Vol 2(3): 263–285
[1462-4745(200007)2:3;263–285; 013132]

PUNISHMENT
& SOCIETY

Life, death and the crime of crimes

Supreme penalties and the ICC Statute

WILLIAM A. SCHABAS
National University of Ireland

Abstract

The attitude of international law and practice to supreme penalties has evolved enormously over the past half-century. At Nuremberg, in 1946, capital punishment was imposed upon Nazi war criminals. But at the Rome Conference in 1998, when the international community provided for the establishment of the International Criminal Court, not only was capital punishment excluded, the text also limited the scope of life imprisonment. These changes were driven principally by evolving norms of international human rights law. The first changes became apparent in the early work of the International Law Commission on the Code of Crimes against the Peace and Security of Mankind, during the 1950s. When criminal prosecution returned to the international agenda, in the late 1980s and early 1990s, there was widespread agreement to exclude capital punishment. But at the Rome Conference, a relatively small and geographically isolated group of States made an aggressive attempt to defend capital punishment. Ultimately unsuccessful, their efforts only drew attention to a growing rejection of both capital punishment and life imprisonment in international and national legal systems.

Key Words

capital punishment • International Criminal Court • life imprisonment

Punishment should not be harsh, but must be inevitable.[1] (Cesare Beccaria)

At Nuremberg in 1946, a dozen Nazis were sentenced to death and executed within weeks of the judgment for heinous crimes that shocked the conscience of humanity and that will never be forgotten. At Tokyo, a few years later, this exercise in retributive justice was repeated. In parallel with these two international military tribunals, national war crimes courts throughout Europe and Asia administered speedy justice followed promptly, in many cases, with the supreme penalty. These important trials were

followed by a period of relative indifference of the international community to international prosecution of such atrocities. When the matter returned to the agenda in the 1990s, as part of a renewed enthusiasm for individual accountability for human rights violations, attitudes to punishment had changed dramatically. The vast majority of the States that had enthusiastically meted out the death penalty in the late 1940s had now abolished the sanction in their domestic penal codes, often completing this with the significant step of ratification of international treaties prohibiting recourse to capital punishment. The two ad hoc tribunals established by the United Nations Security Council to address the specific situations of the former Yugoslavia and Rwanda excluded the death penalty, providing exclusively in their statutes for 'imprisonment'. These developments were crowned in July 1998 with the adoption of the Statute of the International Criminal Court (see Bassiouni, 1998; Lattanzi and Schabas, 1999; Lee, 1999; Triffterer, 1999). After protracted debate during the Rome Conference, the Statute not only excludes capital punishment from its available penalties, it also sets a general principle of a maximum of 30 years of detention, allowing for life imprisonment only 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person' (United Nations, 1998a).

The overall message of the Rome Statute is a positive recognition of progressive views in penology and one that respects evolving trends within international human rights law towards universal abolition of capital punishment and suppression of life imprisonment. This article will examine the issues of capital punishment and life imprisonment as they developed within the context of the drafting of the penalty provisions of the Rome Statute.

BACKGROUND FOR THE DEBATE: CAPITAL PUNISHMENT IN INTERNATIONAL CRIMINAL LAW

The customary laws of war crimes have little to contribute on the subject of sentencing, apart from recognizing the principle that a court may impose death or such lesser punishment as it may deem appropriate (*Public Prosecutor* v. *Klinge*, 1946; Schabas, 1997). The Treaty of Versailles contemplated the trial before allied military tribunals of persons accused of violating the laws and customs of war.[2] Those found guilty were to be sentenced 'to punishments laid down by law'. It was later agreed that the trials would be held by German courts, but based on a list of suspects submitted by the allies. The parties agreed that if the trials did not result in 'just punishment being awarded to the guilty', the allied powers reserved the right to proceed before their own courts (UN, 1948: 17). In the end, the handful found guilty were sentenced to brief prison terms. The Commission of allied jurists that evaluated the trials later concluded that 'the sentences were not adequate' (UN, 1948: 48).

The Charter of the International Military Tribunal authorized the Nuremberg court to impose upon a convicted war criminal 'death or such other punishment as shall be determined by it to be just' (UN, 1951a). The Nuremberg Charter provided the model for similar provisions pursuant to Control Council Law No. 10 (Official Gazette Control Council for Germany, 1945) under which many prosecutions in Germany were undertaken, and the Charter of the Tokyo Tribunal, which was the basis for the companion war crimes trial in the Far East (Pritchard, 1999). The harshness of the death penalty in Germany incited an unholy alliance in the post-war legislature of Nazi

sympathizers, who were anxious to shelter their friends, and left-wing penal reformers to abolish capital punishment in the new German constitution.[3] Indeed, Germany set in motion an irreversible trend that has spread throughout Europe.[4]

The 1948 Convention for the Prevention and Punishment of the Crime of Genocide envisions the eventual establishment of an International Criminal Court (UN, 1951b). In an annex to the initial draft of the Convention, the United Nations Secretary-General actually outlined two alternative statutes for such a tribunal that included general sentencing texts essentially copied from a 1937 treaty that never entered into force[5] (League of Nations, 1936, 1938). Provision was made for capital punishment. The draft statutes were eventually set aside, and the final version of the Genocide Convention, adopted on 9 December 1948, only required that States' parties establish 'effective' penalties for genocide within their domestic legal systems (UN, 1951b; see also Schabas, 2000).

Shortly thereafter, the International Law Commission prepared its first draft of the 'Code of Offences against the Peace and Security of Mankind', which stated: '[t]he penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence' (UN, 1951d: 134; see also UN, 1951e: 252–6). This neither permitted nor excluded the death penalty and, given State practice at the time, it can hardly be suggested that abolition of capital punishment was being contemplated. In comments by governments on the draft Code, Yugoslavia insisted it be clearly stated that the tribunal was entitled to impose any sentence, including death (UN, 1954: 121).

In parallel with this work, the General Assembly established a Committee on International Criminal Jurisdiction, charged with preparing one or more draft conventions and proposals concerning the establishment of an international criminal court (UN, 1951e). The Committee generated a draft statute that allowed the future tribunal to impose such penalties as it judged appropriate, without making specific reference to the death penalty (UN, 1952).[6] Yet the Committee also felt that it might be fitting for the convention to 'lay down limitations with respect to the penalty', giving the specific example that it might proclaim that 'the death penalty should not be imposed' (UN, 1952: §111). Later, some delegates argued that 'according to present international law, penalties up to and including the death sentence could be imposed for crimes against humanity' (UN, 1953: §110). These projects then lay dormant for nearly 30 years and the International Law Commission only returned to the draft Code of Crimes in the early 1980s. In 1990, taking up a request from the General Assembly, it also began to re-examine the question of the establishment of an international criminal jurisdiction. It soon became apparent that in the intervening years dramatic changes in the approach of international law to criminal penalties had taken place. Following perfunctory discussion of the matter during its 1990 session, the Commission reported: 'In the discussion of penalties, it was stated that a penalty should be proportionate to the gravity of the crime committed. The possibility of excluding the death penalty was also suggested' (UN, 1990a: §149). The following year, Special Rapporteur Doudou Thiam proposed that the draft Code of Crimes expressly exclude capital punishment:

> Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.

> If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.
> [In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.] (UN, 1991a: §29: for the discussion of this proposal by the International Law Commission, see UN, 1991b)

Thiam explained that the establishment of a scale of penalties 'called for a uniform moral and philosophical approach that existed in domestic, but not in international, law', adding that

> [p]enalties varied from country to country, according to the offences to be punished. In addition, there were penalties such as the death penalty and other afflictive punishments (for instance, physical mutilation) about which there was much controversy and which were not universally applied. (UN, 1991b: SR.2207, §6).

Thiam explained that he had endeavoured 'to avoid extremes and to find a middle way that might be acceptable to all States' (UN, 1991b: SR.2207, §6). His views met with widespread support and only one member of the Commission, Awn Al-Khasawneh of Jordan, openly challenged the proposal to exclude capital punishment (UN, 1991b: SR.2211, §15, SR.2213, §55). Christian Tomuschat urged the Commission not 'to resist the world-wide trend towards abolition of the death penalty, even for the most serious crimes, such as genocide', noting that the move away from capital punishment had been evident in legal thinking since the Nuremberg and Tokyo tribunals (UN, 1991b: SR.2208, §15). Jiuyong Shi of China argued in favour of excluding the death penalty, 'given the trend towards abolition of the death penalty' (UN, 1991b: SR.2208, §2). Gaetano Arangio-Ruiz of Italy cited Cesare Beccaria, and concluded that '[t]he death penalty was plainly out of the question' (UN, 1991b: SR.2210, §33). Stephen C. McCaffrey of the United States said 'there could be no doubt that the Commission should recommend against the death penalty on the basis of the practice of States which the Special Rapporteur had so usefully analysed' (UN, 1991b: SR.2210, §50). French law professor Alain Pellet insisted that the death penalty had to be ruled out for two reasons:

> first, because its abolition was a step forward in moral terms and, above all, because the States which had abolished it would be reluctant to accede to an instrument which re-established it, if only in exceptional cases, and might even be unable to do so, since the abolition of the death penalty had become a constitutional principle in some of those countries. (UN, 1991b: SR.2209, §5)

Several members also expressed their reservations about sentences of life imprisonment, which they described as a form of cruel, inhuman and degrading punishment[7] (UN, 1991b: SR.2208, §21, SR.2209, §20, SR.2210, §47, SR.2212, §4, SR.2209, §9; see also §88; van Zyl Smit, 1992, 1998). Bernhard Graefrath of the German Democratic Republic said he was against life imprisonment, 'which was inhuman and contrary to human rights'. Graefrath favoured a maximum sentence of 25 years (UN, 1991b: SR.2208, §10).

The Commission's final report stated that 'many members of the Commission' opposed the death penalty and '[s]ome other members' supported the death penalty:

> 84. Many members of the Commission supported the Special Rapporteur's position that the death penalty should not be included among the penalties applicable to crimes against the peace and security of mankind. In that connection, it was indicated that the Commission should not seek to resist the world-wide trend towards the abolition of the death penalty, even for the most serious crimes, such as genocide. The move away from the death penalty had been evident in legal thinking since the Nürnberg and Tokyo trials. In the opinion of those members, the abolition of the death penalty was a step forward in moral terms that had to be consolidated. The death penalty was unnecessary and pointless and no one had the right to take another's life. In addition, that penalty had been eliminated long ago in many national legislations and the States which had abolished it would be reluctant to accede to an instrument which re-established it. In many of those countries, the abolition of the death penalty had become a constitutional principle and some international instruments, both universal and regional in scope, also provided for its abolition or for a prohibition on its reintroduction. The following instruments were cited: the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (General Assembly resolution 44/128, annex), Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocol to the American Convention on Human Rights relating to the abolition of the death penalty.
>
> 85. Some other members expressed reservations on that position, believing that it would be premature for the Commission, which was called upon to legislate for States which did not have the same ideas on the death penalty, to adopt a clear-cut opinion on the question instead of allowing the States concerned to exercise discretion. Many States still retained the death penalty in their internal law for particularly heinous crimes. Failure to include the death penalty in the draft Code was bound to give rise to discussion among those States and would risk rendering the Code less acceptable to them. Some members expressed the view that even certain regional instruments providing, in principle, for the abolition of the death penalty allowed for exceptions in certain circumstances. For example, Optional Protocol No. 6 to the European Convention referred to earlier, which provided for the abolition and non-restoration of the death penalty in peacetime, also contained a proviso for the case of war and for the case of 'imminent threat of war', which in the view of some writers, the authorities of the State concerned would be free to determine. Moreover, the Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the General Assembly, was, as its name indicated, optional and in no way mandatory. The draft Code dealt only with the most serious of the most serious crimes and should not be turned into an instrument for settling the question of capital punishment. In the view of those members, leaving the question to the discretion of States would in no way undermine the principle *nulla poena sine lege*. All that was needed was to include in the Code a general provision to the effect that such crimes should be punished in proportion to their gravity. One member in particular suggested that, in order to accommodate the sensibilities of States which had abolished the death penalty, the article of the Code providing for that penalty could be accompanied by a reservation entitling any State instituting proceedings to request the Court not to impose the death penalty in the event of a conviction. (UN, 1991b: §§84–5)

The International Law Commission reconsidered the draft Code at its 1995 session but confined itself to reiterating the importance of having a 'residual' sentencing provision

in the statute in order not to run foul of the *nulla poena sine lege* principle (UN, 1995a). On the issue of the death penalty, the report stated:

> It was suggested that it would be sufficient to prescribe an upper limit for all the crimes, leaving it to the courts to determine the penalty in each particular case, following article 47 of the draft Statute which precluded the death penalty . . . However, questions were raised regarding the legal basis for the absence of the death penalty from more recent instruments, whether that absence denoted significant progress in the human rights field, and the fate of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. In this regard, attention was drawn to the discrepancy regarding the inclusion of the death penalty between the statutes of the ad hoc tribunals and the national legislation applicable in the former Yugoslavia and of Rwanda. (UN, 1991c, vol. I: 64, §124; see also vol. I: 16, §19).

The Code of Crimes against the Peace and Security of Mankind was finally adopted, almost 50 years after the International Law Commission was given its first mandate on this matter, in 1996. Ultimately, the final draft Code stated only that an individual responsible for a crime against the peace and security of mankind 'shall be liable to punishment', and that such punishment 'shall be commensurate with the character and gravity of the crime' (UN, 1996a). The Commission declined to specify precise penalties, noting in its commentary that 'everything depends on the legal system adopted to try the persons who commit crimes against the peace and security of humanity' (UN, 1996a).

In the meantime, the Security Council had also addressed these issues when it set up the ad hoc tribunals for the former Yugoslavia and Rwanda. The Statutes of the two ad hoc tribunals contain brief provisions dealing with sentencing, proposing essentially that sentences be limited to imprisonment (thereby tacitly excluding the death penalty, as well as corporal punishment, imprisonment with hard labour and fines) (UN, 1993a, 1994a). The Secretary-General's report to the Security Council proposing the draft statute for the Yugoslav tribunal stated that '[t]he international tribunal should not be empowered to impose the death penalty' (UN, 1993b: §112). This was consistent with all of the proposals submitted by Member States and international organizations (Correll et al., 1993; UN, 1993c, 1993d, 1993e, 1993f, 1993g, 1993h, 1993i).

The exclusion of the death penalty by the ad hoc tribunals was a particularly sore point with Rwanda. In the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts with execution if those tried by the international tribunal – presumably the masterminds of the genocide – would only be subject to life imprisonment (UN, 1994b). 'Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence,' said Rwanda's representative. 'That situation is not conducive to national reconciliation in Rwanda' (UN, 1994b). But to counter this argument, the representative of New Zealand reminded Rwanda that '[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable – and a dreadful step backwards – to introduce it here' (UN, 1994b). But Rwanda did not

repeal the death penalty, and has since condemned several hundred offenders to death. In April 1998, 22 individuals were publicly executed by firing squads for the crime of genocide. The International Criminal Tribunal for Rwanda has imposed sentence of life imprisonment for genocide in several cases, noting as justification for such harsh punishment that were the prosecution to take place within Rwanda the punishment would be even more severe (*Prosecutor* v. *Kambanda*, 1998; *Prosecutor* v. *Akayesu*, 1998; *Prosecutor* v. *Kayishema and Ruzindana,* 1999; *Prosecutor* v. *Rutaganda*, 1999).

PREPARING THE DRAFT STATUTE

In parallel with its work on the Code of Crimes, the International Law Commission began work in 1990 on a draft Statute for an International Criminal Court, responding to the request from the General Assembly (UN, 1990b). In 1993, the Commission presented an initial version of its draft Statute to the General Assembly (UN, 1993j). Article 53 of the draft Statute adopted by the Commission that year stated that a person convicted would be subject to imprisonment, up to and including life imprisonment, and a fine of any amount. In order to avoid any ambiguity, the commentary prepared by the Special Rapporteur said: 'The Court would not be authorized to impose the death penalty' (UN, 1993j). The report noted with equivocation: 'Various views were expressed on the Special Rapporteur's proposal that the death penalty should be ruled out' (UN, 1993j: 39, §85). The report reiterated: 'The Court is not authorized to impose the death penalty' (UN, 1993j: 123–5, §84).

The provision was somewhat reworked in the 1994 draft submitted to the General Assembly (UN, 1994c), although the substance was not changed significantly. States had been asked to comment on the 1993 draft, but few addressed the issue of penalties. Hungary repeated its opposition to capital punishment being included in the draft Statute (UN, 1994d). The United States spoke to sentencing matters, but said not a word about capital punishment (UN, 1994d). The 1994 draft then became the reference point for the General Assembly in its work on the permanent criminal court over the years 1995–8. Article 47, 'The provision on applicable penalties', read as follows:

> 1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:
>
> (a) a term of life imprisonment, or of imprisonment for a specified number of years;
>
> [. . .]

The commentary pointed out that the court was not authorized to impose the death penalty. Some members of the Commission had hoped the Statute might contemplate alternative forms of punishment, such as community service, but this provoked opposition from others who considered these to be inappropriate for the serious crimes that would be tried by the Court (UN, 1994d).

The General Assembly, at its 1994 session, decided to advance with work on the Court's creation and to this effect it set up an Ad Hoc Committee with a one-year mandate (UN, 1995b). Article 47 met with sharp criticism for its alleged failure to respect the *nulla poena sine lege* rule. According to the report of the Ad Hoc Committee:

> [i]t was generally held there was a need for maximum penalties applicable to various types of crimes to be spelled out. The view was expressed that minimum penalties should also be made explicit in view of the seriousness of the crimes. (UN, 1995c: 36, §187)

There was widespread support for excluding the death penalty, although one delegation proposed its incorporation within the Statute (UN, 1995c: 36, §187).

Following the presentation of the Ad Hoc Committee report at its 1995 session, the General Assembly decided to create a Preparatory Committee that would have broader participation (UN, 1995d). What became known as the 'PrepCom' met twice during 1996, reporting back to the General Assembly at the end of the year. The PrepCom dealt with issues relating to penalties at its August 1996 session in the Working Group on General Principles of Criminal Law and Penalties. A number of amendments to the International Law Commission draft were considered (UN, 1996b). There was general agreement that imprisonment would be the basic sentence and a variety of views were expressed on such other sanctions as fines, forfeiture and civil sanctions including disenfranchisement (UN, 1996c). Again, the majority favoured exclusion of the death penalty, although a few States argued for its inclusion (UN, 1996d). A proposal sponsored by Algeria, Libya, Egypt, Jordan and Kuwait sought to retain the death penalty in the Statute 'where there are aggravating circumstances' (UN, 1996e). At the August 1996 session of the PrepCom, some States with a predominantly Moslem population argued that if the Statute were to be considered representative of all legal systems, it should include the death penalty (UN, 1996c, 1996d). Citing the Islamic legal code of the Sharia, the representative of Egypt said that capital punishment should be retained as an option, perhaps with aggravating circumstances (UN, 1996c). Malaysia also urged recognition of the death penalty, which it said was provided for in many national legal jurisdictions (UN, 1996e). Representatives of Italy, Portugal, Mexico, New Zealand and Denmark spoke against including the death penalty in the Court's Statute (UN, 1996e). According to the PrepCom's 1996 report:

> Some delegations expressed their strong support for the exclusion of the death penalty from the penalties that the Court would be authorized to impose in accordance with article 47 of the draft statute. While the death penalty was ruled out by those delegations, others suggested that the death penalty should not be excluded *a priori* since it was provided for in many legal systems, especially in connection with serious crimes. (UN, 1996b)

The work of the PrepCom was reviewed by the Sixth Committee of the General Assembly at its 1996 session. Halimah Ismail of Malaysia argued for the availability of the death penalty. He said that it should be imposed at the discretion of the Court, noting that it was provided for in many national criminal justice systems. 'Exclusion of that option in the draft statute could give rise to serious difficulties', he said (UN, 1996f). Dumitru Mazilu of Romania (UN, 1996g) and Fernando Berrocal Soto of Costa Rica spoke in opposition to the death penalty (UN, 1996h).

The Working Group on General Principles reconvened in February 1997 but did not have time to study the issue of penalties (UN, 1997a). In December 1997, the PrepCom decided to establish a distinct Working Group on Penalties, to be chaired by Norwegian diplomat Rolf Einar Fife (UN, 1997b; for Fife's personal account of the negotiations,

see Fife, 1999). On the issue of the death penalty, the chair deemed that no agreement could be reached and he avoided all discussion whatsoever of the question. There would be no point discussing it 'at the technical level', he said. The conference room paper adopted at the December 1997 PrepCom left several options in square brackets: life imprisonment; imprisonment for a specified number of years; imprisonment for a maximum term (30 years was suggested); a definitive term of imprisonment (20–40 years was suggested), subject to a reduction in accordance with other provisions of the Statute (UN, 1997c). An additional clause, also in square brackets, stated that the court could specify a minimum period to be served, during which time the convicted person would not be subject to provisional release or parole.[8] Clearly, no consensus could be found in the Preparatory Committee on how to frame the texts dealing with imprisonment. Several States preferred defining maximum sentences only, while a majority felt that both maximum and minimum sentences should be clearly spelled out. Only a small group of countries considered it unnecessary to set either minimum or maximum penalties.

Out of respect for some of the views expressed, the conference room paper adopted at the December 1997 PrepCom included two footnotes. The first addressed the issue of lengthy sentences, and said that '[t]o meet concerns of several delegations regarding the serving of a life sentence or a long sentence of imprisonment', there should be a mandatory mechanism for re-examination of sentences by the Court after a certain period of time. 'In this way, the Court could also ensure the uniform treatment of prisoners regardless of the State where they served their sentence' (UN, 1997c). The second note, in a similar vein, declared that an exhaustive list of factors that may reduce the minimum sentence should be included if minimum sentence provisions were to be included (UN, 1997c). These texts were essentially repeated in the Zutphen draft and the final proposal of the Preparatory Commission submitted to the Diplomatic Conference (UN, 1998a, 1998b; see also UN, 1998c).

THE ROME DIPLOMATIC CONFERENCE

At the Rome Diplomatic Conference, a Working Group on Penalties was constituted, also chaired by Rolf Einar Fife.[9] The Working Group met for the first time on 30 June 1998, expecting to wrap up its work in a couple of scheduled sessions over the next few days. However, while some concerns were disposed of quickly, it soon became apparent that it would be impossible to finalize the general provisions until the debate on the death penalty had been completed. Because of the obstinacy of some States who were determined to make this an issue, the Working Group did not complete its report until the final days of the Diplomatic Conference.

The process of negotiating treaties by 'general agreement' or by consensus renders the proceedings an extremely complex and sometimes inscrutable web of concession and compromise. The substantive exchanges are generally preceded with what can be a rather prolonged period of diplomatic foreplay. At Rome, the Working Group on Penalties began with two sessions where delegates were invited to express their positions on the penalty provisions as a whole. From these initial exchanges, the chair endeavoured to identify areas on which agreement would be relatively simple and others where there were two or more extreme positions. Here, he said, groups of States would have to moderate their views somewhat if a solution was to be found. Great care

was taken not to suggest that minority views were marginal or isolated. There can be no greater diplomatic faux pas than to imply that an opinion shared by only a few delegations is insignificant or unimportant. Without such deference even to the views of a handful of States on one or another issue, it seems that the integrity of the entire process would be threatened irreparably.

There was never any doubt that a vast majority of delegations were opposed to including the death penalty in the text of the Statute. However, a persistent group of Arab and Islamic States, together with English-speaking Caribbean States and a few others such as Singapore, Rwanda, Ethiopia and Nigeria, threatened to block consensus on the subject. They ultimately obtained some concessions, including a new article stating the obvious, namely, that the penalties provisions by the Statute are without prejudice to domestic criminal law sanctions, as well as a statement by the President at the conclusion of the Conference recognizing their sensitivity on the issue.

At the first meeting of the Working Group, the chair summarized the difficulties encountered in 'refining' the Statute's position on imprisonment. A 'large number' of delegations had insisted on a reference to life imprisonment, Fife noted. Yet a 'large number' had also objected to it, on the grounds that life imprisonment neglected rehabilitation and, in certain cases, raised constitutional problems. In the debate that followed, many States[10] reiterated their opposition to life imprisonment, with several calling it a cruel, inhuman and degrading form of punishment, prohibited by international human rights norms. A few[11] rejected life imprisonment because it was not a determinate penalty, preferring a term of a fixed number of years. Several[12] said simply that they supported life imprisonment. Sierra Leone claimed that life imprisonment would be necessary if the death penalty were to be excluded, later adding that there should be no option for subsequent review of such a sentence.

Many States, in the sometimes generous spirit of a consensus approach to negotiation, informed the Working Group of their preferences while indicating that they were 'flexible'. Thus, several States[13] explained that they preferred a maximum of life imprisonment, but that they would agree to a maximum fixed term accompanied by a period without parole eligibility. Others[14] said they opposed life imprisonment but were prepared to compromise in order to meet half-way those States favouring the death penalty. Another option was for both life imprisonment and fixed terms.[15] Summing up the discussion, Fife said that there was a 'general feeling' that 'high sentences' should be allowed, adding that some delegations favoured minimum sentences. The following day, 1 July 1998, the Working Group met in informal session, a chance to exchange views with greater candour. Some States that had opposed life imprisonment the previous day as being too harsh[16] now appeared to have softened their position. Consensus seemed within reach. But when Fife suggested that life imprisonment with a review mechanism might be a basis for agreement, Mexico took the floor to say that this would not be acceptable.

By this point, the debate on imprisonment was growing inextricably entwined with the question of capital punishment. Predictably, those States quite aggressively supportive of the death penalty also insisted upon heavy and inflexible terms of imprisonment. Abolitionist States, on the other hand, also tended towards a liberal approach to custodial sentences. It was becoming rather clear that the price to pay for a consensus excluding the death penalty would be provisions on imprisonment that were

more rigorous than many States would have liked. At the same time, the concerns of the liberal States, which were in many cases driven by constitutional considerations, were recognized by establishing a regime for mandatory review of parole eligibility. That way, it could not be said that there were lengthy fixed terms of imprisonment without any possibility of release. On 6 July the chair of the Working Group submitted a discussion paper on the imprisonment provision accompanied by a lengthy footnote reflecting the tone of the debates:

> 1. To meet the concerns of a number of delegations regarding the severity of a life sentence or a long sentence of imprisonment, it would be necessary to provide for a mandatory mechanism in Part 10, article 100, by which the prisoner's sentence would be re-examined by the Court after a certain period of time, in order to determine whether he or she should be released. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the States where they served their sentence.
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> However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question. Among such criteria several delegations emphasized that evidence of the prisoner's early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgments in other cases, and in particular providing information as to the location of assets, which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.
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> With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at: (i) not less than 20 years in case of life imprisonment, and (ii) not less than two thirds of the term in case of imprisonment for a specified number of years. With regard to the period for life imprisonment, it is noted that some delegations supported this period being set at not less than 25 years.
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> Consideration should also be given to the issue of subsequent mandatory reviews following the initial one. In subsequent reviews other grounds besides those listed above may become more relevant, while the relevance of the stated grounds may diminish. For the purposes of establishing a system of periodic review, there would appear to be a need to distinguish between life imprisonment and imprisonment for a specified number of years. In the case of the former, it is suggested that subsequent reviews take place at three-year intervals. In relation to other terms of imprisonment, in view of the technical complexity of similar provisions, it is suggested that subsequent mandatory reviews take place according to a schedule specified in the Rules of Procedure and Evidence. (UN, 1998c)

On 8 July 1998 Fife presented a compromise proposal on the subject of imprisonment, allowing for a life term but with a mandatory review mechanism. It was included in an official document entitled 'Report of the Working Group on Penalties' but that was never in fact adopted (UN, 1998d, 1998e). Fife told the Working Group that the compromise addressed concerns expressed by Venezuela, El Salvador, Nicaragua and Colombia, all of whom had constitutional prohibitions on life imprisonment. To address this, the report included a 'Note', destined for the Working Group concerned

with article 100 of the Statute and, eventually, for judges called upon to interpret the Statute. It was similar to the discussion paper text submitted two days earlier, but there were also some significant changes:

> To meet the concerns of a number of delegations regarding the severity of long sentences of imprisonment, it would be necessary to provide for a *mandatory* mechanism in Part 10, article 100, by which the prisoner's sentence would be re-examined *by the Court* after a certain period of time. In this way, the Court should also ensure the uniform treatment of prisoners regardless of the State where they served their sentence.
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> However, a number of other delegations linked their consideration of this proposal to a requirement for lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the sentence. Among such criteria, several delegations emphasized that the behaviour of the prisoner, including in particular early and continuing willingness to cooperate with the Court in investigations and prosecutions ought to be the principal or only ground upon which the Court would base its determination. Yet other delegations argued that the Court should be able to take other grounds into consideration for such a determination. Such grounds could include voluntarily assisting the Court in the enforcement of its judgements in other cases, and in particular providing information as to the location of assets which may be used to the benefit of victims or their families. Clearly, any grounds for such a determination would have to be strictly defined.
>
> With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at not less than two thirds or the term of imprisonment, and, in any event, not more than 25 years.
>
> Article 100 should also provide for subsequent mandatory reviews following the initial one. In subsequent reviews other grounds besides those listed above may become more relevant, while the relevance of the stated grounds may diminish. In view of the technical complexity of such rules, it is suggested that subsequent mandatory reviews take place according to modalities specified in the Rules of Procedure and Evidence.[17] (UN, 1998d, 1998e)

Pressuring the delegates, the chair said he was expected to present the report to the Committee of the Whole within a few minutes. But Sierra Leone, which had insisted upon a minimum term of 25 years, objected to the words 'only when justified by the extreme gravity of the crime'. Sierra Leone said it would agree if the word 'only' was deleted. Failing general agreement, Fife was unable to present his report to the Committee of the Whole.

The Working Group met again on 9 July. Now Sierra Leone was silent, no doubt the result of discussion in the corridors. But there were new obstacles to a consensus text on imprisonment. Saying that 'everyone must know that there will be no pity' towards perpetrators of crimes within the subject matter jurisdiction of the Court, Syria somewhat provocatively proposed the addition of a footnote reading: '[s]ome delegations were opposed to the principle of conditional release'. But when Venezuela said, in effect, 'we had a deal', Syria backed down. The text that Fife had proposed the previous day on life imprisonment was adopted (UN, 1998d).

The Working Group text was accompanied by a footnote saying that it was 'without prejudice to the issue of the inclusion or the non-inclusion of the death penalty', a matter which remained unresolved (UN, 1998d). States opposed to life imprisonment had made an important concession. Their acceptance had been won in return for a

proviso of mandatory parole review after a certain period of time, as well as the qualification that life imprisonment only be imposed 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. And Fife had skilfully managed to extricate, at least partially, the issue of life imprisonment from that of capital punishment. As a final gesture of respect for the feelings of the more liberal States, the report of the Working Group contained a footnote stating that '[s]ome delegations expressed concerns about an explicit reference to life imprisonment' (UN, 1998d: 2, fn 2).

The decision to modify the sentence pursuant to article 110 of the Rome Statute is irreversible and not conditional, as in domestic parole schemes. During the debate at the Rome Conference, the chair of the Working Group on Penalties suggested that the mechanism was similar to the procedure in the statutes of the ad hoc tribunals. However, unlike the Rome Statute, the ad hoc statutes do not make review mandatory. In accordance with article 110 of the Statute,

> when the prisoner has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

Article 110 authorizes the Court to reduce the sentence if it finds that one or more of the following factors are present: the early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions; the voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence. The Statute also states that the Rules will provide for review subsequent to an initial refusal. The Rules of Procedure and Evidence are to be drafted by the Preparatory Commission whose creation was mandated by the Final Act of the Rome Conference, and must be completed by the end of June 2000. When the Statute enters into force, the Rules will be formally adopted by the Assembly of States' parties.[18]

During the initial statements in the Working Group on Penalties at the Rome Conference, many States[19] expressed their opposition to a Statute that provided for the death penalty. Some gave no reasons for this position. Most of those who explained their position for this invoked human rights norms. Ukraine said it was obliged to take this view as a member of the Council of Europe. A few noted problems with complementarity. Others said they had no firm position on the subject of capital punishment,[20] or implied this by saying nothing on the subject and stating that they preferred imprisonment.[21] As for the chair, he indicated his preference by submitting a text 'proposed for consideration, in order to contribute to clarity as to a possible structure' that eliminated the death penalty (UN, 1998c).

Two geo-cultural blocs of States were vocal advocates of the death penalty, those of the Arab and Islamic group, and those of the English-speaking Caribbean States. In the case of the former, support was expressed (by Egypt) as being based principally on religious and cultural considerations. In the latter, domestic public opinion was

invoked. Recent decisions of the Judicial Committee of the Privy Council and the organs of the Inter-American human rights system have incited vigorous debate within Jamaica, Trinidad, Barbados, Guyana and other Commonwealth States. The death penalty proponents implied that they were not prepared to agree upon other issues related to penalties until they had obtained some satisfaction with respect to capital punishment. Informally, they admitted that they never expected to obtain recognition of the death penalty within the Statute. Some of the States that would later go to battle in the camp of the death penalty States were initially rather subdued but became more insistent as the Conference plodded on and the tension mounted. Singapore, in its first speech in the Working Group, where it expressed its general views on the subject of penalties, did not even raise the issue. Later, it would become much more difficult, eventually insisting on having the last word on the subject. Trinidad said it would prefer to include the death penalty, a matter which was 'of serious concern to us'. But in a signal of conciliation, added that 'we are conscious of the fact that no consensus can be reached, and would like to ensure that the concerns of death penalty states are adequately expressed, through declarations or understandings'.[22]

Indeed, the debate of the first few days was deceptively serene, implying that the issue would be easier than it really was. The first signs of real difficulty were refusals to consent to other provisions of Part 7. Some delegations said that it was impossible to finalize not only the general text on imprisonment but also those dealing with the principle of legality[23] with fines[24] and with the role of national legislation[25] without an agreement on the death penalty. On 3 July, a group of Arab States presented what they described as an 'honest, genuine effort to bridge the gap'. It read:

> The Court may impose on a person convicted under this Statute one or more of the penalties provided for by the law of the State where the crime was committed.
>
> In cases where national law does not regulate a specific crime, the Court may apply one or more of the following penalties:
>
> . . . ;
> . . . ;
> . . . ;
> . . . ; (UN, 1998f)

The same day, the Caribbean States submitted a text that openly recognized the death penalty:

> The Court may impose upon a person convicted under this Statute one or more of the penalties:
>
> The death penalty;
> A term of life imprisonment;
> A term of imprisonment not exceeding thirty (30) years.
>
> The Court may attach to any sentence of imprisonment a minimum period during which the convicted person may not be granted any [release under relevant provisions of the Statute] (UN, 1998g).

In parallel with the Caribbean proposal, and in keeping with its earlier promise of a compromise, Trinidad and Tobago circulated informally a document entitled 'Sample understanding/declaration by Trinidad and Tobago in lieu of article 75(e)':

> UNDERSTANDING. Trinidad and Tobago understands that International Law does not prohibit the death penalty, and that this Statute does not restrict the right of Trinidad and Tobago to apply the death penalty to persons duly convicted and sentenced to that penalty under the existing laws of Trinidad and Tobago. It also follows that under the principle of complementarity, recognized by the Statute of the International Criminal Court, Trinidad and Tobago retains the sovereign right to impose the death penalty on persons duly tried and convicted in Trinidad and Tobago, of international crimes potentially falling within the complementary jurisdiction of the International Criminal Court. DECLARATION. Trinidad and Tobago declares that nothing in the Statute of the International Criminal Court and the Final Act of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court affects the right of Trinidad and Tobago or of other States to impose the death penalty under their domestic law.

The subject was aired at an informal session of the Working Group on the afternoon of 3 July. The chair of the Working Group explained that under the principle of complementarity the penalties regime chosen for the International Court would have no impact on the scheme in force within national courts. Fife said that including the death penalty in the Statute, either directly, as in the Caribbean States proposal, or implicitly, as in the Arab and Islamic States proposal, would make it impossible for a huge number of States to accede to the treaty. Many States spoke in support of the chair, some of them predictable, such as Chile, Costa Rica, Greece, France, Namibia and New Zealand, others perhaps not so, such as Kenya. Slovenia and Colombia pointed to constitutional problems if capital punishment were to be included.

The United States of America, many of whose national jurisdictions are keen supporters of capital punishment, took the floor at the formal, public session of the Working Group on the evening of 3 July 1998. It was a sincere effort to assist the chair in his search for a workable solution. Ambassador David Scheffer focused on the concept of complementarity, noting that 'we know the death penalty very well in the United States, where it is imposed in many jurisdictions including by the federal system, and where it is supported by the executive'. He said he was confident that federal prosecutors would seek the death penalty in appropriate cases where genocide, crimes against humanity and war crimes were charged, citing relevant United States legislation. Scheffer said that the International Criminal Court should encourage national judicial systems to prosecute and punish the crimes within its jurisdiction, 'and this will include the death penalty'. But, said Scheffer, a second principle was the need to create a uniform penalty regime for the Court, failing which the operation of the court would be diverse and unpredictable. 'The United States believes that the language proposed by the chair achieves the goal of just and severe punishment on an international level', he concluded.

Three days later, on 6 July 1998, the chair of the Working Group issued a 'position paper' containing a detailed assessment of the death penalty debate:

> 2. The Coordinator would like to stress the following:
>
> Extensive consultations, as well as statements in the Plenary of the Conference and in the Working Group on Penalties, have shown that a number of delegations strongly favor an inclusion of the death penalty as one of the penalties to be applied by the Court. On the other hand, the consultations as well as statements in the Plenary and in the Working Group have also shown that a number of other delegations are strongly opposed to such an inclusion. In this context, a number of delegations have stressed that cooperation between States and the Court would effectively be hindered should the Statute provide either directly or indirectly for an inclusion of the death penalty.
>
> On the basis of these consultations it is the opinion of the Coordinator that there are no grounds for establishing a consensus on this issue. At the same time, a very substantial number of interventions of delegations in the course of the work of the Working Group have indicated a strong desire to achieve a balanced compromise on the main penalties to be included in the Statute. All delegations have indicated a willingness to find solutions which may be conducive to the shared goal of an early establishment of an International Criminal Court with a broad basis of support from the international community.
>
> It should be noted that not including the death penalty in the Statute would have no bearing on national legislations and practices in this field. States have the primary responsibility for prosecuting and punishing individuals for crimes falling under the subject-matter jurisdiction of the Court. In accordance with the principle of complementarity between the Court and national jurisdictions, the Court would clearly have no say on national practices in this field. (UN, 1998c: 2–3)

The Working Group reconvened on 16 July, one day before the end of the Diplomatic Conference, with the death penalty issue still on the table. Fife referred to 'intense consultations' on the subject, citing an informal meeting held on 11 July where he was mandated to prepare a compromise position. It had three constituent elements. The first was deletion of any reference to the death penalty in the Statute, accompanied by a footnote in the report of the Working Group that said

> [s]ome delegations do not agree with the decision to exclude the death penalty but they have decided to permit the Conference to proceed on the basis of the Chairman's proposal while reserving the right to put their views on record at appropriate stages of the Conference. (UN, 1998h: 2)

The second was the addition of a provision which would later be numbered article 80 of the Rome Statute:

> Non-prejudice to national application of penalties and national laws
>
> Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

The third element was a statement which the Working Group was to recommend be read by the President of the Conference, and that would be included in the official records of the conference:

> The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes. (UN, 1998h)

There were statements from some of the concerned delegations. The Minister of Justice of the Sudan took the floor:

> On behalf of the Arab group, which we chair, I thank you for your efforts. We accept, on behalf of our group, this compromise; we do not want this issue to be a stumbling block to the advancement of this conference; we should like to express clearly and unequivocally our views. This must not be interpreted as proof that it is an acceptance of worldwide abolition of the death penalty.

Trinidad and Tobago's Attorney General also made a statement:

> We cannot agree with the decision to exclude the death penalty. But in order to permit the conference to proceed, we will not oppose this. We want to make it quite clear that we do not consider the death penalty to be a human rights issue.

His remarks was endorsed in brief comments by the delegations of Dominica, Ethiopia, Barbados and Jamaica.

The same afternoon, the Working Group's report was presented to the Committee of the Whole. Singapore had reserved its right to intervene during the morning session, and had a prepared statement to deliver:

> In the exercise of our right under fn. 1 of L.14/Add.3/Rev.1, we make this statement. Penalties must be commensurate with the gravity of the crime. We cosponsored the proposal to introduce the death penalty. No delegation made the mistaken assertion that the death penalty is prohibited under international law. Even the Second Optional Protocol allows the death penalty. It has been characterized by some as a human rights question. We should not overplay the right to life of the convicted person vis à vis the right to security of the victim. We do not want to impose our system of criminal justice on others. The decision not to include the death penalty would not impede the sovereign right of states to impose the death penalty. The record of this conference shows that there is no international consensus as to the abolition of the death penalty.

Trinidad and Tobago, Ethiopia, Lebanon, Saudi Arabia and Rwanda also made declarations expressing their preference for the death penalty.

The next evening, when the final draft Statute was presented in the plenary

committee of the conference, President Giovanni Conso dutifully – and surely without a degree of personal anguish – read the statement that had been agreed upon.

At the final plenary of the Rome Conference, late in the evening of 17 July 1998, Singapore again took the floor to affirm that 'the debate in the conference clearly demonstrates that there is no international consensus on abolition of the death penalty'. Singapore was, of course, quite correct to proclaim the absence of a consensus. The same language appears in a statement by several States[26] made in the Commission on Human Rights in April 1998, submitted immediately prior to adoption of a resolution by the Commission calling for a moratorium on capital punishment (UN, 1998i). Yet stating that there is no consensus is hardly anything to be proud of. There is probably no consensus internationally on such other matters as child labour, ethnic cleansing, women's equality and freedom of religion! What the debate in the Working Group showed is that a relatively small number of States favoured retention of the death penalty and a very large number were opposed. This is a dramatic development when viewed from an historical perspective. Half a century earlier, when the international military tribunals were established to try criminals from the Second World War, the death penalty was not a source of controversy and was, in fact, carried out with enthusiasm by international justice. The exclusion of the death penalty from the Rome Statute is a significant benchmark in an unquestionable trend towards universal abolition of capital punishment, although it shows that a few regions of the world continue to resist progress in this respect.

It may well be that with their claim that the Rome Statute not be 'considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes', the death penalty States may have achieved the opposite of what they intended. In the past, some of them have defended the view that the issue of capital punishment belongs to the *domaine réservé* of States, insulated from international supervision by article 2(7) of the Charter of the United Nations. By insisting, as they have done, that a statement be attached to an international instrument in effect neutralizing its role with respect to the development of customary international human rights law, they have actually admitted that the conditions of application of capital punishment and related issues, as well as its eventual abolition, fall within the ambit of customary international human rights law.

Notes

1 Cited by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor* v. *Furundzija* (Case No. IT-95-17/1-T-10), Judgment, 10 December 1998, §290.

2 Treaty of Peace between the Allied and Associated Power and Germany ('Treaty of Versailles'), 1919 T.S. 4, art. 228. Article 227 of the Treaty of Versailles also envisaged the trial of the Kaiser by an international tribunal, although this never took place because of The Netherlands' refusal to extradite. The provision stated merely that the tribunal would have the duty 'to fix the punishment which it considers should be imposed'.

3 The Federal Republic of Germany had the honour of first proposing to the United Nations General Assembly the adoption of an abolitionist protocol to the International Covenant on Civil and Political Rights: UN, 1981: §15.

4 On abolitionist developments in European human rights law, see Schabas (1993/1997).
5 The treaty was signed by 13 states, but was never ratified. The proposed statute included a series of sentencing provisions that allowed for capital punishment, detention, confiscation and restoration of property and, eventually, pardon (see de Vabres, 1938 [which includes the text of the Convention as an appendix]; Sottile, 1938).
6 See draft article 32: 'The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court'.
7 The German Constitutional Court has suggested that life imprisonment without possibility of parole constitutes cruel, inhuman and degrading punishment: [1977] 45 B.VerfGE 187, 228.
8 The International Criminal Tribunal for the former Yugoslavia made such a recommendation in the *Tadic* case: *Prosecutor* v. *Tadic* (Case No. IT-94-1-A), Judgment, 15 July 1999.
9 There are no summary records of the Working Group on Penalties. Observations based on the debates in the Working Group are from the personal notes of the author, who attended the sessions.
10 Andorra, Chile, Cuba, Israel, Mexico, Portugal, Spain and Venezuela reiterated their opposition.
11 Qatar and Saudi Arabia.
12 Holy See, Iran, Kenya and Russian Federation.
13 France, Dominican Republic and Hungary.
14 Finland, Norway, Sweden and Switzerland.
15 Egypt, Libya and Singapore.
16 China, France, Germany, Norway, Portugal, Spain and Switzerland.
17 The third paragraph was orally amended by the chair: 'With regard to the periods of imprisonment to be served before a review may take place, it is suggested that they be set at not less than two thirds of the term of imprisonment. In case of life imprisonment, the period to be served before a review may take place would be not less than 25 years.'
18 On the work of the Preparatory Commission and the drafting of the Rules, see Schabas (1999).
19 Argentina, Dominican Republic, France, Hungary, Israel, Mexico, Samoa, Spain, Uruguay, Andorra, Chile, Finland, Greece, Holy See, Philippines, Russian Federation, Sweden, Switzerland, Ukraine, Venezuela.
20 Sierra Leone, Turkey.
21 Congo (DR), Cuba, Japan, Kenya, Senegal.
22 Portugal said that Trinidad's proposal was 'adequate'.
23 Sudan.
24 United Arab Emirates, Rwanda.
25 Sudan.
26 The States were: Algeria, Antigua and Barbuda, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Burundi, China, Democratic Republic of the Congo, Egypt, Ghana, Indonesia, Iran, Iraq, Jamaica, Japan, Jordan, Kuwait, Lebanon, Lesotho,

Libya, Malawi, Malaysia, Maldives, Mauritania, Mongolia, Myanmar, Nigeria, Oman, Philippines, Qatar, Rwanda, Saudi Arabia, Singapore, Sudan, Swaziland, Syria, Tajikistan, Tanzania, United Arab Emirates, Vietnam, Yemen.

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WILLIAM A. SCHABAS, MA (Toronto), LLD (Montreal), is Director of the Irish Centre of Human Rights, Galway, where he also holds a professorship in international human rights law at the National University of Ireland, Galway.
