REPORT ON THE PROPOSED INTERNATIONAL CRIMINAL COURT

by THE COMMITTEE ON INTERNATIONAL LAW AND
THE COMMITTEE ON INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

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 statute7 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 specialists20 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 tribunal45 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 75 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 Duško 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 Conventions65 and Protocols66 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 Convention72 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.
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> 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 depositary 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 90 days of the provisional arrest, although the 90-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 "vitiated 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 then 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

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 Crimes131 both apply the laws of war to purely internal conflicts. In addition, the Appeals Chamber for the International Tribunal for Yugoslavia in the Tadic 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 Tadi 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 court157). 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 accomodating 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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