud Commentary, para 4532 at 1373.

/18/ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) art. 1. In addition to the indictments confirmed by the ICTY, rape has been recognized as torture by the last two UN Rapporteurs on Torture since 1986. See, e.g, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report by the Special Rapporteur, UN Doc, E/CN.4/1986/15 para.33(1986)(Kooijmans); UN Doc. E/CN.4/1997/7 (1997) and E/CN.4/1995/34 (1994) (Rodley). It has been recognized as such by the UN Rapporteur on Violence Against Women. See, Report of Ms. Radhika Coomaraswamy, the Special Rapporteur on Violence Against Women its Causes and Consequences, UN Doc. E/CN.4/1997/47, at para. 20. It has also been recognized as such by the Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Haiti (1994); and by the European Court of Human Rights *Aydin v. Turkey*, Eur. Ct.HR (1997). This understanding is also reflected in the writings of jurists. It is noted that the state action requirement of CAT is not applicable to war crimes. See discussion of torture in the Pilloud Commentary to Protocol II, art. 4 at 1373-74: "...[t]he act of torture (as defined by See, art. 12, para. 2 of the First and Second Geneva Conventions; Art. 16 of the Third Convention; Art. CAT) is reprehensible in itself, regardless of its perpetrator, and cannot be justified in any circumstances." See *id.* at 1374, n 22 which cites art. 1 of CAT which preserves "any other international instrument or any national law which contains or might contain provisions with a broader scope."

/19/ Torture is distinguished from inhuman treatment by the severity of suffering even though both the line is not a clear one. Human Rights Committee, General Comment 20 on Art. 7, para. 4 in Human Rights Compilation at 31. The UN Special Rapporteur on Torture, Mr. Nigel S. Rodley states that rape and other forms of sexual assault are common and especially traumatic means of torture. Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1995/34 at para. 18-19. Quoting Mr.Kooijman's 1992 report, Mr. Rodley stated that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly

constituted an act of torture." E/CN.4/1995/34, para. 16, quoting E/CN/1992/SR.21, para. 35. In classifying rape as torture, the Special Rapporteur includes rape with beatings, electric shock, sleep and food deprivation, and death threats, with no distinction being made between these other forms of torture and rape. E/CN.4/1997/7 10 January 1997. The Special Rapporteur on Violence Against Women stated that "[r]ape is often used as an instrument of torture" E/CN.4/1995/42, 22 November 1994, paras. 51, 173-174. Moreover, in assessing the impact of rape even in civil society, the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, compares the experience of rape victims with that of other survivors of traumatic event such as war and torture. Report of Ms. Radhika Coomaraswamy, the Special Rapporteur on Violence Against Women its Causes and Consequences, UN Doc. E/CN.4/1997/47, at para. 20.

/20/ In this regard, the Inter-American Commission elaborated the application of the definition of torture in its Report on the Situation of Human Rights in Haiti, OAS/Ser.L/V/II.88 ((1994):

"133. The Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the Convention, but also a form of torture in the sense of Article 5(2) of that instrument.

134. Consistent with the definitions elaborated in the Inter-American Convention to Prevent, Punish and Eradicate Torture, . . . and the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Commission considers that the rape and other sexual abuse of Haitian women inflicted physical and mental pain and suffering in order to punish women for their militancy and/or their association with militant family members and to intimidate or destroy their capacity to resist the regime and sustain the civil society particularly in the poor communities. Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women. From the testimonies and expert opinion provided in the documentation to the Commission, it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects."

/21/ Meron, Rape as a Crime Under International Humanitarian Law, 87 American Journal of Int'l Law 424 (1993); Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's Law Journal 243 (1994); Thomas & Ralph, Rape in War: Challenging the Tradition of Impunity, 14 SAIS Review 81 (1994); Sellers, n. 9; Pillay, n. 9.

/22/ Eur. Ct. Hum. Rts. 57/1996/676/866 (25 September 1997). At para. 83 the Court stated:

"Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally."

The Court therefore concludes that "... the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture under the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately." *Id.* at para. 86.

/23/ Report on the Situation of Human Rights in Haiti, OEA/Ser.L/V/II.88, para. 134 (1995).

/24/ See, *Viseur-Sellers*, discussed *supra* WC.5.5 .

/25/ Slavery Convention (1926); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).

/26/ See, M. Cherif Bassiouni, A Draft International Criminal Code, Article VII, sec. 2 (1993).

/27/ See Anne Tierney Goldstein, Recognizing Forced Impregnation as a War Crime Under International Law (Center for Law and Reproductive Policy, 1993).

/28/ Pictet Commentary, art. 27 at 2007-208.

/29/ Special Rapporteur on Violence Against Women, Its Causes and

Consequences, Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1 at paras. 8-10 and generally (4 January 1996).

/30/ Pilloud Commentary, art. 75(a)(ii) at 873.

/31/ It should be noted that, when the issue of whether rape in the former Yugoslavia qualifies as a grave breach of the Geneva Conventions and before the fuller examination of sexual violence as a form of torture had taken place, the ICRC issued an aide memoire indicating that it is a grave breach falling into this category. ICRC, Aide Memoire (December 3, 1992).

/32/ Pictet Commentaries, art. 27 at 202. Art. 75(b) of Protocol I and Protocol II, art. 4, also place sexual violence in the category of "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault."

/33/ Pilloud Commentary, Protocol I, art. 75 at 873.

/34/ Pilloud Commentary, Protocol II, art. 4, para. 4541 at 1376.

/35/ See, Report of Graca Machel, Expert of the Secretary-General of the United Nations, on the impact of armed conflict on children, UN Doc. A/51/306, paras. 34-62 (11 November 1996); Rachel Brett and Margaret McCallin, Children: The Invisible Soldiers (1996); Human Rights Watch Children's Rights Project, The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda (1997).

/36/ Identifying 15 years as the cut-off: art. 38 of the Convention on the Rights of the Child, G.A. res.44/25, annex 44 UNGAOR Supp. (No. 49) at 167; art. 77 to Protocol I and art. 4(3) to Protocol II. Identifying 18 years: arts. 2 and 22 of the African Charter on the Rights and Welfare of Children; the Working Group of the UN Commission on Human Rights to draft an optional protocol to the Convention on the Rights of the Child has reached consensus on the age of 18 for compulsory recruitment and will be examining the minimum age for participation at its 1998 session.

/37/ Article 24 Section 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res 798, UN Doc. S/798/1992 (hereinafter ICTY) which states: "In addition to imprisonment, the Trial Chambers may order the return of any



property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners." See also Rule 105 of the Rules of Procedure and Evidence of the ICTY, and Rule 105 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, UN Doc. ITR/3/Rev.1 (1995) (hereinafter ICTR), which states:

- A. After a judgment of conviction containing a specific finding as provided in Sub-rule 88(B), the Trial Chamber shall, at the request of the prosecutor, or may, proprio motu, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.
- B. The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.
- C. Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.
- D. Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
- E. Should the Trial chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
- F. Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
- G. The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-rules (C), (D), (E) and (F).

/38/See for example, Prosecutor v. Radovan Karadzic and Ratko Mladic, counts 7 and 8-9 pertaining to "Extensive Destruction of Property" and "Appropriation and Plunder of Property"

respectively. See also, ICC Draft Statute (February Report) War Crimes B(3)(e) & (I, C(I)(h).

/39/Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final Report submitted by Theo van Boven, Special Rapporteur, UN ESCOR, 45th Sess., UN Doc. E/CN.4/Sub.2/1993/8 (1993) at p. 54 (hereinafter Van Boven Report) at p. 54.

/40/Id.

/41/Id. at 57.

/42/Id.

/43/Id.

/44/See, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. 40/34, annex, 40 UN GAOR Supp. (No. 53) at 214, UN Doc. A/40/53 (1985) (hereinafter "Declaration on Justice for Crime Victims"). Paragraph 6(b) of the Declaration provides explicitly that judicial and administrative processes should respond to the needs of victims, inter alia, by:  
(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system...

/45/Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of Mr. Theo Van Boven, Special Rapporteur, UN ESCOR, 45th Sess., UN Doc. E/CN.4/Sub.2/1993/8 (1993) at p. 54 (hereinafter Van Boven Report).

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