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REPORT ON THE PROPOSED INTERNATIONAL CRIMINAL COURT
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By The Committee on International Law
and The Committee on International Human Rights
of The Association of the Bar of the City of New York

December 20, 1996

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EXECUTIVE SUMMARY

The Association of the Bar of the City of New York strongly endorses the creation of a permanent international criminal court ("ICC") to prosecute and punish individuals who commit serious crimes under international law, including genocide, war crimes and crimes against humanity.

The ICC is needed in cases where national courts are unable or unwilling to prosecute. Ad hoc tribunals established by UN Security Council resolution, such as the tribunals created for the former Yugoslavia and Rwanda, address specific grievous violations of international humanitarian law but are an inadequate long-term solution. A permanent tribunal, by providing a mechanism for the enforcement of international criminal law, would not only encourage the achievement of peace and justice in countries that have been traumatized by atrocities, but may also deter future atrocities.

Remarkable and historic progress has been achieved toward the creation of a permanent ICC. In December 1996, following several years of negotiation and debate, the nations of the UN General Assembly adopted a timetable for a diplomatic conference in 1998 that will draft the international criminal court treaty. The ICC could be operational by the end of this century.

A permanent international criminal court merits strong United States support and is consistent with the policy and principles of the United States. The United States was instrumental in the creation of the Nuremberg, Yugoslavia and Rwanda international tribunals. The Report demonstrates bipartisan support for enforcement of international criminal law through an international criminal tribunal. The Report therefore encourages the United States government to continue its constructive efforts toward the finalization and ratification of the international criminal court treaty. The Report makes other recommendations relating to the ICC's subject matter jurisdiction, the authority of the prosecutor and countries to trigger investigations, the role of the Security Council, and protection of the rights of suspects and defendants.

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The Association of the Bar of the City of New York strongly endorses the creation of a permanent international criminal court to prosecute and punish individuals who commit the most serious crimes under international law.[1] The world's first permanent international criminal court ("ICC") would be the last major international institution created in this century, a time when the inhumanity of armed conflict and internal atrocities has become unconscionably familiar. Responding to these recurring humanitarian atrocities has been impeded by the fact that, as the Supreme Court of Israel lamented in the Eichmann judgment, "there still does not exist either an International Criminal Court or even international penal machinery." [2] A proposal for a permanent tribunal is attracting significant support, however, and assuming a continued high level of commitment, the Court could be operational by late 1998.

"The most compelling reason for establishing an ICC is that persons who commit the most serious crimes will otherwise go unpunished." [3] A permanent ICC will reduce the likelihood of international crimes going unpunished while promoting the consistent application of international criminal norms. The ICC will not diminish the authority or responsibility of national tribunals to punish international criminals, [4] but in many cases national courts are simply unable or unwilling to proceed. In these cases, when the alternative is impunity for the perpetrators of international crimes, the ICC would be authorized to exercise jurisdiction.

Permanency is required primarily because a permanent court is likely to be more effective than ad hoc tribunals, which are inadequate in several respects. First, marshaling the necessary political will and resources required to create ad hoc tribunals is notoriously difficult. Second, reliance solely on ad hoc tribunals or national courts results in a system of international criminal enforcement that appears idiosyncratic or selective. Why create tribunals in the cases of Yugoslavia and Rwanda, for example, but not in other equally compelling situations? In addition, the fundamental issue of whether the Security Council's powers encompass the creation of criminal tribunals persists. A permanent judicial institution is more appropriately created by legislation, which in the case of the ICC means a multilateral treaty. [5] Finally, resolution-created judicial bodies are innately temporal as Security Council resolutions can be revoked or amended. [6]

An independent ICC, which adheres to the highest standards of fairness and due process, also is an important component of the goal of achieving international peace and justice. For societies to emerge from the trauma of prolonged armed conflict or internal strife, a mechanism for justice is necessary to hold the perpetrators of international crimes responsible and thereby promote stability. In the absence of a forum for criminal accountability, the blame for past atrocities may become a permanent barrier to national reconciliation and justice.

In addition, the drastically changed nature of international and internal conflicts requires an institution capable of enforcing clearly established law. During this century, warfare has evolved from conflicts where the principal victims are members of national armed forces, to conflicts where the majority of victims are innocent civilians. In many instances civilians have been the prime targets of armed combatants, in clear violation of accepted norms of international criminal law. A minimal but essential response to the indiscriminate barbarity of modern warfare, therefore, should be a permanent mechanism to enforce established international criminal law.

A permanent ICC also would likely have a deterrent effect, a crucial goal of any system of criminal law enforcement. The possibility of arrest, prosecution and punishment by a permanent international tribunal, especially in countries without effective judicial institutions, should serve to deter future atrocities. The Court's deterrent effect is also enhanced by the likelihood that the ICC, a secondary forum available only if a national court is unavailable or ineffective, will likely spur prosecutions by national tribunals for genocide, war crimes and crimes against humanity.

Finally, the ICC merits support because the current proposal, a draft statute^[7] adopted in 1994 by the International Law Commission ("ILC"),^[8] presents a realistic and workable basis for an effective court. The draft statute establishes an ICC by multilateral treaty, open for ratification by interested states, that would prosecute only when national courts are unable or unwilling to proceed and the violators would otherwise escape justice.^[9] National tribunals will remain the preferred forum for prosecution of international crimes, and the right to seek extradition and other forms of international judicial assistance will not be affected. The consensus engendered by the draft statute is apparent in the nearly unanimous agreement reached, in December 1996, to schedule a high-level diplomatic conference for 1998 that will negotiate and adopt a treaty creating the international criminal court.^[10]

I. OUTLINE OF THE REPORT

This Report aims to increase awareness of, and support for, the establishment of a permanent international criminal court. The Report begins by explaining the present momentum in favor of the ICC in terms of several factors: (1) a series of United Nations initiatives and proposals; (2) the impact of previous international criminal tribunals; and (3) the continuing maturation of international criminal law.

The next section describes the structure of the Court as set forth in the draft ICC statute. The Report then examines several prominent issues: (1) the ICC's subject matter jurisdiction; (2) the procedures for initiating prosecutions; and (3) protection of the rights of defendants and suspects. Finally, the Report discusses the position

of the United States, and argues that support for the proposed ICC is entirely consistent with established legal principles and policy of the United States. The Report concludes with the following recommendations:

- * The United States should work toward the prompt finalization and ratification of the ICC treaty.
- * The ICC's subject matter jurisdiction initially should be limited to genocide, war crimes and crimes against humanity.
- * The draft statute's state consent requirements, which determine whether the ICC's jurisdiction may be exercised, may unnecessarily inhibit the exercise of the Court's jurisdiction and should be modified.
- * The Prosecutor should be permitted to initiate investigations, in addition to state parties and the Security Council.
- * The Security Council's primary role in the maintenance of international peace and security should not include the power to block the initiation of cases within the ICC's jurisdiction.
- * The protections afforded accused persons and defendants under internationally recognized standards of fairness and due process must be recognized and enforced by the ICC.

II. PROLOGUE TO THE CREATION OF AN INTERNATIONAL CRIMINAL COURT

The international criminal court, although long considered either unattainable or undesirable,[11] may well be established by the close of this century.[12] The recent momentum in favor of the ICC has largely been the result of three factors. First, a series of initiatives undertaken under United Nations auspices has supplied an institutional context for ICC proposals. Second, prior ad hoc international criminal tribunals have demonstrated the feasibility of criminal law enforcement through international tribunals. Finally, international criminal law now provides a suitable basis for defining the crimes within the ICC's subject matter jurisdiction.

A. The United Nations and the proposed ICC

The United Nations has provided an institutional framework for proposals and debates concerning international criminal law and an international criminal court. The first initiatives, relating to the codification of international criminal law, resulted from a 1947 General Assembly resolution requesting the International Law Commission to

prepare a "draft Code of offences against the peace and security of mankind."^[13] The ILC continued to work on the draft code of crimes, until finally, in July 1996, the International Law Commission adopted the final text of twenty draft articles, with commentaries, comprising the Draft Code of Crimes Against the Peace and Security of Mankind.^[14]

Shortly after work on the Draft Code of Crimes began in 1947, the General Assembly passed a resolution recognizing that "there will be an increasing need of an international judicial organ for the trial of certain crimes under international law[.]"^[15] As a result, in 1950 the General Assembly created a "Committee on International Criminal Jurisdiction" composed of representatives from seventeen nations to "prepar[e] one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court."^[16]

In 1951, the Committee on International Criminal Jurisdiction completed a report and draft statute for an international criminal court.^[17] The General Assembly then urged UN member states to submit comments and suggestions, and requested the Committee to prepare another report and draft statute exploring "the implications and consequences of establishing an international criminal court and of the various methods by which this might be done."^[18] The Committee submitted a revised draft statute in 1953.^[19]

Further consideration of an international criminal court ceased following the 1953 revised draft statute, primarily due to Cold War politics and controversy over the proposed court's jurisdiction. Academic specialists^[20] and nongovernmental organizations,^[21] however, nurtured various proposals.

In 1989, Trinidad and Tobago, concerned with rampant narcotics trafficking in the Caribbean, raised the issue of an international criminal court before the Sixth (Legal) Committee of the General Assembly. Trinidad's initiative led to a request from the General Assembly for the ILC, in the context of its ongoing work on the Draft Code of Crimes, to consider "the question of establishing an international criminal court or other international criminal trial mechanism[.]"^[22] The ILC subsequently established a working group to develop a structure for an international criminal court.^[23]

In November 1992, the General Assembly endorsed the efforts of the ILC working group and requested it to continue drafting a statute for an international criminal court.^[24] In 1993, spurred in part by the Security Council's decision to create an ad hoc tribunal to prosecute atrocities committed in the former Yugoslavia, the ILC working group completed a draft statute and report, which the ILC referred to the General Assembly.^[25] The General Assembly received the ILC's 1993 draft statute "with appreciation" and requested the ILC to continue its work and formulate a final draft.^[26] Incorporating the extensive comments made by states in the Sixth Committee, as well as by

nongovernmental organizations, the ILC significantly revised the earlier draft and in 1994 adopted a Draft Statute for an International Criminal Court.[27]

In December 1994 the General Assembly established an Ad Hoc Committee to discuss the ILC's draft statute and identify revisions that would command broad political acceptance. The Ad Hoc Committee met for two two-week sessions in 1995. At the conclusion of the Ad Hoc Committee's 1995 sessions a consensus emerged among participating states that although the draft statute provided a suitable framework for discussion, further work was needed.[28]

In December 1995, the General Assembly adopted a resolution creating the United Nations Preparatory Committee on the Establishment of an International Criminal Court, open to all UN member states.[29] The Preparatory Committee's overall mandate, wider in scope than the Ad Hoc Committee's mandate, has been "to prepar[e] a widely acceptable consolidated text of a convention for an international criminal court." [30] The draft convention that emerges from the Preparatory Committee will be the basis for an international diplomatic conference of "plenipotentiaries" to finalize and adopt the ICC statute.[31] The Preparatory Committee includes representatives from more than 120 countries, and met from March 25-April 12 and from August 12-30, 1996, at UN Headquarters in New York.

The two Preparatory Committee sessions in 1996 made significant progress, as delegations and NGOs produced a significant quantity of alternative texts, proposals and commentary.[32] The measure of the Committee's progress is the resolution adopted by the Sixth Committee in November 1996. The resolution provides that the diplomatic conference for "finalizing and adopting a convention on the establishment of an international criminal court," [33] will be held in 1998. The resolution also adopted the recommendation of the Preparatory Committee for an additional nine weeks of Preparatory Committee sessions through April 1998.[34]

The organization of the Preparatory Committee's remaining sessions through April 1998 will be "in the form of open-ended working groups, concentrating on the negotiation of proposals with a view to producing a draft consolidated text of a convention to be submitted to the diplomatic conference." [35] The Preparatory Committee is directed to address a number of specific issues, including definition and elements of crimes; principles of criminal law and penalties; organization of the Court; complementarity and trigger mechanism; cooperation with states; and finances.[36]

In December 1996, the General Assembly adopted the Sixth Committee's resolution by consensus. Following the diplomatic conference, which is scheduled to be held in Italy in late 1998, an ICC treaty will enter into force upon ratification by a specified number of states.[37]

B. Enforcement by international criminal tribunals

The proposed international criminal court differs in important respects from the tribunals created following World War II and in response to the atrocities in Yugoslavia and Rwanda. The ICC, for example, will not be limited in scope to a specific situation or conflict, nor will it be created pursuant to Security Council resolutions, as were the recent ad hoc tribunals. The proposed ICC, however, should be regarded as an extension of the legal and structural precedents established by the predecessor international criminal tribunals, beginning with the landmark Nuremberg tribunal.[38]

The Allies created the Nuremberg Tribunal by the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis. The tribunal's jurisdiction, established in the Charter of the International Military Tribunal annexed to the London Agreement,[39] encompassed crimes against peace, which included aggression, war crimes, and crimes against humanity. The tribunal initially indicted twenty-four defendants and ultimately tried twenty-two of them, one in absentia, of whom nineteen were convicted.[40] The Nuremberg trials, of course, took place following a defeated enemy's unconditional surrender and therefore in some respects are an inadequate precedent for a permanent court.[41]

The ad hoc tribunals for the former Yugoslavia and Rwanda, created by the UN Security Council in 1993 and 1994, are more direct models for the permanent court in terms of structure and jurisdiction.[42] In Yugoslavia, details of mass murders and concentration camps precipitated Security Council resolutions that expressed concern over violations of international law in the region and affirmed individual responsibility for such violations.[43] On February 22, 1993, the Security Council decided to establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.[44] The Secretary-General subsequently issued a draft statute for the tribunal[45] and on May 25, 1993 the Security Council formally established the Tribunal.[46]

The International Tribunal for Yugoslavia consists of three primary organs: a judiciary with eleven judges assigned to two Trial Chambers and an Appeals Chamber; the Prosecutor's Office; and the Registry.[47] The Tribunal's jurisdiction encompasses (1) grave breaches of the Geneva Conventions of 1949, (2) violations of the laws or customs of war, (3) genocide, and (4) crimes against humanity. As of late 1996, the International Tribunal for Yugoslavia had indicted seventy-five persons, although only seven are in custody at the Tribunal's seat in The Hague.

On May 7, 1996, the Tribunal commenced the trial of Du_ko Tadi_, the first defendant over whom it obtained custody. The trial followed an unsuccessful motion by Tadi_ that alleged the unjustified primacy of

the Tribunal over national courts and a lack of subject matter jurisdiction.[48] The Appeals Chamber, in "a unique and important event in the development of international law,"[49] upheld the lawfulness and subject matter jurisdiction of the Tribunal [50]

The history of the International Tribunal for Rwanda is similar to that of the Yugoslavia Tribunal. In the aftermath of the violence that consumed Rwanda starting in April 1994, the Security Council adopted a series of resolutions expressing alarm at violations of international law and determining that the conflict represented a threat to international peace and security.[51] On November 8, 1994, the Security Council, again acting under Chapter VII of the UN Charter, established the International Tribunal for Rwanda.[52]

The Statute of the International Tribunal for Rwanda gives the Tribunal subject matter jurisdiction over: (1) genocide; (2) crimes against humanity; and (3) violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[53] The Rwanda Tribunal has handed down twenty-four indictments, with thirteen persons in detention.

The International Tribunals for Yugoslavia and Rwanda function under considerable impediments. Funding shortfalls and inadequate staffing, among other problems, have complicated their operations.[54] The most serious setback, and one that jeopardizes the ultimate success of the Tribunals, has been the failure to apprehend persons indicted of crimes.[55]

These operational difficulties, however, should not obscure the importance of the establishment and operation of the first international criminal tribunals since Nuremberg. The process of creating the ad hoc tribunals, which coincided with the ILC deliberations on the permanent court, represented a conceptual breakthrough which energized the pace of the ICC initiative.[56] Moreover, as the next section describes, developments regarding the scope and content of international criminal law have been equally important.

C. The progress of international criminal law

The international criminal court will not command respect or legitimacy if the conduct it seeks to prosecute and punish is not universally considered criminal, or if the ICC is viewed as legislating or creating law rather than applying existing law. The subject matter jurisdiction of the proposed ICC therefore is appropriately limited to clearly established crimes under customary international law that are, as the Preamble to the draft statute states, "the most serious crimes of concern to the international community as a whole." [57]

The core of the proposed ICC's jurisdiction is over certain crimes under "general international law," [58] also referred to as customary international law. Customary international law is considered binding law and results from a general and consistent practice adhered to by

states from a sense of legal obligation.[59] It is based on consistent state practice and *opinio juris*. Ratification of multilateral treaties, independent of the rights and obligations established among the parties, also constitutes evidence of customary international law. A treaty also may have the effect of codifying or developing customary international law,[60] and multilateral treaties have significantly affected the development of international crimes under customary international law.

The customary international law that the ICC will apply is generally "defined by existing treaties." [61] These treaties include the Genocide Convention, "Geneva law," "Hague law," and the Nuremberg Charter.

The 1948 Genocide Convention,[62] without dispute a part of customary international law, forms a central component of the court's subject matter jurisdiction. The Genocide Convention, which entered into force in January 1951, has been ratified by 122 countries, including by the United States on February 23, 1989.[63] Article IV of the Convention provides that persons committing acts of genocide "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

The International Court of Justice underscored the universality of the Genocide Convention by holding, in the *Bosnia v. Yugoslavia* case, that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. . . [T]he obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited[.]" [64] "Geneva law" consists of the four Geneva Conventions[65] and Protocols[66] established under the aegis of the International Committee of the Red Cross (ICRC) dealing primarily with the protection of victims. The Geneva Conventions have been ratified by 185 countries, including by the United States in 1956. Article 3 common to all four Conventions establishes minimum rules to be observed in internal armed conflicts,[67] and "binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents." [68] Each Geneva Convention, as well as Protocol I, identifies particular acts described as "grave breaches," [69] and requires state parties to enact legislation establishing criminal penalties for "grave breaches." [70] The United States, as a party to the Geneva Conventions, recently carried out its obligation to criminalize grave breaches of the Conventions by passing the War Crimes Act of 1996.[71]

"Hague law" is based on the 1907 Hague Convention[72] dealing principally with the laws of war. Forty-three countries have ratified the Hague Convention, including the United States in 1909. The concept of "war crimes" initially derived from Hague law but more recently is regarded as somewhat coterminous with Geneva law. The ICJ's Nuclear Weapons advisory opinion summarized the consolidation of Hague law and

Geneva law:

A large number of customary rules have been developed by the practice of States and are an integral part of . . . international law[.] [The] "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations[.] One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.

* * *

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles on international customary law.[73]

The Genocide Convention, Geneva law, Hague law and the Nuremberg Charter are collectively described in the Secretary-General's Report on the Statute for the International Tribunal for Yugoslavia as "beyond any doubt part of customary [international] law so that the problem of adherence of some but not all States to specific conventions does not arise." [74] Furthermore, the application of these universally applicable standards as a benchmark of individual criminal liability was established fifty years ago in the Nuremberg Judgment: That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . [I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[75]

State practice also confirms individual criminal responsibility for violations of international criminal law. The United States Court of Appeals for the Second Circuit, for example, recently held that

"certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." [76] In addition, many nations, in military manuals or in legislation, have criminalized and prosecuted in national courts serious breaches of the rules and principles of international humanitarian law. [77]

International criminal law, as customary international law, is applicable to individuals. No permanent international institution, however, provides an enforcement mechanism; therefore, when nations are unable or unwilling to prosecute under their criminal or military codes, impunity for even the most blatant and egregious offenders results. The ICC fills this institutional lacuna.

III. THE ILC'S 1994 DRAFT STATUTE

This section describes the basic structure of the proposed ICC as set forth in the International Law Commission's 1994 draft statute, which has provided the framework for negotiations within the Ad Hoc Committee and the more recent Preparatory Committee.

Virtually every section of the draft statute underwent significant scrutiny at the 1996 Preparatory Committee sessions. Governmental delegations proposed alternative versions of many articles as well as the deletion of certain articles. [78] The various competing proposals will be subject to further debate and revision before the final treaty text is drafted at the diplomatic conference, scheduled for late 1998. As a starting point, though, an understanding of the draft statute's structure and procedures is essential.

A. Structure of the proposed ICC

The draft statute describes an ICC with four principal organs: (1) a Presidency; (2) Trial Chamber(s) and an Appeals Chamber; (3) a Procuracy; and (4) a Registry. [79]

The Presidency, consisting of a President and first and second Vice Presidents, is elected from among the judges of the ICC by a majority of judges. The eighteen judges of the ICC are elected to single nine-year terms by a majority vote of state parties. No two judges shall be from the same state, and the judges selected should "represent[] the principal legal systems of the world." [80] Judges of the ICC should be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices." [81] In addition, judges must have both "criminal trial experience" and "recognized competence in international law."

The judges, according to the draft statute, "shall be independent." [82] Any activity which might "interfere with their judicial functions" or "affect confidence in their independence" is prohibited. Judges of the ICC are prohibited from holding any

legislative, executive or prosecutorial positions in a national government.[83]

The Presidency performs a number of pre- and post-trial procedural and administrative functions. Among these functions is the appointment of the Appeals Chamber from among the judges of the ICC for renewable three-year terms.[84] The Appeals Chamber consists of the President and six other judges. The Presidency also has the responsibility of nominating five judges to be members of the Trial Chamber for a given case.[85]

The Procuracy, headed by the Prosecutor and assisted by Deputy Prosecutors, is an independent organ responsible for the investigation of complaints and the conduct of prosecutions. The Prosecutor and Deputy Prosecutors, who hold office for renewable five-year terms, are nominated by state parties and elected by a majority of the state parties.[86] They must be "persons of high moral character and have high competence and experience in the prosecution of criminal cases." [87]

The Registrar and Deputy Registrar, elected by a majority of the judges, are the principal administrative officers of the ICC.[88] The draft statute delineates a number of functions for the Registrar relating primarily to its role as a depository of notifications and as a channel for communications with states.

B. Pre-trial procedures

An investigation by the Procuracy is initiated either (1) by a state party "lodg[ing] a complaint with the Prosecutor alleging that a crime appears to have been committed"[89] or (2) by the "referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations." [90] The draft statute does not permit the Prosecutor to sua sponte initiate a complaint or investigation.

Upon receipt of a complaint from a state or a referral by the Security Council, the Prosecutor may commence an investigation unless the Prosecutor, on an initial review of the complaint and supporting documentation, "concludes that there is no possible basis for a prosecution." [91] The Prosecutor's investigation may involve on-site questioning of witnesses or suspects, collecting evidence, and seeking the cooperation of states. The Prosecutor then must determine whether a prima facie case exists, defined in the ILC's commentary to the draft statute as "a credible case which would (if not contradicted by the defense) be a sufficient basis to convict the accused of the charge." [92]

The Prosecutor's investigation should also determine whether the case is "inadmissible" because the crime in question: (1) has been investigated by a state with jurisdiction and made a well-founded decision not to proceed; (2) is under investigation by a state that may

have jurisdiction; or (3) is not of such gravity to justify further action by the Court.[93] Issues of admissibility also may be raised before the commencement of the trial by an accused or by an "interested state." After the commencement of the trial, admissibility issues may be raised only on the Court's own motion.

If a prima facie case exists, and the case is admissible, the Prosecutor prepares an indictment stating concisely the facts alleged and the crimes alleged to have been committed. The Prosecutor also must inform the Presidency if it determines that there are insufficient grounds to file an indictment.[94] A decision not to proceed may be reviewed by the Presidency, at the request of the complainant state or the Security Council, after which the Presidency "may request the Prosecutor to reconsider the decision." [95] Ultimate discretion on whether to file an indictment remains with the Prosecutor.

The indictment is filed with the Registrar and thereafter submitted to the Presidency. The Presidency is required to "examine the indictment and any supporting material" to determine whether a prima facie case indeed exists regarding a crime within the Court's jurisdiction. If the Presidency determines a prima facie case exists, and also that the case is admissible pursuant to the criteria in Article 35, the Presidency is required to "confirm the indictment." [96]

The Presidency must at the confirmation stage also assess, like the Prosecutor, whether the case is "admissible." [97] Assuming a case is admissible, the ICC also is required to satisfy itself, even in the absence of a challenge, that it has jurisdiction. [98] The accused and "any interested State" are permitted to challenge the jurisdiction of the ICC in the Trial Chamber after confirmation of the indictment. [99] A defendant also is permitted to challenge jurisdiction "at any stage of the trial." [100]

Whether the ICC may exercise jurisdiction over a person depends on the crime alleged and whether certain states have accepted the jurisdiction of the ICC over the crime alleged. The jurisdictional state consent requirements are examined in greater detail infra Part V.A.

After the commencement of the Prosecutor's investigation, the Presidency may at the Prosecutor's request issue a warrant for the "provisional arrest" of a suspect if there are sufficient grounds and if the suspect "may not be available to stand trial unless provisionally arrested." [101] A suspect provisionally arrested must be released if the indictment is not confirmed within ninety days of the provisional arrest, although the ninety day period may be extended by the Presidency.

C. Trial

Following confirmation of the indictment, the Presidency convenes a Trial Chamber of five judges. The Presidency also may issue orders

relating to the language(s) to be used at trial, the arrest and transfer of the accused, the exchange of information between the Prosecutor and the defense, and provision for the protection of the accused, victims, witnesses, and of confidential information.[102] The draft statute also provides that the rules of procedure and evidence should be drawn up by the judges of the ICC within six months of the judicial elections and then submitted to a conference of state parties for approval.[103]

The Trial Chamber has a range of powers necessary for conducting the trial, including the power to require the attendance and testimony of witnesses and the production of evidence. In addition, the Trial Chamber is charged with ensuring "full respect for the rights of the accused and due regard for the protection of victims and witnesses." [104] The rights of the accused, which include the presumption of innocence,[105] reflect the fundamental rights set forth in Article 14 of the International Covenant on Civil and Political Rights.[106] At least three of five Trial Chamber judges must concur in any conviction, acquittal, or sentencing. Upon conviction, the Trial Chamber may order a fine or imprisonment, but not the death penalty.[107]

The draft statute states that "the accused should be present during the trial." [108] The Trial Chamber is authorized, however, to conduct trials in absentia for reasons "of security or the ill- health of the accused," if the accused continuously disrupts the trial, has escaped, or has broken bail.[109] If "a trial cannot be held because of the deliberate absence of an accused," the Trial Chamber may create an Indictment Chamber to record the evidence and consider whether such evidence constitutes a prima facie case. If a prima facie case is established, the Indictment Chamber then issues an arrest warrant.[110] Finally, "the record of evidence before the Indictment Chamber shall be admissible." [111]

D. Appeal

Both the Prosecutor and convicted persons have a right of appeal following a judgment of the Trial Chamber. Grounds for appeal include procedural error, error of fact or law, or disproportion between the crime and sentence.[112] The Appeals Chamber, if it finds that the proceedings below were "unfair" or the decision was "vitiating by error of fact or law," [113] may reverse or amend the Trial Chamber's decision, or order a new trial. On the Prosecutor's appeal following an acquittal, the Appeals Chamber may order a new trial. The Chamber may also amend a sentence if it finds the sentence "manifestly disproportionate to the crime." [114] A trial or appeal may also be reconvened if, upon motion by a convicted person or the Prosecutor, newly discovered evidence appears which "could have been a decisive factor in the conviction." [115]

The Court's judgments are be legally binding on all parties to the

statute. Persons convicted serve sentences of imprisonment under the ICC's supervision in a state designated by the ICC from a list of willing states, or if no state is so designated, in the host state of the ICC. Subject to certain procedures and conditions, convicts would be eligible for pardon, parole, and commutation of sentences.[116]

E. Cooperation with states and judicial assistance

The draft statute requires state parties to "cooperate with the Court in connection with criminal investigations and proceedings." [117] Cooperation may take the form of locating persons, taking testimony, producing evidence or serving papers. [118] Requests to states to cooperate or provide judicial assistance are transmitted by the Registrar. The Court also may request a state to take provisional measures, such as preventing an accused from leaving its territory or provisionally arresting a suspect.

Provisions relating to the transfer of an accused to the Court are set forth in Article 53. In this regard the draft statute's distinction between genocide, as the crime that invokes the Court's "inherent jurisdiction," and other crimes, is relevant. In the case of genocide, all state parties are required to "take immediate steps to arrest and transfer the accused to the Court" upon receipt of a request from the Registrar. [119] In cases other than genocide, an obligation to transfer only adheres if the state party has accepted the jurisdiction of the Court with respect to the crime in question. [120] A state party which has not accepted the Court's jurisdiction with respect to the crime in question that receives a request has three options: (1) "in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court"; (2) "extradite the accused to a requesting State"; or (3) "refer the case to its competent authorities for the purpose of prosecution." [121]

IV. CRIMES WITHIN THE SUBJECT MATTER JURISDICTION OF THE ICC

The ICC's subject matter jurisdiction, as set forth in the draft statute, encompasses: (1) genocide; (2) aggression; (3) serious violations of the law and customs applicable in armed conflict (or war crimes); (4) crimes against humanity; and (5) certain crimes established pursuant to multilateral treaties. [122] This section examines the subject matter jurisdiction of the proposed ICC, and concludes that the ICC's initial jurisdiction should be limited to the "core crimes" -- genocide, war crimes and crimes against humanity. [123]

A. Genocide

The ICC without question will have jurisdiction over the crime of genocide. There has been further consensus that Articles II and III of the widely ratified Convention on the Prevention and Punishment of the Crime of Genocide of 1948 [124] provide an authoritative definition of

the crime of genocide. The Statute for the International Tribunal for Yugoslavia incorporates the Genocide Convention's definition as well.[125] Finally genocide is clearly punishable by the ICC as the Genocide Convention, in Article VI, provides for trial "by such international penal tribunal as may have jurisdiction." [126]

B. Serious Violations of the Laws and Customs Applicable in Armed Conflict

War crimes, referred to in the draft statute as "serious violations of the laws and customs applicable in armed conflict," are also appropriately within the ICC's subject matter jurisdiction. The ILC Commentary notes that the category of war crimes "overlaps but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977." [127] The grave breaches provisions of the Geneva Conventions clearly envision individual criminal responsibility in that state parties are required to enact legislation "necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches" [128] of the Conventions. An additional source is the 1907 Hague Convention (IV) Respecting the Laws and Customs of War, which provides the basis for the war crimes definitions found in the Nuremberg Charter, and "has become part of the body of international customary law." [129]

A principal definitional issue with respect to war crimes is whether this category applies to internal, as opposed to international, armed conflicts. Some states argued in the Preparatory Committee that violations of the laws and customs of war committed in purely internal conflicts should be excluded from the ICC's jurisdiction. Other states argued that violations committed in internal armed conflicts should be included because, among other reasons, national courts are less likely to address such offenses. [130]

Our position is that customary international law provides for individual criminal responsibility for war crimes committed in purely internal conflicts. The Statute for the Rwanda Tribunal and the Draft Code of Crimes [131] both apply the laws of war to purely internal conflicts. In addition, the Appeals Chamber for the International Tribunal for Yugoslavia in the Tadić decision found that "customary international law imposes criminal liability for serious violations of common Article 3 [of the 1949 Geneva Conventions], as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife." [132]

The State Department and by the Defense Department also advocate applying war crimes prohibitions to internal armed conflicts, as shown in letters submitted to Congress during deliberations on the War Crimes Act of 1996, :

[T]he phrase "war crimes" should be defined to include not only grave breaches of the 1949 Geneva Conventions and their protocols, but also violations of the rules applicable in non-international armed conflict, e.g., civil wars and other internal conflicts, that are specified in common Article 3 of the Geneva Conventions.[133]

[W]e believe that the [war crimes] provision should also cover violations of the rules of non-international armed conflicts, e.g., civil wars, rebellions, that are specified in common Article 3 of the Geneva conventions.[134]

C. Crimes Against Humanity

Crimes against humanity, it is generally accepted, also should be included within the ICC's subject matter jurisdiction. The Nuremberg Charter defined crimes against humanity broadly to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal[.]" The phrase "committed against any civilian population" in the Nuremberg Charter has been interpreted to require that the acts must be "widespread or systematic" to constitute crimes against humanity. As the International Law Commission stated:

the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part. The hallmarks of such crimes lie in their large-scale and systematic nature . . . [The acts must be] committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds.[135]

A principal controversy regarding crimes against humanity is whether crimes against humanity must be committed in connection with an armed conflict, as was required in the Nuremberg Charter. The Statute for the International Tribunal for Yugoslavia likewise requires that such acts be "committed in an armed conflict."[136]

In our view, the armed conflict requirement should not be included in the definition of crimes against humanity. As was argued in the Preparatory Committee, "the armed conflict nexus that appeared in the Nuremberg Tribunal Charter was no longer required under existing law."[137] The International Tribunal for Rwanda's statute, in contrast, does not require an "armed conflict" requirement.[138]

The Appeals Chamber of the International Tribunal for Yugoslavia convincingly addressed this issue in a preliminary ruling in the Tadić case and rejected an armed conflict nexus for crimes against humanity.

The Tribunal held that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all." [139]

D. Aggression

Aggression, as one of the most serious crimes of concern to the international community, is included in the draft statute to create a deterrent and avoid impunity for individuals responsible for committing aggression. [140] Aggression also was a focus of the Nuremberg Tribunal, and therefore, it is argued, omitting aggression from the ICC's jurisdiction might be considered "retrogressive." [141]

Nevertheless, many delegations argued in the Preparatory Committee against including aggression for several reasons. First, aggression has not yet been the subject of a multilateral treaty, which would appear to conflict with the International Law Commission's view that the ICC's jurisdiction should be "defined by existing treaties." [142] Second, no commonly accepted definition of aggression exists, and it is far from clear that additional effort will yield results. Most definitions of aggression, such as General Assembly Resolution 3314, [143] refer to aggression by states and do not contemplate individual criminal responsibility. This point is buttressed by the fact that since Nuremberg there has not been significant national prosecutions of individuals for the crime of aggression, while there has been prosecutions by states for the core crimes.

Third, because the Security Council has primary responsibility for the maintenance of international peace and security under the UN Charter, the Security Council is required to make a determination "that a State has committed the act of aggression which is the subject of the complaint." [144] The necessity of Security Council involvement, however, is problematic. The independence and integrity of the ICC may be compromised if prosecutions for aggression are dependent on a factual finding by a political institution such as the Security Council. [145] For these reasons, therefore, we conclude that aggression should not be within the ICC's initial subject matter jurisdiction.

E. Treaty-based crimes

In addition to the crimes referred to by the ILC as "crimes under general international law," the draft statute includes fourteen "treaty-based crimes," listed supra note 122, which relate to terrorism, drug trafficking, apartheid and hostage-taking. The ILC's criteria for inclusion of a particular treaty are (1) the crime must be "defined by the treaty" with sufficient precision; and (2) the treaty must either "create[] a system of universal jurisdiction" or permit trial of the crime by an international criminal court. [146]

Six of the fourteen treaties are "specifically concerned with terrorist offences of one kind or another,"[147] and much of the debate over inclusion of the treaty crimes has focused on terrorism. Among the arguments advanced during the Preparatory Committee for the inclusion of terrorism within the ICC's jurisdiction were that: (1) terrorism is one of the most serious crimes of concern to the international community; (2) recent Security Council practice demonstrates the serious threat to international peace and security from terrorism; (3) the ICC should be permitted to accept exceptionally serious cases of terrorism when referred by the Security Council; and (4) international terrorism cases are precisely the types of matters in which national tribunals may be unavailable or ineffective.[148]

The arguments raised in the Preparatory Committee against including the treaty crimes, however, have garnered significant support. No generally accepted definition of terrorism exists, and reaching agreement on a definition may delay the creation of the ICC. Terrorism is investigated and prosecuted by national authorities. As the ILC notes with respect to the treaty-based crimes in general, "many of those treaties could cover conduct which, though serious in itself, was within the competence of national courts to deal with and . . . did not require elevation to the level of an international jurisdiction."[149]

Concerns also arose at the Preparatory Committee meetings that broadening the ICC's jurisdiction to include the treaty crimes would overburden the ICC's limited resources while detracting from the prosecution of other core crimes, or perhaps trivialize the ICC's role and functions.[150] Finally, the treaty crimes "could lessen the resolve of States to conduct national investigations and prosecutions and politicize the functions of the Court." [151] We therefore conclude that the treaty-based crimes should be excluded for the time being from the ICC's subject matter jurisdiction.

F. Conclusions

The ICC's subject matter jurisdiction, at least initially, should encompass only the three "core crimes" -- genocide, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity. A number of factors compel this conclusion. Most important is the fact that the three core crimes are the only crimes which a considerable majority of countries clearly consider to be part of customary international law.

In addition, under the guiding principle of complementarity, as set forth in the Preamble to the draft statute, the ICC should only prosecute cases "where such trial procedures may not be available or may be ineffective." [152] A narrower subject matter jurisdiction of the core international crimes therefore may enhance complementarity by minimizing the potential for overlap or direct conflict between the ICC and national courts. Narrowing the jurisdiction of the ICC may also

facilitate broader acceptance, as well as simplify the functioning of the court.[153] Furthermore, the elements of these crimes, including defenses, must be enumerated in the Statute itself so that the conduct proscribed is precisely defined.

Nevertheless, the crime of terrorism clearly is of significant concern to the international community and therefore, in principle, may be appropriate for the ICC's subject matter jurisdiction. Thus, given that the development of customary international law is a fluid process, a review mechanism should be included that would allow the initial subject matter jurisdiction of the ICC to be expanded at a later time.[154]

V. THE EXERCISE OF JURISDICTION BY THE ICC

A.State consent requirements and "inherent jurisdiction"

An investigation of a crime within the ICC's jurisdiction may be initiated either by a state party or by the Security Council. Using the terminology of the draft statute, the Security Council "refer[s] . . . a matter,"[155] while "a complaint is brought"[156] by a state. When proceedings are initiated by state complaint, the ICC's assumption of jurisdiction over an accused is dependent on numerous state consent requirements (the consent requirements are dispensed with when the Security Council, acting under Chapter VII of the Charter, refers a matter to the court[157]). Consent is given, under the draft statute's "opt-in" approach, when a state that has ratified ICC statute lodges declarations specifying the crimes over which the state accepts the jurisdiction of the ICC.[158] (The exception is genocide, where the Court has "inherent jurisdiction," as described below.) Such declarations may be general, or may contain temporal limitations, or may be limited to a single incident or crisis.[159]

The consent requirements affect: (1) the initiation of investigations; (2) the ICC's exercise of jurisdiction, and (3) the procedures for transferring accused persons to the Court. First, a state cannot bring a complaint alleging that a particular crime, other than genocide, has been committed unless that state has lodged a declaration accepting the ICC's jurisdiction over such crime.[160] With respect to genocide, a declaration is not required as long as the state is a party to the Genocide Convention.[161]

Second, in order for the ICC to exercise jurisdiction over a suspect, the jurisdiction of the ICC over the crime alleged must be accepted by: (1) the state with custody over the accused; and (2) the state in which the crime is alleged to have occurred.[162] When the complaint alleges genocide there are no state consent requirements because the Genocide Convention provides for trial by an "international penal tribunal,"[163] which is interpreted to allow for the exercise of the ICC's "inherent jurisdiction."

Third, the transference of persons to the Court, pursuant to a request from the Registrar to a state, may also involve consent requirements. For example, if a state with custody of an accused receives an extradition request pursuant to an extradition treaty from another state, the acceptance of the Court's jurisdiction by the state with a right of extradition is required.[164] In other cases the duty to transfer an accused depends on the crime and whether the state has accepted the jurisdiction of the Court over the crime. In the case of genocide and crimes which a state has lodged a declaration accepting jurisdiction, a state party receiving a request "shall . . . take immediate steps to arrest and transfer the accused to the Court." [165] States that are not parties to the ICC statute may cooperate with the ICC upon receipt of a request to arrest and transfer an accused to the ICC, although a binding obligation is not imposed.[166]

B. Trigger mechanism and the role of the Security Council

1. How should an investigation be triggered?

The right to trigger an investigation is limited to the Security Council and to state parties to the ICC statute. The Preparatory Committee considered proposals to authorize the Prosecutor or individuals, in addition to states and the Security Council, to trigger investigations. Proposals to permit investigations to be triggered by the Prosecutor and/or by individuals found support among some countries and nongovernmental organizations who argued that the purposes and ideals of the ICC cannot be realized unless the Prosecutor and individuals are permitted to initiate proceedings. States and the Security Council, it is argued, will in many cases be unwilling to file complaints for political or other reasons.

Other delegations argued against an independent power of the Prosecutor to institute proceedings on the grounds that such authorization could politicize the ICC, undermine its credibility and strain the resources of the ICC, not least because a Prosecutor's decision to investigate without a complaint or referral presumably would require an additional layer of review.

2. The role of the Security Council

A key issue regarding the triggering of the ICC's jurisdiction involves the role of the Security Council. Article 23(3) of the draft statute provides:

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council decides otherwise.

Article 23(3), strongly favored by the United States, is, as the International Law Commission Commentary explains, "an acknowledgment of the priority given by Article 12 of the Charter[[167]] . . . as well as for the need for coordination between the [International Criminal] Court and the Council in such cases." The ICC must operate in conformity with the UN Charter, which permits the Security Council to make measured judgments regarding the panoply of appropriate responses to a breach of the peace or act of aggression. Prosecutions under international criminal law should promote, not hinder, peace. Thus, it is argued, "the primary U.N. body empowered to handle issues of international peace and security must not be handcuffed by the prosecutor investigating a particular suspect." [168]

Other delegations and many commentators, however, argue that Article 23(3) is a threat to the independence of the ICC. Despite the ILC's statement that Article 23(3) "does not give the Council a mere 'negative veto' over the commencement of prosecutions," [169] the Security Council retains the option of exercising its Chapter VII powers and blocking any prosecution. As a result, Article 23(3) is fundamentally incompatible with an independent ICC. The Security Council, as an overtly political body, should not have the ability to prevent the exercise of the ICC's jurisdiction over a particular situation. The problem is compounded by the vagueness of the phrase "being dealt with by the Security Council," which could be interpreted to simply mean the placement of an item on the Security Council's agenda. [170]

An alternative proposal seeks to resolve the ambiguity of the phrase "being dealt with" by restricting the circumstances in which an ICC prosecution may be blocked while accommodating the role of the Security Council. These proposals seek to narrow the Security Council's ability to prevent the initiation of prosecutions by, for example, requiring the Security Council to make a formal decision to request the court not to proceed, or by permitting a delay in prosecution by the ICC in "a situation in respect of which Chapter VII action is actually being taken" by the Security Council. [171]

C. Conclusions

The draft statute's state consent requirements are intended to maximize state participation and cooperation with the ICC. This is, of course, a compelling purpose, especially because the the Yugoslavia and Rwanda Tribunals clearly have suffered from a lack of state cooperation. A state which ratifies the ICC treaty, however, and follows through with its obligation to pass implementing legislation, [172] should not be required to take further steps to indicate acceptance of the ICC's limited jurisdiction. The statute should provide that state parties to the ICC statute automatically accept the Court's inherent jurisdiction

over the core crimes.[173]

Moreover, as some members of the ILC have argued, "the strict requirements of acceptance contained in Article 21 [are] likely to frustrate its operation in many cases, and even to make the quest for international criminal jurisdiction nugatory." [174] As others have noted, "[t]hese obviously complicated consent requirements could lead to absurd situations." [175] For example, a state with custody of a person accused of committing war crimes in another state would be prevented from transferring the person to the ICC without the consent of the state on whose territory the crime was committed. We conclude, therefore, that the draft statute's state consent requirements would weaken the ICC's effectiveness, and should be simplified or eliminated.

A preferable option would be to allow any state party to lodge a complaint regarding any of the core crimes within the ICC's jurisdiction. Under this approach, states would be considered to have consented to the jurisdiction of the ICC over all of the core crimes by signing and ratifying the ICC Statute. The exercise of "inherent jurisdiction" over the core crimes is appropriate because these crimes are clearly established under customary international law. The distinction between genocide and the other core crimes for the purposes of determining the ICC's jurisdiction is unnecessary.

We believe that the effectiveness of the ICC will be greatly enhanced if the Prosecutor, in addition to state parties and the Security Council, is permitted to initiate proceedings in the absence of a state complaint or Security Council referral, with appropriate judicial review. One proposal for such review requires that complaints initiated by the Prosecutor be reviewed in camera by an "indictment chamber" composed of judges who would not ultimately try the case. The procedure by the indictment chamber "upon a hearing, would decide whether the matter should be pursued by the Prosecutor or the case should be dropped." [176]

Whether complaints are initiated by the Prosecutor or by states, however, the gatekeeper function of the Security Council under Article 23(3) remains problematic. Whether or not the Security Council's role is characterized as a "veto" should not obscure the potential of Article 23(3) to significantly diminish the Court's independence. Of course, the Security Council's role as a peacemaker and peace enforcer under the UN Charter should be recognized and encouraged. The danger of abuse exists, though, if Article 23(3) is used to prevent the ICC from pursuing prosecutions for overtly political reasons.

It is also doubtful whether adequate compromise language could be formulated to reduce the discretion of the Security Council. No matter how Article 23(3) is phrased, if prosecutions are perceived as requiring the imprimatur of the Security Council, then many countries appropriately will question the legitimacy and effectiveness of the ICC. Article 23(3) in its present form, therefore, should be eliminated in

order to ensure the independence and integrity of the ICC.

Finally, concerns that the Court would exercise unfettered discretion to initiate prosecutions, in the absence of the state consent requirements or Security Council oversight, are vastly overstated. The draft statute contains a number of procedural safeguards. For example, the Prosecutor and the Presidency are required to determine whether a prima facie case exists and whether the case is "admissible" under Article 35, that is, whether national authorities may prosecute or whether the case "is not of such gravity to justify further action by the Court."^[177] An accused or any "interested State" also is authorized to mount challenges to the jurisdiction of the Court after the confirmation of the indictment.^[178] And any "interested State," or the Court itself, is authorized to make a motion regarding Rule 35 admissibility. Finally, even in the absence of a challenge, each organ of the Court has a responsibility to satisfy itself that jurisdiction is appropriately exercised in a given case.^[179]

VI. PROTECTION OF THE RIGHTS OF DEFENDANTS

The draft statute, and all proceedings before the ICC, must be in accordance with the highest international standards of fairness and due process. In general, the draft statute, which was expressly modeled on Article 14 of the International Covenant on Civil and Political Rights,^[180] describes a workable level of protection of the rights of accused persons. The draft statute, however, should also make clear that the listing of certain rights under existing customary law is not intended to exclude others, thus leaving room for the incorporation of additional rights that may be recognized in the future.^[181] Specific areas of concern regarding the rights of the accused are addressed below.

The draft statute provides an Indictment Chamber "[i]n cases where a trial cannot be held because of the deliberate absence of an accused."^[182] The Indictment Chamber procedures, modeled on Rule 61 of the Rules of Evidence and Procedure of the International Tribunal for Yugoslavia, allow the Prosecutor to publicly present the evidence that has been gathered against the accused, and to have that evidence recorded and preserved. According to the ILC, the Indictment Chamber is intended to "fulfill some of the purposes of a trial in absentia," by, inter alia, "mak[ing] the accused in a certain sense a fugitive from international justice while still giving the accused an opportunity to defend against the charges if eventually brought before the court."

As demonstrated in the rule 61 proceedings conducted by Yugoslavia Tribunal,^[183] the Indictment Chamber may well serve a vital function. Cause for concern exists, however, with respect to provision that "the record of evidence before the Indictment Chamber shall be admissible"^[184] at any subsequent trial of the accused. This provision may be

inconsistent with the defendant's fundamental right to "examine, or have examined, the prosecution witnesses" recognized in Article 41(a)(3) of the Statute. There is also the possibility that testimony of unnamed witnesses in the Indictment Chamber proceedings could be introduced at trial.[185]

There is no reason why evidence introduced at an Indictment Chamber proceeding should be "admissible" merely because it was presented by the Chamber. As was noted in the Preparatory Committee, at the very least the "accused should be able to challenge the admissibility of the evidence recorded in his or her absence." [186] Thus, the Indictment Chamber record should not be automatically admissible in a subsequent trial.

The draft statute states "as a general rule, the accused should be present during the trial." [187] Exceptions from this general rule permit the Trial Chamber to order trials in absentia (1) for reasons of security or ill health of the accused; (2) where the accused has escaped from lawful custody; or (3) where the accused is continuing to disrupt the trial. This range of circumstances is vague and overbroad, however, and may permit trials in absentia in circumstances where the procedure may be unwarranted. For example, it is doubtful that considerations regarding "ill health" of a defendant or "security" should merit a trial in absentia. In our view, the more general prohibition of trials in absentia included in the Statute of the International Tribunal for Yugoslavia should be adopted. [188]

The draft statute also authorizes the "provisional arrest" of a suspect before formal charges are brought, upon a finding that there is "probable cause" to believe that the suspect has committed a crime within the jurisdiction of the ICC, and that the suspect "may not be available to stand trial" if not provisionally arrested. The provisions pertaining to provisional arrest, however, require further clarification. For example, the draft statute appears to permit an indefinite term of detention by allowing detention longer than ninety days "as the Presidency may allow." [189] In addition, it is not clear that provisionally arrested suspects have a right to prompt access to a lawyer or the capacity to challenge the detention. Suspects provisionally arrested should be expressly afforded all the procedural protections and rights granted arrested persons.

VII. THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

A permanent international criminal court deserves the strong support of the United States government. An independent ICC is consistent with prior positions and policies of the United States executive, legislative and judicial branches and would further long-established and bipartisan goals. This section, then, presents the proposed international criminal court in the context of United States

policy and principles, and concludes that active promotion of an independent ICC should be a primary goal of the United States government.

The prosecution of war criminals has long been a principal objective of American policy. The United States spearheaded the creation of the Nuremberg, Tokyo, Yugoslavia and Rwanda tribunals.[190] In these forums the United States has consistently and forcefully argued in favor of individual criminal responsibility for perpetrators of crimes under international law. As a senior State Department official testified recently before Congress, "those accused of war crimes, crimes against humanity and genocide must be brought to justice. They must be tried and, if found guilty, they must be held accountable." [191]

With respect to the ICC proposal, the United States position has evolved from indifference to qualified support.[192] This support finds expression in a high level of participation in the Preparatory Committee and, in 1995, the Ad Hoc Committee.[193] The United States delegation has circulated detailed position papers, and has played an important role in defining the debate. The ILC's draft statute, in fact, incorporates many suggestions made by the United States.[194] President Clinton, moreover, expressed support for a permanent ICC in a speech delivered in October 1995:

By successfully prosecuting war criminals in the former Yugoslavia and Rwanda, we can send a strong signal to those who would use the cover of war to commit terrible atrocities that they cannot escape the consequences of such actions. And a signal will come across even more loudly and clearly if nations all around the world who value freedom and tolerance establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law. This, it seems to me, would be the ultimate tribute to the people who did such important work at Nuremberg, a permanent international court to prosecute such violations. And we are working today at the United Nations to see whether it can be done.[195]

The United States recognizes the law to be applied by the ICC to be part of binding customary international law.[196] The federal courts, moreover, have shown awareness of the content and scope of international humanitarian law.[197] And as the United States government argued before the International Tribunal for Yugoslavia:

The relevant law and precedents for the offences in question here -- genocide, war crimes and crimes against humanity -- clearly contemplate international as well as national action against the individuals responsible. Proscription of these crimes has long since acquired the status of customary international law, binding on all states, and such crimes have already been the subject of

international prosecutions by the Nuremberg and Tokyo Tribunals.[198]

The United States Congress also has demonstrated knowledge of the utility and feasibility of an international criminal tribunal. Since 1993 Congress has consistently voted significant funding, as well as contributions of personnel and resources, in support of the establishment and operations of the International Tribunals for Yugoslavia and Rwanda. The bipartisan support for these contributions by the United States demonstrates that international criminal law enforcement is a priority of Congress,[199] as well as of the Executive branch.

Numerous statutes also have expressly referred to the need for some type of international criminal court. In 1986, the Omnibus Diplomatic Security and Antiterrorism Act requested the President to explore an international tribunal for prosecuting terrorists.[200] The 1988 Anti-Drug Abuse Act called for an international criminal court with jurisdiction over international drug trafficking and "international crimes." [201] In 1991, Congress passed an appropriations bill expressing its sense that "the United States should explore the need for the establishment of an International Criminal Court." [202]

In January 1993 Senator Christopher Dodd introduced a Congressional joint resolution stating that the United States should "make every effort to advance this [ICC] proposal at the United Nations." [203] The Senate Foreign Relations Committee held hearings on the joint resolution and on the international criminal court in May 1993. The Committee subsequently issued a report recommending the adoption of the joint resolution placing the Congress on record in support of the concept of an ICC. [204]

More recently, the President signed into law the War Crimes Act of 1996, designed to carry out the obligations of the United States under the 1949 Geneva Conventions to provide criminal penalties for certain war crimes. The House Report stated that war crimes "[p]rosecutions can be handled by the nations involved or by an international tribunal." [205]

In our view, moreover, the United States Constitution does not present a barrier to participation in the ICC. [206] First, Congress has authority to ratify United States participation in the ICC under Art. I, Sec. 8 of the Constitution, which provides that "The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations." In *Yamashita*, the Supreme Court relied on Art. I, Sec. 8 to uphold Congressional authority to determine "an appropriate tribunal for the trial and punishment of offenses against the law of war." [207] The House Report for the War Crimes Act of 1996 cited *Yamashita* as authority for its unequivocal conclusion that "[t]he constitutional authority to enact federal criminal laws relating to the

commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes." [208]

Second, the absence of certain constitutional protections, such as a right to trial by jury, does not render United States participation in the ICC unconstitutional. The ICC would not be a tribunal of the United States exercising "the judicial power of the United States" [209] under Article III. [210] The ICC would be an international tribunal, established by multilateral treaty, and there is no constitutional requirement that the full panoply of constitutional protections applicable to Article III tribunals must apply ipso facto to proceedings before the ICC. Indeed, under the "rule of non-inquiry", U.S. courts routinely approve extradition of persons to foreign countries without consideration of the adequacy or integrity of the judicial procedures in the requesting state. [211]

Finally, it is constitutionally permissible for the United States to waive the exercise of criminal jurisdiction over a defendant in favor of the ICC. As the U.S. Supreme Court has stated, "a sovereign nation has exclusive jurisdiction to punish offenses within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." [212]

VIII. CONCLUSION

Significant progress has been made in the past several years toward the establishment of a permanent international criminal court. Nevertheless, the ultimate success of the ICC depends on whether the political will is present to resolve such divisive issues as the ICC's jurisdiction and the role of the Security Council. Another looming roadblock that will test governmental resolve to create the ICC relates to the financing of the Court. The draft statute does not state how the Court will be financed, but the basic choices are to fund the ICC through the regular budget of the UN, or establish a separate assessment. [213] These questions must await final resolution at the diplomatic conference scheduled for late 1998.

Once established, the effectiveness of the ICC will depend of the seriousness with which countries takes their duties under the statute. The International Tribunal for Yugoslavia, despite its achievements, has experienced tremendous frustrations as states ignore promises of cooperation while indicted war criminals remain free. [214] For the ICC, it is apparent that the enormous efforts that have sustained the drive toward the establishment of a permanent Court must be maintained in order to guarantee that the ICC will be a truly effective institution.

IX. SUMMARY OF RECOMMENDATIONS

* The United States should work toward the prompt finalization and

ratification of the ICC treaty.

* The ICC's subject matter jurisdiction initially should be limited to genocide, war crimes and crimes against humanity.

* The draft statute's state consent requirements, which determine whether the ICC's jurisdiction may be exercised, may unnecessarily inhibit the exercise of the Court's jurisdiction and should be modified.

* The Prosecutor should be permitted to initiate investigations, in addition to state parties and the Security Council.

* The Security Council's primary role in the maintenance of international peace and security should not include the power to block the initiation of cases within the ICC's jurisdiction.

* The protections afforded accused persons and defendants under internationally recognized standards of fairness and due process must be recognized and enforced by the ICC.

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ENDNOTES

[1]/ The Association of the Bar of the City of New York expressed support for the establishment of an international criminal court in letters sent in February 1996 to President Clinton and senior government officials. See Letters to William J. Clinton, Robert Dole, Newt Gingrich and Conrad K. Harper, from Barbara Paul Robinson, President of the Association of the Bar of the City of New York, dated February 26, 1996 .

The American Bar Association and the New York State Bar Association also have endorsed the establishment of an international criminal tribunal. See ABA Section of International Law and Practice, Report of the Task Force on an International Criminal Court of the American Bar Association 1, 63 (1995); Working Group on Improving the Effectiveness of the United Nations, International Criminal Court, 29 Int'l Law. 300 (1995) (recommending, in August 1994 vote of ABA House of Delegates, "that the United States Government take an active role in the establishment of an international criminal court").

[2]/ 36 I.L.R. 277, 292 (Sup.Ct.Israel 1962) (attributing lack of international criminal court to "present retarded stage of development").

[3]/ Comments of the Government of the United States of America on Draft Articles for a Statute on an International Criminal Court 10 (June 1, 1994).

[4]/ In this respect the ICC Statute differs from the Statute for the International Tribunal for Yugoslavia, which in Article 9(2) proclaims the Tribunal's "primacy over national courts." Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (1993) (hereinafter "Secretary-General's Yugoslavia Tribunal Report"). The Statute is contained in an Annex to the Secretary-General's Report (hereinafter referred to as "Statute for the Yugoslavia Tribunal").

[5]/ James Crawford, The ILC Adopts a Draft Statute for an International Criminal Court, 89 Am. J. Int'l L. 404, 416 (1995).

[6]/ Id.

[7]/ Report of the International Law Commission on the work of its forty-sixth session, 49 U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) (hereinafter "Draft Statute"). The Draft Statute also contains extensive commentary by the International Law Commission (hereinafter "International Law Commission Commentary").

[8]/ The International Law Commission, whose thirty-four members are elected by the General Assembly and serve in their individual capacity,

is an advisory body of legal experts established in 1947.

[9]/ The proposed ICC's jurisdiction over natural persons should be distinguished from the jurisdiction of the International Court of Justice ("ICJ") in The Hague, which has jurisdiction only over states. See Statute of the International Court of Justice, art. 34(1) ("Only states may be parties in cases before the Court."). Created in 1945, the ICJ is the principal judicial organ of the United Nations, and all U.N. member states are automatically parties to the ICJ Statute. See U.N. Charter, art. 93(1).

[10]/ G.A. Res. A/RES/51/207 (1996). Of the fifty-five countries that expressed a position on the timing of the diplomatic conference during the October/November 1996 meetings of the General Assembly's Sixth (Legal) Committee, only Algeria, China and Mexico did not endorse the scheduling of the diplomatic conference in 1998. See NGO Coalition for an International Criminal Court, Support For 1998 Diplomatic Conference (available on the internet at <http://www.igc.apc.org/icc/1998conf.html>).

[11]/ See, e.g., Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, to Hon. Dan Quayle, President of the Senate, dated October 2, 1991, in Senate Comm. on Foreign Relations, International Criminal Court, S. Rep. No. 71, 103d Cong., 1st Sess., ? 3 (1993) (hereinafter "Senate Report") (noting opposition or ambivalence of Canada, Brazil, Austria, the Nordic countries, Mexico, Ghana and Australia on the need to create an international criminal court).

[12]/ See Proposed International Criminal Court Should Be Operational Before The Turn of the Century, Preparatory Committee Told, U.N. Press Rel. L/2809 (1996) (describing statements of representative of France). Adriaan Bos of The Netherlands, Chairman of the Preparatory Committee on the Establishment of an International Criminal Court, stated in April 1996 that "[I]ast year at this time many countries, including several major powers, made statements indicating their governments were not yet convinced of the need for an International Criminal Court . . . This year none indicated they opposed the establishment of an ICC. This fact is an indicator of the important progress achieved in a short period of time." William Pace, Serious Progress Achieved at April ICC "Prep Com", 1 The International Criminal Court Monitor 1 (July/Aug. 1996) (emphasis in original). See also Crawford, *supra* note 5, at 415 (noting "a distinct change in the balance of professional opinion. Most international lawyers hitherto regarded a permanent criminal court as unrealistic and even undesirable. Many now seem to have changed their minds.").

[13]/ G.A. Res. 177 (II) (1947).

[14]/ Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) (hereinafter "Draft Code of Crimes").

[15]/ G.A. Res. 260 B (III) (1948).

[16]/ G.A. Res. 489 (V) (1950). The Committee was composed of

representatives of Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, the Netherlands, Pakistan, Peru, Syria, the United Kingdom, the United States and Uruguay. Id.

[17]/ Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, U.N. GAOR, 7th Sess., Supp. No. 11, U.N. Doc. A/2136 (1952).

[18]/ G.A. Res. 687 (VII) (1952).

[19]/ Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 (1954).

[20]/ See M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Tribunal* (1987); Benjamin B. Ferencz, *An International Criminal Court, A Step Toward Peace: A Documentary History and Analysis* (1980).

[21]/ Nongovernmental organizations play an active role in lobbying and disseminating information. The NGO Coalition for an International Criminal Court's home page at <http://www.igc.apc.org/icc> contains commentary, UN documents and government position papers.

[22]/ G.A. Res. 44/39 (1989).

[23]/ Report of the International Law Commission on the work of its forty-fourth session, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

[24]/ G.A. Res. 47/33 (1992).

[25]/ Report of the International Law Commission on the work of its forty-fifth session, 45 U.N. GAOR, 48th Sess., Supp. No. 10 at 255, 335, U.N. Doc. A/48/10 (1993).

[26]/ G.A. Res. 48/31 (1993).

[27]/ Draft Statute, *supra* note 7.

[28]/ See Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50 U.N. GAOR Supp. No. 22, U.N. Doc. A/50/22 (1995).

[29]/ See G.A. Res. 50/46 (1995).

[30]/ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996), U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 6, U.N. Doc. A/51/22 (1996) (hereinafter "Preparatory Committee Report").

[31]/ A treaty generally is adopted at a diplomatic conference, and then is open for signature for a period of time. A signature to a treaty does not bind a state in the absence of endorsement by ratification. A state also may become a party to a treaty by "accession," or, in the case of newly independent states, by "succession."

[32]/ Volume II of the Preparatory Committee's Report contains the various proposals and alternative texts submitted by states. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals), U.N. GAOR, 51st

Sess., Supp. No. 22A, U.N. Doc. A/51/22 (1996) (hereinafter "Preparatory Committee Compilation of Proposals").

[33]/ U.N. Doc. A/C.6/51/L.10 (1996).

[34]/ *Id.*; Preparatory Committee Report, *supra* note 30, ¶ 368(a). The Preparatory Committee's 1997 meetings will be held February 11-21, August 4-15 and December 1-12. The 1998 session will be from March 16-April 3.

[35]/ U.N. Doc. A/C.6/51/L.10 (1996) (quoting Preparatory Committee Report, *supra* note 30, ¶ 368).

[36]/ *Id.*

[37]/ G.A. Res. A/RES/51/207 (1996). Proposals ranged from twenty-five to ninety ratifications. Preparatory Committee Report, *supra* note 30, ¶ 28. The International Commission of Jurists, observing that international human rights treaties generally do not require a large number of ratifications to enter into force, has suggested that twenty to twenty-five ratifications would be reasonable. International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper*, at 4-5 (Aug. 1995) (hereinafter "ICJ Position Paper").

[38]/ The Versailles Treaty following World War I provided for the constitution of an international tribunal to prosecute the Kaiser and other alleged German war criminals. Although the tribunal was not established, in Article 228 of the Versailles Treaty the German government recognized the right of the Allies "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war." The League of Nations, in 1937, opened for signature a statute for an international criminal court, which India was the only country to ratify.

[39]/ Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[40]/ The International Military Tribunal for the Far East, established in Tokyo by proclamation of General Douglas MacArthur, tried twenty-eight Japanese leaders, of whom twenty-five were convicted.

[41]/ Crawford, *supra* note 5, at 407.

[42]/ The UN Charter gives the Security Council "primary responsibility for the maintenance of international peace and security[.]" U.N. Charter, art. 24(1). The Security Council's powers in discharging its responsibility with respect to "any threat to the peace, breach of the peace, or act of aggression," are set forth in Chapter VII, and include the use of force. U.N. Charter, art. 39.

[43]/ S.C. Res. 827 (1993); S.C. Res. 764 (1992). On October 6, 1992, the Council created a "Commission of Experts" to gather evidence relating to alleged violations of international law. SC Res. 780 (1992). The Commission concluded in an interim report to the Security Council that serious violations of international humanitarian law were occurring and recommended the creation of an ad hoc international

tribunal. See generally M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 *Am. J. Int'l. L.* 784 (1994).

[44]/ S.C. Res. 808 (1993).

[45]/ Statute for the Yugoslavia Tribunal, *supra* note 4.

[46]/ S.C. Res. 827 (1993).

[47]/ See Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. A/51/292, S/1996/665 (1996) (hereinafter "Third Report of the Yugoslavia Tribunal").

[48]/ Prosecutor v. Tadić, No. IT-94-1-T (Yugo. Tribunal Trial Chamber, Aug. 10, 1995), *aff'd*, No. IT-94-1-AR72 (Yugo. Tribunal, Appeals Chamber, Oct. 2, 1995), reprinted in 35 *I.L.M.* 32 (1996).

[49]/ Third Report of the Yugoslavia Tribunal, *supra* note 47, ¶ 33.

[50]/ Prosecutor v. Tadić, *supra* note 48. The Tadić trial, in which 115 witnesses gave testimony, took seven months and ended on November 28, 1996. The Tribunal's next trial, of four Muslims accused of committing atrocities at a detention camp in Bosnia, is scheduled to begin in late January 1997.

[51]/ In July 1994, the Security Council authorized the creation of a Commission of Experts to examine the evidence. The Commission's December 1994 report concluded that Hutu forces had committed genocide against the Tutsi minority. S.C. Res. 918 (1994); S.C. Res. 935 (1994). The Secretary-General's report concluded that "[o]n the basis of the evidence that has emerged, there can be little doubt that [the situation in Rwanda] constitutes genocide. . . ." Report of the Secretary-General on the situation in Rwanda, U.N. Doc. S/1994/640 (1994).

[52]/ The Statute for the International Tribunal for Rwanda is contained in an Annex to SC Res. 955 (1994) (hereinafter "Statute for the Rwanda Tribunal").

[53]/ See *infra* text accompanying notes 65-71, 127-28 (discussing Geneva Conventions and Protocols).

[54]/ See, e.g., Cedric Thornberry, *Saving the War Crimes Tribunal*, 104 *Foreign Policy* 72 (1996).

[55]/ The Yugoslavia Tribunal recently reported, in a significant understatement, that the Federal Republic of Yugoslavia and Republika Srpska "have failed fully to cooperate by arresting and surrendering to the Tribunal persons indicted of war crimes, crimes against humanity and genocide." Third Report of the Yugoslavia Tribunal, *supra* note 47, at 8.

[56]/ See, e.g., Crawford, *supra* note 5, at 405-06.

[57]/ Draft Statute, *supra* note 7, Preamble.

[58]/ International Law Commission Commentary, *supra* note 7, art. 20.

[59]/ Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992) (discussing nature of customary international law and concluding that "the right to be free

from official torture is fundamental and universal, a right deserving of the highest status under international law").

[60]/ See *Id.* ¶ 102, Comment f ("Multilateral agreements open to all states, however, are increasingly used for . . . codifying and developing customary law").

[61]/ International Law Commission Commentary, *supra* note 7, Part 3.

[62]/ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 227.

[63]/ See 18 U.S.C. ¶ 1091.

[64]/ Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Yugoslavia*), 1996 I.C.J. ¶ 31 (11 July) (Judgment) (unofficial text released by ICJ Registry).

[65]/ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("Geneva Convention II"); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva Convention III"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Geneva Convention IV").

[66]/ Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 ("Protocol I"); Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 ("Protocol II"). Protocol I has been ratified by 143 countries, and Protocol II has been ratified by 134 countries. The United States signed both Protocols, but has ratified neither. See generally Theodor Meron, *The Time Has Come For The United States To Ratify Geneva Protocol I*, 88 *Am. J. Int'l L.* 678 (1994).

[67]/ Article III common to all four Geneva Conventions states that: "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Conventions I, II, III & IV, *supra* note 65, art. 3 (hereinafter "common Article III").

[68]/ *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), reh'g denied, 74 F.3d 377 (2d Cir.), cert. denied, 116 S.Ct. 2524 (1996).

[69]/ For example, Geneva Convention I states that "Grave breaches to which [state parties are obligated to enact penal sanctions for] . . . shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Geneva Convention I, supra note 65, art. 50. See also Geneva Convention II, supra note 65, art. 51; Geneva Convention III, supra note 65, art. 130; Geneva Convention IV, supra note 65, art. 147; Protocol I, supra note 66, art. 85(3), (4).

[70]/ Geneva Convention I, supra note 65, art. 49; Geneva Convention II, supra note 65, art. 50; Geneva Convention III, supra note 65, art. 129; Geneva Convention IV, supra note 65, art. 146; Protocol I, supra note 66, arts. 85, 86.

[71]/ War Crimes Act of 1996, Pub. L. 104-192, 110 Stat. 2104 (Aug. 21, 1996)..

[72]/ Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

[73]/ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶¶ 75, 79 (July 8) (unofficial text released by ICJ Registry) (emphasis added).

[74]/ Secretary-General's Yugoslavia Tribunal Report, supra note 4, ¶ 35.

[75]/ International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 Am. J. Int'l L. 172, 220-21 (1947).

[76]/ Kadic, 70 F.3d at 243 (recognizing "the settled proposition that federal common law incorporates international law" and that acts of genocide, war crimes and torture by individuals are violations of international law).

[77]/ See, e.g., *United States v. Calley*, 22 C.M.A. 534 (U.S.C. M.A. 1973) (affirming conviction of United States soldier for summary executions of unresisting persons); see also *Prosecutor v. Tadić*, supra note 43, ¶¶ 130-33; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 586-67 (1995). Many countries, moreover, including the United States, France and the United Kingdom, have enacted legislation regarding cooperation with various aspects of the International Tribunals for Yugoslavia and Rwanda. Russia, among other states, has formally stated that no legislation is necessary to ensure full compliance. Third Report of the Yugoslavia Tribunal, supra note 42, ¶¶ 181-85. See also Amnesty International, *International Criminal Tribunals: Handbook for Government Cooperation*, AI Index: IOR 40/07/96 (Aug. 1996).

[78]/ See Preparatory Committee Report, supra note 30, ¶ 13 (listing sixty written proposals submitted by UN member states during the Preparatory Committee's August 1996 session); Preparatory Committee Compilation of Proposals, supra note 32.

[79]/ Draft Statute, supra note 7, art. 5. France has proposed additional organs: a "Preliminary Investigations Chamber"; a "Remand

Chamber"; a "General Assembly of Judges"; and a "General Assembly of States Parties." Draft Statute for an International Criminal Court: Working Paper Submitted By France, U.N. Doc. A/AC.249/L.3 (1996) (hereinafter "Working Paper Submitted By France").

- [80]/ Draft Statute, supra note 7, art. 6.
- [81]/ Draft Statute, supra note 7, art. 6(1).
- [82]/ Draft Statute, supra note 7, art. 10(1).
- [83]/ Draft Statute, supra note 7, art. 10(2).
- [84]/ Draft Statute, supra note 7, art. 9(1).
- [85]/ Draft Statute, supra note 7, art. 9(5).
- [86]/ Draft Statute, supra note 7, art. 12(3).
- [87]/ Draft Statute, supra note 7, art. 12(3).
- [88]/ Draft Statute, supra note 7, art. 13.
- [89]/ Draft Statute, supra note 7, art. 25.
- [90]/ Draft Statute, supra note 7, art. 23(1).
- [91]/ Draft Statute, supra note 7, art. 26(1).
- [92]/ International Law Commission Commentary, supra note 7, art. 34.
- [93]/ Draft Statute, supra note 7, art. 35.
- [94]/ Draft Statute, supra note 7, art. 26(4).
- [95]/ Draft Statute, supra note 7, 26(5).
- [96]/ Draft Statute, supra note 7, art. 27(2).
- [97]/ Draft Statute, supra note 7, art. 27(2).
- [98]/ Draft Statute, supra note 7, art. 24.
- [99]/ Draft Statute, supra note 7, art. 34.
- [100]/ Draft Statute, supra note 7, art. 34(b). At all hearings relating to admissibility and jurisdiction, "the accused and the complainant State have the right to be heard." *Id.*, art. 36(1).
- [101]/ Draft Statute, supra note 7, art. 28(1)(b).
- [102]/ Draft Statute, supra note 7, arts. 26-28.
- [103]/ Draft Statute, supra note 7, art. 19. Significant support exists, however, for establishing the rules of procedure and evidence in conjunction with the diplomatic conference.
- [104]/ Draft Statute, supra note 7, art. 38(2). Article 43 authorizes the Court to take "necessary measures" to protect defendants, victims and witnesses, including conducting "closed proceedings" or presenting evidence by "electronic or other special means."
- [105]/ Draft Statute, supra note 7, art. 40.
- [106]/ Draft Statute and International Law Commission Commentary, supra note 7, art. 41. See *infra* Part VI for further discussion of protection of the rights of defendants.
- [107]/ Draft Statute, supra note 7, arts. 45-47, 53. Article 47 stipulates which state's laws the Trial Chamber is to have reference to in determining penalties.
- [108]/ Draft Statute, supra note 7, art. 37(1).
- [109]/ Draft Statute, supra note 7, art. 37(2).
- [110]/ Draft Statute, supra note 7, Art. 37(4). The Indictment

Chamber is modeled on the rule 61 hearings provided for in the Rules of Procedure and Evidence of the Yugoslavia Tribunal. In June-July 1996, a Trial Chamber of the Yugoslavia Tribunal held rule 61 proceedings on the indictments against Karad_i_ and Mladi_. The proceedings resulted in international arrest warrants for Karad_i_ and Mladi_, and "certification" that the failure to apprehend Karad_i_ and Mladi_ was due to the refusal of the Federal Republic of Yugoslavia and the Republika Srpska to cooperate with the Tribunal. Third Report of the Yugoslavia Tribunal, supra note 47, ¶ 61.

[111]/ Draft Statute, supra note 7, art. 37(5)(a).

[112]/ Draft Statute, supra note 7, art. 48(1).

[113]/ Draft Statute, supra note 7, art. 49(2).

[114]/ Draft Statute, supra note 7, arts. 49(3).

[115]/ Draft Statute, supra note 7, art. 50(1).

[116]/ Draft Statute, supra note 7, arts. 58-60.

[117]/ Draft Statute, supra note 7, art. 51(1).

[118]/ Draft Statute and International Law Commission Commentary, supra note 7, art. 51.

[119]/ Draft Statute, supra note 7, art. 51(2)(a)(i).

[120]/ Draft Statute, supra note 7, art. 51(2)(a)(ii).

[121]/ Draft Statute, supra note 7, art. 53(2)(c).

[122]/ Draft Statute, supra note 7, art. 20. The Annex to the draft statute lists the treaties which would be a part of the ICC's subject matter jurisdiction. The treaties listed in the Annex are:

1. Grave breaches of:

(i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;

(ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

(iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

(iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

(v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of that Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the

Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

8. The crimes defined by Article 3 of the convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the convention, are crimes with an international dimension.

[123]/ The draft statute fails to enumerate the specific elements of these crimes, or defenses, although the statutes for the International Tribunals for Rwanda and Yugoslavia do list specific proscribed conduct. There was universal agreement at the Preparatory Committee, though, that "all general elements of crimes and the basic principles of liability and defence should be elaborated by States and laid down in the Statute itself, or in an annex thereto which would have the same legal value as the Statute." Preparatory Committee Report, *supra* note 30, ¶ 180. Article 39 of the draft statute expresses this principle in terms of the maxim *nullum crimen sine lege*, or no crime without law.

[124]/ Articles II and III of the Genocide Convention provide:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life

- calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

See Genocide Convention, *supra* note 62, arts. II, III.

[125]/ Statute for the Yugoslavia Tribunal, *supra* note 4, art. 4.

[126]/ Genocide Convention, *supra* note 62, art. VI.

[127]/ International Law Commission Commentary, *supra* note 7, art. 20.

[128]/ Geneva Convention I, *supra* note 65, art. 49; Geneva Convention II, *supra* note 65, art. 50; Geneva Convention III, *supra* note 65, art. 129; Geneva Convention IV, *supra* note 65, art. 146. See also Protocol I, *supra* note 66, art. 80.

[129]/ Secretary-General's Yugoslavia Tribunal Report, *supra* note 4, ¶¶ 41-42.

[130]/ Preparatory Committee Report, *supra* note 30, ¶ 78.

[131]/ Draft Code of Crimes, *supra* note 14, art. 20(f).

[132]/ *Prosecutor v. Tadić*, *supra* note 48, ¶ 134.

[133]/ Letter from Barbara Larkin, Acting Assistant Secretary, Legislative Affairs to Hon. Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Committee on the Judiciary, House of Representatives, dated May 17, 1996, in H.R. Rep. No. 104-698, 104th Cong., 2nd Sess. (1996), reprinted in, 1996 U.S.C.C.A.N. 2166, 2179 (hereinafter "House Report on War Crimes Act of 1996").

[134]/ Letter from Judith Miller, General Counsel of the Department of Defense, to Hon. Bill McCollum, Chairman, Subcommittee on Crime, House Committee, dated May 22, 1996, in House Report on War Crimes Act of 1996, *supra* note 133, at 2178.

[135]/ International Law Commission Commentary, *supra* note 7, ¶ 14.

The Draft Code of Crimes similarly provides that a crime against humanity involves acts "committed in a systematic manner or on a large scale." Draft Code of Crimes, *supra* note 14, art. 18.

[136]/ Statute for the Yugoslavia Tribunal, *supra* note 4, art. 5.

[137]/ Preparatory Committee Report, *supra* note 30, ¶ 89.

[138]/ Statute for the Rwanda Tribunal, *supra* note 51, art. 3.

[139]/ *Prosecutor v. Tadić*, *supra* note 48, ¶ 141.

[140]/ The Draft Code of Crimes includes the "crime of aggression"

as a crime against the peace and security of mankind. Draft Code of Crimes, *supra* note 14, art. 16.

[141]/ International Law Commission Commentary, *supra* note 7, art. 20; Preparatory Committee Report, *supra* note 30, ¶ 66.

[142]/ International Law Commission Commentary, *supra* note 7, art. 20.

[143]/ G.A. Res. 3314 (XXIX) (Dec. 14, 1974). See also Report of the Special Committee on the Question of Defining Aggression, 24 August-21 September 1953, U.N. GAOR, 9th Sess., Supp. No. 11, U.N. Doc. A/2638 (1954).

[144]/ Draft Statute, *supra* note 7, art. 23(2).

[145]/ See ICJ Position Paper, *supra* note 37, at 14; Lawyers Committee for Human Rights, Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute 11 (Mar. 1996).

[146]/ International Law Commission Commentary, *supra* note 7, art. 20.

[147]/ International Law Commission Commentary, *supra* note 7, art. 20.

[148]/ Preparatory Committee Report, *supra* note 30, ¶ 106.

[149]/ International Law Commission Commentary, *supra* note 7, art. 20.

[150]/ Preparatory Committee Report, *supra* note 30, ¶ 116. The United States opposes the inclusion of terrorism and drug trafficking within the ICC's jurisdiction. Statement of The Honorable Conrad K. Harper, Legal Adviser, U.S. Dep't of State, USUN Press Rel. No. 149-(94), at 2 (Oct. 25, 1994) (hereinafter "Statement of Conrad K. Harper").

[151]/ Preparatory Committee Report, *supra* note 30, ¶ 107.

[152]/ Draft Statute, *supra* note 7, Preamble.

[153]/ Preparatory Committee Report, *supra* note 30, at ¶ 107. See also International Law Commission Commentary, *supra* note 7, art. 20 (noting that inclusion of three core crimes was influenced by statute of International Tribunal for Yugoslavia).

[154]/ Preparatory Committee Report, *supra* note 30, ¶ 115 (noting differing views on establishing a review procedure).

[155]/ Draft Statute, *supra* note 7, art. 23(1).

[156]/ Draft Statute, *supra* note 7, art. 21(1)(a). The state complaint should "specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available[.]" *Id.*, art. 25(3).

[157]/ International Law Commission Commentary, *supra* note 7, art. 23 ("referral" process "allows the Security Council to initiate recourse to the Court by dispensing with the requirement of the acceptance by a State of the Court's jurisdiction").

[158]/ Draft Statute, *supra* note 7, art. 22(1).

[159]/ Draft Statute, *supra* note 7, art. 22(2), (3).

[160]/ Draft Statute, *supra* note 7, art. 25(2).

[161]/ Draft Statute, *supra* note 7, art. 25(1).

[162]/ Draft Statute, *supra* note 7, art. 21(1)(b).

[163]/ Genocide Convention, *supra* note 62, art. 4.

[164]/ Draft Statute, *supra* note 7, art. 21(2).

[165]/ Draft Statute, supra note 7, art. 53(2).

[166]/ Draft Statute, supra note 7, arts. 53(1), 56.

[167]/ The UN Charter affords the Security Council primary authority "relative to the maintenance of international peace and security." U.N. Charter, art. 12. Chapter VII of the Charter provides that the Security Council shall "decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. Charter, art. 39.

[168]/ United States Delegation to Preparatory Committee on ICC, "Trigger Mechanism," Second Question, The Role of the Security Council and of Complaints by States, Articles 23 and 25 (Apr. 1996). See also David Scheffer, International Judicial Intervention, 102 Foreign Policy 32, 50 (1996).

[169]/ International Law Commission Commentary, supra note 7, Art. 23.

[170]/ Preparatory Committee Report, supra note 30, ¶ 142. See also Lawyers Committee for Human Rights, supra note 145, at 10 (arguing that Article 23(3) unnecessarily permits a political body, the Security Council, to control the ICC's ability to act).

[171]/ Preparatory Committee Report, supra note 30, ¶ 143; Preparatory Committee Compilation of Proposals, supra note 32, art. 23; Working Paper Submitted by France, supra note 79, art. 38(3).

[172]/ The ICC statute will likely have a provision similar to that found in Security Council resolution 827, which stipulated that all states "shall take any measures necessary under their domestic law to implement the provisions" of the statute. S.C. Res. 827 (May 25, 1993).

[173]/ Preparatory Committee Compilation of Proposals, supra note 32, art. 22.

[174]/ International Law Commission Commentary, supra note 7, Part 3.

[175]/ Lawyers Committee for Human Rights, supra note 145, at 16.

[176]/ Preparatory Committee Report, supra note 30, ¶ 150.

[177]/ Draft Statute, supra note 7, arts. 27, 35.

[178]/ Draft Statute, supra note 7, art. 34.

[179]/ Draft Statute and International Law Commentary, supra note 7, art. 24.

[180]/ Article 41 of the draft statute "reflects as closely as possible the fundamental rights of the accused set forth in article 14 of the ICCPR." International Law Commission Commentary, supra note 7, art. 41. In addition, the draft statute guarantees a suspect's right "to remain silent, without such silence being a consideration in the determination of guilt or innocence" and "to have the assistance of counsel of the suspect's choice or . . . to have legal assistance assigned by the Court." Draft Statute, supra note 7, art. 26(6)(a).

Article 14 of the International Covenant on Civil Political Rights sets forth an array of rights of accused persons, defendants and convicted persons. These rights include the right to be informed promptly of the charges; the right to communicate with counsel of his or her choosing; the right to adequate time and facilities to prepare a defense; the right to be tried without undue delay; the right, in

general, to be present at trial; the right to legal assistance, including the right to appointed counsel if the accused is unable to pay for counsel; the right to examine the witnesses against him or her; the right to obtain the attendance of defense witnesses; the right to translation of document and proceedings; the right not to be compelled to testify or confess guilt; the right to appeal; and the right to a pardon or reversal based on newly discovered facts showing a miscarriage of justice. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, art. 14.

[181]/ See generally Lawyers Committee for Human Rights, Fairness to Defendants at the International Criminal Court: Proposals to Strengthen the Draft Statute (Aug. 1996).

[182]/ Draft Statute, supra note 7, art. 37(4).

[183]/ Third Report of the Yugoslavia Tribunal, supra note 47, ¶ 50-61.

[184]/ Draft Statute, supra note 7, art. 37(5).

[185]/ See Monroe Leigh, The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused, 90 Am. J. Int'l L. 235, 238 (1996) (arguing that ruling of Yugoslavia Tribunal trial chamber allowing prosecutor to withhold from accused the identity of some witnesses harms prospect for permanent international criminal court).

[186]/ Preparatory Committee Report, supra note 30, ¶ 259.

[187]/ Draft Statute, supra note 7, ¶ 37(1).

[188]/ The Statute for the International Tribunal for Yugoslavia makes no provision for trials in absentia. The Secretary-General's Report states that "[t]here is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with Article 14 of the International Covenant Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence." Secretary-General's Yugoslavia Tribunal Report, supra note 4, ¶ 101.

[189]/ Draft Statute, supra note 7, art.28(2)..

[190]/ See also Scheffer, supra note 168, at 47-48 (describing American initiatives regarding Iraq and Cambodia genocide prosecutions).

[191]/ Statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State, before the House Committee on the Judiciary (June 12, 1996) (available on NEXIS Federal News Service file).

[192]/ See Scheffer, supra note 168, at 49 ("From the Clinton administration's earliest days, the government established a far more positive approach to the concept of an international criminal court than had the previous administration.").

[193]/ In addition, in the early 1950s, the United States representative chaired both sessions of the Committee on International Criminal Jurisdiction. 1951 Draft Statute, supra note 17, ¶ 4; 1953 Revised Draft Statute, supra note 19, ¶ 6.

[194]/ Statement of Conrad K. Harper, supra note 150, at 2-3.

[195]/ 31 Weekly Comp. Pres. Doc. 1840 (Oct. 15, 1995). See also Letter from Jamison S. Borek, Deputy Legal Adviser, United States Department of State to Barbara Paul Robinson, President of the Association of the Bar of the City of New York, dated April 15, 1996 (invoking President Clinton's remarks and stating that "[t]he United States is pursuing a policy consistent with the views of the President"); Statement of Conrad K. Harper, *supra* note 150, at 2 ("the most compelling case for a permanent court is made with respect to war crimes, crimes against humanity and genocide").

[196]/ See House Report on War Crimes Act of 1996, *supra* note 133, at 2177-80 (views of Department of State and Department of Defense on War Crimes Act of 1996).

[197]/ E.g., *Kadic*, 70 F.3d at 242-43.

[198]/ Amicus Curiae Brief of the United States of America in *Prosecutor v. Tadić*, (Case No. IT-94-I-T) at 20 (25 July 1995) (quoted in ICJ Position Paper, *supra* note 37, at ? 5A).

[199]/ Congressional support for international criminal tribunals is also shown through the recent enactment of legislation providing judicial assistance to the International Tribunals for Yugoslavia and Rwanda. This law extends the provisions of U.S. law regarding the extradition of persons to a foreign country to "the surrender of persons, including United States citizens" to the International Tribunals for Yugoslavia and Rwanda. National Defense Authorization Act, Pub. L. No. 104-106, ? 1342, 110 Stat. 486 (1996).

[200]/ Section 1201(d) of the Omnibus Diplomatic Security and Terrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 896, entitled "Consideration of an International Tribunal," states that "[t]he President should also consider . . . the possibility of eventually establishing an international tribunal for prosecuting terrorists."

[201]/ Section 4108 of the Anti-Drug Abuse Act of 1988 provided:

(a) In General. -- It is the sense of the Senate that the President should begin discussions with foreign governments to investigate the feasibility and advisability of establishing an international criminal court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes.

(b) United States Citizens. -- Such discussions shall not include any commitment that such court shall have jurisdiction over the extradition of United States citizens and shall assure that any international agreement shall recognize the rights and privileges guaranteed to United States citizens under the United States Constitution.

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4267, ? 4108 (1988).

[202]/ The Foreign Operations, Export Financing, and Related

Programs Appropriations Act, 1991, Pub. L. No. 101-513, 104 Stat. 2067, § 599E (Nov. 5, 1990) provided as follows:

(a) The Congress finds that--

- (1) the international community has defined as criminal conduct in various international conventions, certain acts such as war crimes, crimes against humanity, torture, piracy and crimes on board commercial vessels, aircraft hijacking, and sabotage of aircraft, crimes against diplomats and other internationally protected persons, hostage-taking, and illicit drug cultivation and trafficking;
- (2) in spite of these international conventions, the effective prosecution of those who commit criminal acts has been seriously obstructed in certain cases because of problems of extradition and differences between the legal and judicial systems of individual nations;
- (3) the jurisdiction of The International Court of Justice extends only to cases involving governments, and not to individual criminal cases;
- (4) the concept of an international criminal court has been under consideration in the United Nations and other international fora for many years, including proposals and reviews undertaken in 1990 by the United Nations General Assembly, the International Law Commission, and the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders;
- (5) the international military tribunals established in Nuremberg, Germany, and Tokyo, Japan, following World War II also establish a precedent for international criminal tribunals; and
- (6) there is a growing movement among nations of the world to formulate their economic, political and legal systems on a multilateral basis.

(b) It is the sense of Congress that--

- (1) the United States should explore the need for the establishment of an International Criminal Court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions; and
- (2) the establishment of such a court or courts for the more effective prosecution of international criminals should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations.

(c) The President shall report to the Congress by October 1, 1991, the results of his efforts in regard to the establishment of an International Criminal Court to deal with criminal acts defined in international conventions.

(d) The Judicial Conference of the United States shall report to the Congress by October 1, 1991, on the feasibility of, and

relationship to, the Federal judiciary of an International Criminal Court.
[203]/ Senate Report, *supra* note 11, ? 2 (S.J. Res. 32).

[204]/ The Resolution provided that: "It is the sense of Congress that (1) the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law; (2) such a court would thereby serve the interests of the United States and the world community; and (3) the United States delegation should make every effort to advance this proposal at the United Nations." Senate Report, *supra* note 11, ? 2 (S.J. Res. 32).

The 1993 hearings also revealed opposition to the proposed ICC. For example, Senator Helms, the present Chair of the Senate Foreign Relations Committee, described the ICC initiative as "an unwise and dangerous proposal" and stated that "I will resist, to the best of my ability, this notion of a permanent international criminal court." Senate Report, *supra* note 11, ? 3.

[205]/ House Report on War Crimes Act of 1996, *supra* note 133, at 2173 (emphasis added). See also Statement of Mark S. Zaid, Esq., before the House Judiciary Committee Subcommittee on Immigration and Claims on H.R. 2587 (June 12, 1996) (available on NEXIS, Federal News Service file).

[206]/ See Louis Henkin, *Foreign Affairs and the United States Constitution* 270 (2d ed. 1996) ("If the proposed International Criminal Court came into existence and the United States adhered to it, United States participation would not be constitutionally troublesome."); Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 1 *Colum. J. Transnat'l L.* 73, 73 (1995) (arguing that "Constitutional objections [to the ICC] are simply poorly reasoned"). But see Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court (Sept. 1991), in Senate Report, *supra* note 11, ? 3 (questioning "whether the United States could participate in an International Criminal Court, or permit its citizens to be tried in such a court, that did not adhere to the full range of protections provided to defendants by the U.S. Constitution as interpreted by U.S. Courts.").

[207]/ *In re Yamashita*, 327 U.S. 1, 7 (1946).

[208]/ House Report on War Crimes Act of 1996, *supra* note 133, at 2172.

[209]/ Article III, section 1 of the US Constitution states that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

[210]/ See *Hirota v. MacArthur*, 388 U.S. 197, 198 (1948) (denying habeas corpus writs brought by Japanese citizens being held in custody by the Tokyo war crimes tribunal because "the tribunal sentencing these petitioners is not a tribunal of the United States."); Henkin, *supra* note 206, at 268 ("If an international criminal court sat outside the United

States and imposed punishment outside the United States, it would not be exercising judicial power or other governmental authority of the United States."); National Defense Authorization Act, Pub. L. No. 104-106, § 1342(a)(4), 110 Stat. 486 (1996) (Yugoslavia and Rwanda tribunal implementing legislation stating that "[t]he Federal Rules of Evidence and the Federal Rules of Criminal Procedure do not apply to proceedings for the surrender of persons [to the Yugoslavia or Rwandan Tribunals.]").

[211] E.g., *Ahmed v. Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990) (in evaluating extraditee's habeas corpus challenge, district court should not consider the fairness of the foreign country's laws or the manner in which these laws are enforced).

[212] *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam).

[213] Preparatory Committee Report, *supra* note 30, ¶ 32.

[214] See Stacy Sullivan, *Bosnia's Most Wanted Mostly Accessible: War Crimes Suspects Maintain High-Profile in Croat-Run Town, but Police Pay No Mind*, *Washington Post*, Nov. 27, 1996, at A21.