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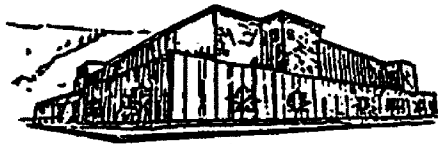
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ASSESSING AMERICAN OBJECTIONS TO
THE INTERNATIONAL CRIMINAL COURT

by

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B.A. University of Maryland, MD. 1990

submitted in partial fulfillment of the requirements for the degree of

Master of Arts

The University of Montana

June 2001

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Assessing American Objectives to the International Criminal Court (253 pp.)

Director: Forest L. Gieves *F.L.G.*

In 1998, the United Nations finalized an International Criminal Court (ICC) Statute. The purpose of this Statute is to create an international tribunal through which the international community could investigate, and, if required, prosecute crimes of genocide, war crimes, and crimes against humanity. An overwhelming majority of the United Nations delegates signed the treaty Statute, with the United States being one of only seven states to oppose the Statute. This study examined the thesis posited by the United States that deficiencies in the institutional structures of the ICC will render the criminal court unable to accomplish its stated objectives of punishing and deterring the worst forms of international criminal atrocities. The study's scope was limited to examining four aspects of the Statute: the jurisdiction, the criminal subject matter, the Prosecutor's office, and the role assigned by the ICC for the United Nations Security Council.

The greatest developments in international criminal law come from the two world wars and the efforts they inspired to punish war criminals. World War II's Nuremberg trials overturned the centuries old practice of granting international criminal immunity to heads-of-state through the conviction of Nazi war criminals. After Nuremberg, for the first time in international law, individuals could be held criminally liable for crimes against humanity, war crimes, and genocide.

Unlike the Nazi trials at Nuremberg, which were made possible by the occupation of Germany by the victorious Allies, the ICC must rely on state cooperation to investigate, apprehend, and prosecute defendants. An independent prosecutor, with the power to investigate information from all sources and decide which cases to try, will complicate the functioning of the ICC. Additional problems for the ICC are created by the lack of specificity of the crimes defined within the Statute. As the only institution capable of forcing states to comply with the dictates of the world criminal court, the Security Council must protect citizens from their own governments by referring the most heinous international atrocities to the ICC for prosecution.

The most serious weakness of the ICC Statute, the ICC jurisdiction exposes peacekeeping forces operating in foreign countries to potential ICC prosecution, yet allows states to exempt its forces from war crimes prosecution while charging another country for those same crimes. While purporting to preserve national sovereignty, the Statute actually allows the ICC to sit in judgment of national courts. The result may be disastrous as states, unwilling to allow their courts to be judged, refuse to cooperate with the ICC, resulting in an ineffective international criminal court unable to prosecute or deter war crimes.

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CHAPTER 1

INTRODUCTION

On July 17, 1998, as the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, one hundred and twenty nations voted for the adoption of the Statute creating a permanent International Criminal Court (the "ICC" or the "Court").¹ The United States joined six other nations in voting against the treaty, while twenty-one nations abstained in the vote. The Statute enters into force after sixty states officially ratify it. Thus far, over twenty nations have ratified the treaty.² U.S. leaders have made it clear their nation will not be one of them.³

The United States objects to perceived legal deficiencies in the Statute that the U.S. claims will ultimately undermine the effectiveness and purpose of the ICC.⁴ This study examines the thesis postulated by the United States that certain deficiencies in the

¹ United Nations, "Rome Statute of the International Criminal Court," 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53rd sess., 1998, U.N. Doc. A/CONF.183/9 (hereafter cited as ICC Statute; See copy of Rome Statute in appendix.)

² United Nations, "Rome Statute of the International Criminal Court, Ratification Status," United Nations Official Website, [ratification status on-line]; available from <http://www.un.org/law/icc/statute/status.htm>; Internet; accessed 16 May 2001.

³ Congress, Senate, Committee on Foreign Relations, Subcommittee on International Operations, Is A U.N. International Criminal Court in the U.S. National Interest? 105th Cong, 2nd sess., 23 July 1998, 1-65.

⁴ Ibid.

ICC Statue will produce a flawed criminal court that will be unable to achieve its objectives of punishment and deterrence for the worst forms of international criminal atrocities. The scope of the thesis is limited to examining four aspects of the ICC Statute that form the core of the U.S. objections:

- (1) The jurisdiction of the ICC;
- (2) The authority and powers of the Office of the Prosecutor;
- (3) The role of the United Nations Security Council; and,
- (4) The crimes that the ICC will be enforcing.

U.S. Ambassador-at-Large for War Crimes Issues, David Scheffer, who led his country's delegation at the Rome Conference, described the U.S. objections as follows:

Unfortunately, a small group of countries, meeting behind closed doors in the final days of the Rome conference, produced a seriously flawed take-it-or-leave-it text, one that provides a recipe for politicization of the Court and risks deterring responsible international action to promote peace and security. Most problematic is the extraordinary way the Court's jurisdiction was framed at the last moment. A country whose forces commit war crimes could join the treaty but escape prosecution of its nationals by "opting out" of the Court's jurisdiction over war crimes for seven years. By contrast, a country that does not join the treaty but deploys its soldiers abroad to restore international peace and security could be vulnerable to assertions that the Court has jurisdiction over acts of those soldiers.

Under the treaty, the Court may exercise jurisdiction over a crime if either the country of nationality of the accused or the country where the alleged crime took place is a party to the treaty or consents. Thus, with only the consent of a Saddam Hussein, even if Iraq does not join the treaty, the treaty text purports to provide the Court with jurisdiction over American or other troops involved in international humanitarian action in northern Iraq, but the Court could not on its own prosecute Saddam for massacring his own people.⁵

In an address to the UN Sixth Committee, he said:

⁵ David Scheffer, "America's Stake in Peace, Security and Justice," 31 August 1998; quoted in Leila Sadat Wexler and others, "Panel discussion: Association of the American Law Schools Panel on the International Criminal Court," American Criminal Law Review 36 (1999): 260.

All of us in Rome shared a common goal that an international court should be able to prosecute tyrants who commit mass murder, mass rape, or mass torture against their own citizens, while at the same time not inhibiting States from contributing to efforts to help protect international peace and security. The irony of the Rome outcome on Article 12 is not lost on us.

Consider the following. A State not a party to the treaty launches a campaign of terror against a dissident minority inside its territory. Thousands of innocent civilians are killed. International peace and security are imperiled. The United States participates in a coalition to use military force to intervene and stop the killing. Unfortunately, in so doing, bombs intended for military targets go astray. A hospital is hit. An apartment building is demolished. Some civilians being used as human shields are mistakenly shot by U.S. troops. The State responsible for the atrocities demands that U.S. officials and commanders be prosecuted by the international criminal court. The demand is supported by a small group of other states. Under the terms of the Rome treaty, absent a Security Council referral, the court could not investigate those responsible for killing thousands, yet our senior officials, commanders, and soldiers could face an international investigation and even prosecution.⁶

The U.S., while supporting the ICC in principle, remains opposed to its creation.⁷

The U.S. objects to the overly broad scope of the Court's jurisdiction and the authority of the prosecutor, and the inadequate role assigned to the United Nations Security Council. The concern of the U.S. is that an unrestrained Prosecutor's Office will be drawn into political controversies within intrastate and interstate conflicts.⁸ Additionally, prospects for the ICC's success are made more difficult by definitional problems within the criminal subject matter of the Court.

⁶ David Scheffer, "The International Criminal Court Remarks Before the 6th Committee of the 53rd General Assembly," 21 October 1998; quoted in Wexler, "Panel Discussion," 260.

⁷ David J. Scheffer, "Developments in International Criminal Law: The United States and the International Criminal Court," The American Journal of International Law 93 (January 1999): 13.

⁸ *Ibid.*, 14.

In regard to the ICC's jurisdiction the thesis examines the following question:
Does the jurisdictional scheme of the ICC support the U.S. contention that the worst forms of interstate violations of humanitarian law will be largely outside the jurisdiction of the ICC, while exposing a nations' peacekeepers operating in a humanitarian mission to the potential risk of prosecution by the ICC?

The thesis also assesses the U.S. claim that the ICC Prosecutor's authority is overly broad and contains too few checks and balances. Furthermore, the thesis assesses the U.S. contention that too little authority is given to the Security Council in determining what cases come before the Court. Finally, the thesis examines theoretical problems associated with the lack of clarity and preciseness in the ICC's definition of crimes that may undermine perceptions that the ICC is operating under the Rule of Law.⁹ The research will be on two levels. First, the research will review the history of war crimes trials following the First and Second World Wars to gain a greater understanding of the unique issues, problems and difficulties associated with international criminal trials. Second, the research will analyze the language of the disputed articles of the ICC Statute that are the source of U.S. objections.

Chapters 2 and 3 describe the historical background behind the ICC's creation. Chapter 2 is in three sections. The first section examines the nature and scope of the laws of war that form the foundation of the law that the ICC is enforcing. The second section examines the post-World War I efforts to punish German and Turkish suspected war criminals for violations of the laws of war. The third section of chapter 2 examines

⁹ William K. Lietzau, "Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court," Cornell International Law Journal 32 (1999): 478.

the developments of international criminal law during the interwar period between the First and Second World Wars.

Chapter 3 describes the successful post-World War II war crimes trials that prosecuted German and Japanese nationals for war crimes. The trials examined include the judicial prosecutions of the International Military Tribunal (IMT), better known as the Nuremberg trials, the International Military Tribunal for the Far East (IMTFE), or the Tokyo trials, and the Allied prosecutions conducted in Germany under Control Council Number 10.¹⁰ Chapter 3 concludes with the developments in international criminal law in the period following World War II leading up to the initiation of proposals to establish the ICC in the late 1980's.

The purpose of Chapters 2 and 3 is to introduce to the reader the concept of international war crimes tribunals while highlighting the unique legal and political issues and difficulties involved in creating such courts. These two chapters will also trace the developments of substantive international law in the last century that form the legal foundation upon which the ICC is based. This discussion sets the context for an examination of the U.S. objections to the International Criminal Court created by treaty in Rome in 1998.

Chapter 4 assesses specific United States objections to the ICC Statute. The chapter opens with a summary of the official U.S. position regarding the type of court sought by the U.S. prior to the start of the Rome Conference in 1998. Next, the chapter describes the key U.S. positions on the ICC's jurisdiction, the Prosecutor, and Security

¹⁰ M. Cherif Bassiouni, "From Versailles To Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," Harvard Human Rights Journal 10 (Spring 1997): 11-12.

Council's relationship with the ICC. Chapter 4 then describes the general institutional features of the ICC Statute as finalized at the Rome Conference. Finally, the chapter examines the actual language of articles pertaining to the jurisdiction, the Prosecutor's functions, and the role of the Security Council. The goal of analyzing the language of the ICC's Articles is to assess the validity of U.S. claims about how the Court will function, or as the case may be, how the Court will malfunction. Specific articles examined include Articles 12, 13, 14, 15, 16 and 124.

Chapter 5 focuses on problems of the ICC's criminal definitions with respect to the principle of legality. In particular, the chapter examines the problem of the ICC's crimes from a theoretical perspective using legal theorist Lon Fuller's analysis of the rule of law. In the context of the theoretical problems with the ICC's definition of crimes, the critique of Major William K. Lietzau, the Deputy Legal Counsel to the Chairman of the U.S. Joint Chiefs of Staff is explored. Major Lietzau has raised concerns that the lack of clarity and preciseness in the ICC's definition of crimes will cast doubt that the ICC is operating under the Rule of Law.¹¹ Such a determination would undermine international confidence in the Court and weaken its effectiveness. Chapter 6 presents the conclusion of the assessment and restates the major points of each chapter.

The ICC's creation is the culmination of a century long development in international law. At the first Hague Conference in 1899, a Russian proposal to establish a compulsory court to resolve international disputes had been roundly opposed, not just

¹¹ Lietzau, 478.

by the U.S., but also by all the major world powers.¹² Nearly a hundred years later, the U.S. is again opposed to the idea of an international court, only this time the U.S. is nearly alone in its opposition.¹³ The passage of two world wars, the Nuremberg trials, genocide in Rwanda, and mass war crimes in Yugoslavia in the early 1990's has radically altered world opinion regarding the viability of a world criminal court.

The Rome Conference and the adoption of the ICC Statute represented a truly extraordinary achievement both in terms of actual drafting and composition of the treaty and the developments it portends in international criminal law. One scholar described the Statute's creation, in a phrase borrowed from international legal expert Richard Falk, as a "Grotian moment" in international law; the Statute's creation was a momentous leap forward in the progress of the law of nations.¹⁴

From a purely compositional and technical standpoint the task of finalizing the Statute was Herculean. The Court Statute was finalized and adopted in just over a month, from June 15 to July 18, 1998.¹⁵ One hundred and sixty countries, 137 non-governmental organizations, and 2000 delegates worked simultaneously in six lan-

¹² While the Russian plan's tenth article introduced at the First Hague Conference in 1899 called for the powers to submit minor quarrels to arbitration, thus ferreting out issues of "high politics" from judicial review, the radical element of the proposal was its compulsory nature which made the submission of disputes obligatory upon all nations. See Calvin DeArmond Davis, The United States and The First Hague Peace Conference (Ithaca: Cornell University Press, 1962), 146- 213.

¹³ Although the final vote on July 17, 1998 for the adoption of the ICC Statute was non-recorded, after the vote the U.S. State Department announced in a press conference that the U.S. had voted against the treaty. See United States, Department of State, Daily Press Briefing 20 July 1998, available from <http://www.secretary.state.gov/briefings/9807/980720db.html>; Internet; accessed 16 May 2001.

¹⁴ Wexler, "Panel Discussion," 235.

¹⁵ "ICC Statute."

guages with a 173-page draft statute containing 116 articles and 1,300 brackets for optional provisions and word choices.¹⁶ The result was, admittedly and expectedly, a Court that is not a perfect institution.

Professor Leila Sadat Wexler, a participant at the Rome conference, has stated that “the first thing one observes in glancing at the Statute is how complicated it is.”¹⁷ With 128 articles it dwarfs the Nuremberg Charter, which only contained thirteen articles. As an example of the Statute’s complexity, bringing an indictment before the ICC requires referring to Articles 12, 13, 17, 53 and 56.¹⁸ Nevertheless, the ICC’s creation contains elements that have the potential to influence dramatically international law. These elements include supranational judicial, enforcement, and quasi-legislative mechanisms and functions that will place state and non-state actors in an international judicial body with the authority to put “real people in real jails.”¹⁹

The Statute adopted in Rome produces a comprehensive judicial organization projected to secure convictions for violations of the most serious international crimes. The Statute begins with a Preamble that provides historical reasons for the establishment of an International Criminal Court and sets forth the intention of the Statute:

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

¹⁶ Leila Sadat Wexler, “A First Look at the 1998 Rome Statute for a Permanent International Criminal Court: Jurisdiction, Definition of Crimes, Structure and Referrals to the Court,” in M. Cherif Bassiouni, ed. International Criminal Law, 2d ed., 3 vols. (New York: Transnational Publishers, Inc., 1999), 3: 655.

¹⁷ Wexler, “Panel Discussion,” 235.

¹⁸ *Ibid.*

¹⁹ Wexler, in Bassiouni, International Criminal Law, 3: 656.

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, **Recognizing** that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.²⁰

The ICC, while being the first permanent international criminal court, is not a new idea. In 1474, Peter von Hagenbach was brought before the judgment of 27 judges of the Holy Roman Empire, and found guilty for war crimes against civilians committed by troops under his command.²¹ Similarly, in 1815 a British naval squadron captured the international fugitive Napoleon Bonaparte. However, Napoleon's fate, unlike von Hagenbach's, was exile, and not prosecution before an international criminal court.²²

Yet, while international crimes and tribunals have existed far back into human history, it was the events of the twentieth century that gave rise to deliberate attempts to establish a permanent international criminal court to prosecute effectively international war crimes. The tremendous destruction of lives and property in the two world wars drew public demands for trials to prosecute those responsible.²³

Numerous scholarly treatments of the evolution of the proposal for an international criminal court document the difficulty of transposing the idea into reality.²⁴ All attest to the

²⁰ "ICC Statute," Preamble.

²¹ Paul D Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court," Columbia Journal of Transnational Law 33 (1995): 76-77.

²² Economist, 19 July 1997, 45.

²³ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 17-25.

²⁴ *Ibid.*; 78-148; Bassiouni, "From Versailles To Rwanda, 11-12; Bassiouni, International Criminal Law, 3 vols.; Colleen R. Donovan, "The History and Possible Future of

fact that, until recently, the proposal has had a long and largely disappointing history. Most notable is the dismal failure of the post-World War I efforts to prosecute German and Turkish nationals suspected of war crimes.²⁵

Following the aborted World War I war crimes trials various proposals for a world criminal court were introduced by the International Law Commission and other scholars throughout the 1920's and 30's, all of which met with failure.²⁶ Even the successful post-World War II Nuremberg and Tokyo trials of German and Japanese war criminals raised moral and legal controversies over accusations of victor's justice.²⁷ Nevertheless, anticipa-

International Criminal Law," Brookings Journal of International Law 13 (1987): 89-90; John B. Anderson, "An International Criminal Court - An Emerging Idea," Villanova Law Review 15 (1991): 433-434; Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Alfred A. Knopf, 1992), 8; James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War (London: Greenwood Press, 1982), 5.

²⁵ Willis, 1-176.

²⁶ For example, in 1924 the International Law Association adopted a resolution for an international criminal court providing that "in [its] ... opinion ... the creation of an International Criminal Court is essential in the interests of justice, and ... a matter of urgency." Several objections were raised and the proposal was defeated. The idea was revived after the assassination of King Alexander of Yugoslavia in 1934, and in 1937 a convention was opened for signature on the creation of an international criminal court that would try persons accused of an offence established in the Convention for the Prevention and Punishment of Terrorism. See Leila Sadat Wexler, "The Proposed Permanent International Criminal Court: An Appraisal," Cornell International Law Journal 29 (1996): 571-573.

²⁷ In regard to victor's justice Immanuel Kant noted that "where no tribunal empowered to make judgments supported by the power of law exists," judgments would be determined by might and power as "neither party can be declared an unjust enemy and the outcome of the conflict determines the side on which justice lies." In Plato's Republic, Thrasymachus says "[E]verywhere justice is the same thing, the advantage of the stronger." WWII General Curtis LeMay, who targeted sixty-three Japanese cities for American bombs remarked, "I suppose if I had lost the war, I would have been tried as a war criminal. Fortunately, we were on the winning side." Quoted in Gary Jonathon Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton: Princeton University Press, 2000), 9.

tion was high in various quarters that the international legal precedents set at Nuremberg would translate into the creation of a permanent war crimes tribunal. The Nuremberg and Tokyo tribunals served as both inspiration and as potential models for the idea of a permanent criminal court. However, that anticipation faltered in the post-World War II reality of the Cold War. At that time, neither the USSR nor the United States was particularly interested in establishing an international judicial body with the power to scrutinize their foreign policy military decisions.²⁸

During the Cold War period the idea of a permanent international criminal court was kept alive mostly due to the efforts of international legal scholars. The idea gained renewed support with the breakup of the former USSR and the reports of war crimes and genocide coming out of the Balkans in the early 1990's. The collapse of the Soviet Union and the creation of ad hoc war crimes tribunals in the former Yugoslavia and Rwanda gave momentum to the 1989 proposal by Trinidad and Tobago for a permanent international criminal court.²⁹ In 1989 the UN General Assembly seized upon the idea and commissioned the International Law Commission to produce a draft of such a court.³⁰

²⁸ Bassiouni, "From Rwanda to Versailles," 39; Marquardt, 85.

²⁹ The idea for a permanent international criminal court was revived by Trinidad and Tobago who argued for the merits of such a court to combat international drug trafficking and other transnational crimes. See United Nations, Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN General Assembly Official Records, 44th Sess., Annex 44, Agenda Item 152, 1989, UN Doc. A/44/195, as cited in Mahnoush H. Arsanjani, "Developments in International Criminal Law: The Rome Statute of the International Criminal Court," The American Journal of International Law 93 (January, 1999), 22.

³⁰ United Nations, General Assembly Resolution 44/39, UN General Assembly Official Records, 44th Sess., Supp. No. 48, 1989, UN Doc.A/44/195, 311.

The reports of atrocities in the former Yugoslavia led to the creation in 1993 by the United Nations Security Council of a war crimes tribunal to investigate and prosecute suspected war criminals. One year later genocide in Rwanda led to another Security Council created war crimes tribunal. The General Assembly took advantage of the favorable international support for an ICC and took steps towards its creation.³¹

Following the UN General Assembly's requests, events toward the establishment of a world criminal court moved rapidly. In 1994, the ILC reported back to the General Assembly with an initial draft.³² On December 9, 1994 the General Assembly created an Ad Hoc Committee to initiate a review of the unresolved substantive and administrative issues needed to bring the ILC's draft of the ICC to treaty form.³³ In 1995, the General Assembly, following a recommendation of the Ad Hoc Committee, created a Preparatory Committee (PrepCom) to hold a series of meetings to assist in the work of establishing the ICC. In December 1996 the General Assembly scheduled a date to convene a diplomatic conference to finalize the ICC draft statute and produce a permanent ICC. The international community accepted Italy's offer to host the event, and the conference was set to convene in Rome in July 1998.³⁴

Four years after the completion of the ILC's first draft for the ICC, delegates from countries all over the world, along with over 3,000 non-governmental organizations,

³¹ William S. Shepard, "Restraining Gulliver: American Exceptionalism and the International Criminal Court," Mediterranean Quarterly 11 (2000), 56.

³² United Nations, Report of the International Law Commission on the Work of the Forty-Sixth Session, UN General Assembly Official Records, 49th Sess., Supp. No. 10, 1994, UN Doc. A/49/10, 44.

³³ United Nations, General Assembly Resolution 49/53, UN General Assembly Official Records, 49th Sess., Supp. No. 49, 1994, UN Doc. A/49/49, 239.

³⁴ Ball, 195.

met in Rome in June and July of 1998 to finalize the draft statute and create a treaty establishing the world's first permanent international criminal court. In the last half of the last decade of the twentieth century the international community accomplished in under a decade what it could not accomplish in seventy-five years.

CHAPTER 2

IMPETUS FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

Throughout the twentieth century proponents of a permanent international criminal court have sought to make their vision of establishing such a court a reality. Following the First and Second World Wars efforts were made to create international tribunals to prosecute war crimes committed during those wars. The World War II war crimes tribunals in Nuremberg, Germany, marked the first time in the modern era that the international community attempted to hold individuals and states accountable for serious violations of international law.¹ The legacy of Nuremberg made the International Criminal Court (ICC) possible.² The purpose of this chapter is to explore the evolution of the twentieth century efforts to create a permanent international criminal court by examining their development through history. This discussion will set the context for an examination of the U.S. objections to the International Criminal Court created by treaty in Rome of 1998.³

¹ Paul D Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court," Columbia Journal of Transnational Law 33 (1995): 83.

² United Nations, "Rome Statute of the International Criminal Court," 17 July 1998. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53rd sess., 1998, U.N. Doc. A/CONF. 183/9 (Hereafter ICC Statute or Rome Statute).

³ Ibid.

The following chapter contains three sections. The first section examines the nature and scope of the laws of war. The second section studies the post-World War I efforts to punish German and Turkish suspected war criminals. Section three explores the developments of international criminal law during the interwar period between the First and Second World Wars. The purpose of this chapter is to describe the historical background of the post-World War I attempts at conducting international war crimes, and to explore the developing law these courts were endeavoring to enforce.

The Laws of War: Beginnings of Codification

The remarkable events of the twentieth century that have led to a permanent world criminal court are best punctuated by the two World Wars and the post-war attempts to introduce international accountability for crimes committed in the conduct of those wars. The more successful of the efforts to punish war criminals followed the Second World War with the Nuremberg and Tokyo war crimes tribunals. The International Military Tribunal (IMT) at Nuremberg, the International Military Tribunal in the Far East (IMTFE), and succeeding Allied prosecutions provided significant international legal precedents necessary for the ICC's creation.⁴

But what law were these international criminal tribunals enforcing? National legal systems are based on laws created by sovereign nations. International tribunals, including the IMT, are not the products of any national system. The IMT was created by the United States, Great Britain, France and the Soviet Union, and the laws adjudicated

⁴ M. Cherif Bassiouni, ed. International Criminal Law, 2d ed., 3 vols. (New York: Transnational Publishers, Inc., 1999), 1: 21-23.

by the IMT were based on international “laws of war,” breaches of which are referred to as “war crimes.” However, Nuremberg while almost synonymous with “war crimes” in our culture, is not the source of these “laws of war.”

Traditionally, international law governed relations among nation-states, not individuals.⁵ Thus, while nation-states could be held liable to pay reparations for breaches of international law, national leaders that authorized the violations were considered beyond its jurisdiction. Criminal law systems were largely confined to national law, even if the criminal actions were international in nature. Consequently, criminal jurisdiction was territorially based, and state jurisdiction was limited to acts committed on its territory or vessels flying its flag.⁶

Nevertheless, certain international conduct by individuals has long been universally recognized as criminal, thus enabling states to prosecute even in the absence of territorial jurisdiction. It was typically the case that if a country could gain custody of an individual then a trial could occur. The problem then became one of apprehending the accused. Two of the earliest crimes recognized as permitting universal jurisdiction for state prosecution are piracy and the slave trade. Piracy in international law is considered outside the protection of any state such that any state may arrest and

⁵ Colleen R. Donovan, “The History and Possible Future of International Criminal Law,” Brookings Journal of International Law 13 (1987): 89-90.

⁶ John B. Anderson, “An International Criminal Court - An Emerging Idea,” Villanova Law Review 15 (1991): 433-434.

prosecute individuals for acts of piracy no matter where they are found.⁷ Violations of the laws of war also warrant state prosecution of individuals even if the conduct occurred outside of a nation's territory.⁸

However, up until the twentieth century prosecution for these few international crimes was limited to national criminal courts. International criminal tribunals were virtually non-existent.⁹ The First and Second World War changed that fact. Out of the aftermath of the suffering and destruction wrought by the two World Wars grew the idea of creating a permanent international criminal court to try individuals for violations of the laws of war.

The twentieth century, beginning one year after the first Hague Convention in 1899, is infamous as both the deadliest century in recorded human history, and the century in which humanity did the most to create laws and institutions to protect humanity from the barbarity of their fellow man. It was most remarkable for criminalizing the

⁷ While piracy has long been viewed as a serious international problem meriting universal condemnation, criminal prosecution and prevention poses numerous practical and legal difficulties for nation-states. See Rupa Bhattacharyya, "Establishing a Rule-of-Law International Criminal Justice System," Texas International Law Journal 31, no. 57 (1996): 66.

⁸ The Romans and Greeks prohibited certain actions in the conduct of war. For example, the Greeks prohibited poisoning of springs and wells. See "Remigiusz Bierzanek, War Crimes: History and Definition," in Bassiouni, International Criminal Law, 3: 87.

⁹ There have been exceptions, but they have been rare. In 1474, an international tribunal consisting of 22 judges from the Holy Roman Empire condemned Peter von Hagenback to death for permitting his troops to attack civilians. See Robert B. Rosenstock, "1994 Mclean Lecture on World Law: The Proposal for an International Criminal Court," University of Pittsburgh Law Review 56 (Winter 1994): 271; Possibly the first recognition in "modern times" that an international tribunal might be useful in fighting international crime was at the Congress of Vienna in 1815 during discussions on the suppression of the slave trade. See Anderson, 433.

very notion of war, thus turning back centuries of state and society acceptance of war as a state prerogative, a sentiment most eloquently espoused by Clausewitz when he wrote, “War is the continuation of politics by other means.”¹⁰

Within this revolutionary change in criminalizing war, three major developments in international law occurred. First, international law prior to the twentieth century had legally recognized states as having complete sovereignty, which meant they were not bound by any outside authority or law for which they did not grant their consent. This meant that the laws of one nation could not bind another. Force alone determined if one nation ruled over another.¹¹

Ancillary to this principle is that states enjoyed complete freedom within their domestic jurisdiction in that nations could not intervene in the affairs of other states regardless of how states treated their nationals. Second, individual actions performed through state sanction were immune from international prosecution with one exception, that being the laws of piracy on the high seas, which was universally condemned and punishable. Therefore, heads-of-state and military commanders were not criminally liable in international law for the actions of their militaries. This principle of sovereign immunity for heads of state prevented their prosecution for conduct committed while

¹⁰ Carl von Clausewitz, On War, quoted in David Marcella, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law,” Michigan Journal of International Law 20 (Winter 1999): 341.

¹¹ H. Lauterpacht, The Function of Law in the International Community (Oxford: Clarendon Press, 1933); reprint Hamden, CT: Archon Books, 1966), 1-21 (page citations are to the reprint edition).

serving in their official capacities. Third, the laws of war at the beginning of the century only applied during armed conflict in war. Yet, as the century progressed the laws of war expanded to include the protection of individuals, both combatants and non-combatants, within the context of officially declared wars, as well as outside official state declaration of hostilities against another state.¹²

The Treaty of Westphalia (1648) at the conclusion of the Thirty Years War (1618-1645) is generally acknowledged as the starting point for the emergence of the modern state system. Usage and practice of rules governing the exercise of hostilities gradually became the laws of war. The core elements of the laws of war were mostly unwritten and known as “customary law.” Prior to the nineteenth century these customary laws of war were largely uncoded.¹³ Among the first attempts to codify and embody the laws of war into an officially adopted code occurred in the United States during the Civil War.¹⁴

Francis Lieber, a German émigré to the U.S., is credited with the first codification of the law of war. After emigrating from Germany to America, he became a legal United States citizen in 1832. He later became a professor in South Carolina before moving to New York in 1857, where he secured a professorship at the newly created Columbia Law School. A visit to a wounded son in Tennessee led to a chance meeting

¹²Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds., The Laws of War: Constraints on Warfare in the Western World (New Haven: Yale University Press, 1994), 1-11.

¹³ Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Alfred A. Knopf, 1992), 8.

¹⁴ Ibid., 8; Howard, Andreopoulos, and Shulman, 6.

with General Henry W. Halleck, who was impressed with Lieber's combination of legal, political, and military interests.¹⁵

Later, upon becoming military advisor to President Lincoln, Halleck, himself the author of an international law treatise, appointed Lieber to draft "a code of regulations for the government of [U.S.] Armies in the field of battle authorized by the laws and usages of war."¹⁶ The results were issued by President Lincoln as General Orders No. 100, entitled "Instructions for the Government of Armies of the United States in the Field."¹⁷ For over half a century they remained the official United States army code of conduct on the laws of land warfare. As the first comprehensive codification of the laws of war, the Lieber Code figured significantly in the first international codification for War Crimes at the First Hague Peace Conference in 1899.¹⁸

The Hague Conference in 1899 is notable for two major developments in international relations and law. The first major development was the internationalization of the laws of war, or at least what passed for international at that time.¹⁹ The 1899 conference produced the first general international codification on the laws of land

¹⁵ Taylor, 9.

¹⁶ Ibid; Howard, Andreopoulos, and Shulman, 6.

¹⁷ Taylor, 9.

¹⁸ Ibid., 10; W. Michael Reisman and Chris T. Antoniou, *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (New York: Vintage Books, 1994), 131.

¹⁹ Only twenty-six states, predominately European, participated in the 1899 conference. Inis Claude Jr., referred to this "international" gathering of heads of state as a "Board of Directors of the European corporation." Inis L. Claude, Jr., Swords Into Plowshares: The Problems and Progress of International Relations, 4th ed. (New York: Random House, Inc., 1971), 29.

warfare ever concluded in the form of a multilateral treaty.²⁰ The “Convention with Respect to the Laws and Customs of War on Land” was signed by the United States, Mexico, Japan, Persia, Siam, Great Britain, France, Germany, Russia, and fifteen other European nations.²¹ The 1899 conference also produced a Convention on Maritime War, and three prohibitory declarations on the use of explosives dropped from balloons, on the use of asphyxiating gases released from projectiles, and on expanding dum dum bullets.²²

The second major development represents the most ambitious effort at the 1899 Hague conference.²³ The third committee at the 1899 conference labored from late May to the close of July to address the proposal to create a permanent international court. On May 26, the second meeting of the third committee had their first serious discussion of the plan for that session, of which the first sentence read:

The contracting nations will mutually agree to submit to the International Tribunal all questions of disagreement between them, excepting such as may relate to or involve their political independence or territorial integrity.²⁴

Additionally, the idea was proposed that states should accept obligatory jurisdiction, a non-voluntary and compulsory method of forcing states to resolve their disputes before

²⁰ Adam Roberts, “Land Warfare: From Hague to Nuremberg,” in Howard, Andreopoulos, and Shulman, 121.

²¹ Taylor, 10.

²² Reisman, 49, 57-58, 130-132.

²³ Calvin DeArmond Davis, The United States and The First Hague Peace Conference (Ithaca: Cornell University Press, 1962), 137.

²⁴ James B. Scott, The Hague Peace Conference, vol. 2 (Boston: Ginn, 1910), 2: 15; quoted in Davis, 137.

a neutral arbitrator.²⁵ The proposal never had a realistic chance of being approved.²⁶ The United States was opposed to any international court that would sit in judgment of its actions, claiming as a defense the principle of national sovereignty.²⁷ Nor was the U.S. the only state unwilling to sacrifice national sovereignty to an international organization.²⁸ The European states likewise were unwilling to forego their sovereign rights as a nation to be the ultimate judge of their own actions.

In 1907 at the second Hague Convention forty-four nations attended, including the majority of Latin American states. The second conference constituted the most universal gathering of nations to date as stated by the president of the conference: "This is the first time that the representatives of all constituted States have been gathered together to discuss interests which they have in common and which contemplate the good of all mankind."²⁹

Many believed that the two Hague Conferences marked the first stage in the gradual evolution of global cooperation among states.³⁰ The American delegate, Joseph H. Choate, commented on the expectation of regular and future conferences:

Friends of peace, friends of arbitration, may now depend upon it that every seven to eight years there will be a similar conference, and that where the last conference left the work unfinished the new conference will take it up, and so progress from time to time be steadily made...³¹

²⁵ Davis, 137.

²⁶ Ibid.

²⁷ Ibid., 138.

²⁸ Ibid., 138-140.

²⁹ Claude, 29.

³⁰ Ibid., 32

³¹ James B. Scott, ed. American Addresses at the Second Hague Peace Conference, (Boston: Ginn, 1910), xxv., as quoted in Claude, 31.

However, the First World War shattered the expectation by Choate and others for a future conference in Hague in 1915.

Yet, while the Hague Conferences failed to secure a lasting peace, they did set a precedent for international organization designed to solve difficult problems of international cooperation and peace through the creation of institutions to aid in the regulation of conduct between nation-states.³² The Hague approach, which recognized the need for international cooperation among nation-states, dominated international relations in the twentieth century.³³

Still, at that time the two Hague conferences were considered by many to be a complete failure.³⁴ The London Times newspaper wrote that the 1907 conference “was a sham, and has brought forth a progeny of shams, because it was founded on a sham.”³⁵ Nonetheless, the Hague meetings are considered to be a turning point in international efforts to use the rule of international law to regulate war.³⁶ Although efforts to reduce armaments ended in failure, the conferences did produce a number of agreements to internationalize both preexistent and new laws and regulations for fighting wars.³⁷ There was never real consideration of governments relinquishing their sov-

³² Claude, 35.

³³ Ibid.

³⁴ Davis, 209-213; For an alternative perspective, see Willis, 3-6.

³⁵ Scott, ed. *American Addresses at the Second Hague Peace Conference*, xiii; as quoted in Claude, 29.

³⁶ Claude, 28-34; Davis, 209-213; Taylor, 8-11; James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War (London: Greenwood Press, 1982), 5.

³⁷ Claude, 30; Willis, 6.

ereign legal right to make war, but the establishment of a Permanent Court of Arbitration and a Convention for the Pacific Settlement of Disputes advanced the still radical concept of states seeking peaceful remedies for the resolution of disputes rather than resorting to redress of grievances by armed force and war.³⁸

The greatest achievements of The Hague conferences were in developing laws designed to mitigate the more horrific effects of modern warfare through the laws governing the use of force in war.³⁹ Customary international law restraining excessive violence on the battlefield had been recognized for centuries, and efforts at codification of these laws of war had been underway even prior to the national militaries adopting such rules of war, the first being Lieber's United States General Orders No. 100 drafted for guidance of Union armies during the American Civil War.

Comprehensive international agreements on the laws of war were adopted for the first time by governments at the Hague conferences.⁴⁰ The two Hague Conventions on the Laws of War on Land in 1899 and 1907 included numerous provisions that forbade actions such as the bombing of undefended towns, the use of poison gas, the declaration of no quarter, misuse of the flag of truce, assaulting soldiers that have surrendered, mistreatment of prisoners of war, the destruction of enemy property, and permitting occupying armies to abuse enemy civilians.⁴¹ The Convention on the Rights and Du-

³⁸ Davis, 137-145

³⁹ Taylor, 11.

⁴⁰ Ibid., 10.

⁴¹ "Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 18 October 1907, reprinted in Burns H. Weston, Richard A. Falk, and Anthony D'Amato, Basic Documents in International Law and World Order, 2d ed.

ties of Neutral Powers and Persons in War on Land of 1907 provided certain protections to neutral states, including an assurance of the inviolability of territorial integrity of a neutral state.⁴²

The problems of implementing the Hague Conventions relating to the conduct of war, which First World War combatants would grapple with, were numerous.⁴³ One problem is the doctrine of military necessity and reprisal.⁴⁴ Reprisals are actions conducted by states to redress a grievous during times of a peace. The doctrine of military necessity and reprisal grants to states the right to exceptions from strictly obeying the laws of war when retaliating against an enemy or pursuing a military objection.⁴⁵ However, as individual nation-states are left to interpret their own use of reprisals and acts of military necessity, the problem of varying interpretations and circumventions is introduced.

There was also the problem of enforcement. The Hague Conventions contained no criminal sanctions in the event of violations, only claims for compensation. Article 3 of the Convention on the Laws and Customs of War on Land in 1907 made belligerent parties in violation of the laws of war “liable to pay compensation,” and to be “re-

(St. Paul: West Publishing Co., 1990), 128-135 (hereafter cited as 1907 Hague Convention).

⁴² Ibid., 130.

⁴³ Taylor, 11.

⁴⁴ Anthony Clark Arend and Robert J. Beck, International Law and the Use of Force (New York: Routledge, 1993), 17-18; Willis, 6; Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, eds., International Law Cases and Materials 3rd ed. (St. Paul: West Publishing Co., 1993), 570, 870-871.

⁴⁵ Ibid.

sponsible for acts committed by persons forming part of its armed forces.”⁴⁶ Individual soldiers would be punished as they had been in the past, in accordance with the military laws and courts of each state.

Participants at The Hague conferences never conceived of creating an international criminal court to prosecute war crimes.⁴⁷ Instead, the 1907 Conference created an International Prize Court for the resolution of disputes between states arising out of captured merchant ships and cargoes in war at sea, but the court was never established. The failure to establish the Prize court was due to governments’ reluctance to sacrifice state sovereignty. This fundamental problem weakened the effectiveness of the Hague Conventions. The inherent problem of limiting the power of sovereign states through international law is captured by John Randolph, who stated, “You may cover whole skins of parchment with limitations, but power alone can limit power.”⁴⁸

Thus, when the First World War broke out in Europe no acknowledged international law existed that made states or individuals criminally liable for violating the laws of war. But the Hague Conventions had internationalized the subject of limiting war through international laws and opened up the possibility of limiting state sovereignty, a major breakthrough in the development of international relations and criminal law. The Hague conference had also laid the foundation for extraordinary developments that were to take place in the political and public mindset regarding war crimes during and after the First World War.

⁴⁶ Ibid., 130.

⁴⁷ Davis, 137-140.

⁴⁸ John Randolph as quoted in Hans J. Morgenthau, Politics Among Nations, 6th.

World War I and War Crimes Trials

The First World War represented a significant departure from previous wars for a number of reasons. It was the first war since the two Hague conferences of 1899 and 1907, and called into question many, although not all of the agreements of the Hague Conventions. It was the world's first total war, involving over 65 million combatants from thirty-two nations.⁴⁹ War was fought on the European continent, the Balkans, Africa, the Middle East, the Atlantic and Pacific oceans, and the North Sea. Twenty one million men were wounded, and nine million were killed.

Administratively, the war required increased mobilization of soldiers through conscription and massive coordination of state and industrial resources.⁵⁰ Technologically, the war was fought with improved battlefield communications, newer, deadlier weapons, and improved methods of destruction, including trench and submarine warfare, poison gas, barbed wire, aerial bombardment, machine guns, powerful long-range artillery, tanks, and airplanes.⁵¹ It was the first major industrial war that gave rise to the military industrial complex involving state and industrial cooperation of such large companies as Dupont in the United States, Krupp in Germany, Vickers in Great Britain, and France's Cruesot company.⁵²

ed., (New York: McGraw-Hill Publishing Co., 1948), 189.

⁴⁹ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 17.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

Finally, the war had a strong ideological component that fostered a storm of enemy propaganda.⁵³ The Germans in the early months of the war had managed to generate a considerable amount of hostile world public opinion against them.⁵⁴ First they had attacked neutral Belgium as a means to outflank French defenses in violation of the Belgium neutrality treaty.⁵⁵ The German invasion of Belgium brought with it reports of atrocities and ruthless destruction. The ancient city of Louvain was sacked, and its world-famous library was set afire; civilians were taken hostage, some of whom were shot; and, invading soldiers were alleged to have raped women and killed children. Shortly thereafter, comparable reports were coming in from France regarding alleged German brutalities in that country.⁵⁶

In January of 1915, German zeppelins began bombing raids over England, which resulted in over 200 civilian deaths by the end of the year.⁵⁷ In February 1915, Germany declared a “war zone” around the British Isles and began sinking ships with no warning using their submarines. In April, the passenger ship, the Lusitania was sunk in the Atlantic, and 1,200 lives were lost. That same month the Germans used poison gas for the first time in the battle of Ypres. Later in 1915, the Turkish government, an ally of Germany, began the ruthless deportation and extermination of the Armenians in the Syrian Desert. Then in October the British public was further outraged upon hearing of

⁵³ Ibid.

⁵⁴ Ibid., 17-18,

⁵⁵ Ibid., 18.

⁵⁶ L. Mirman, G. Simon, and G. Keller, Their Crimes (London: Cassel and Company, Limited, 1917).

⁵⁷ Taylor, 11-12; Ball, 16-19.

the execution of Edith Cavell, the director of a Brussels nursing school. The night after Cavell's execution was reported, a German zeppelin raid killed 175 people in Great Britain.⁵⁸

The list of alleged German and Turkish actions was long and sordid, and earned for the Germans the invidious label of "Huns" and their military policies as "frightfulness."⁵⁹ However, in nearly every case, there were serious evidentiary or legal questions" that cast doubt on whether or not the Central Powers' actions constituted "war crimes."⁶⁰ As it turned out, many of the reports regarding German atrocities in Belgium, including indiscriminate murder, rape, and infanticide, were exposed as fraudulent propaganda stories⁶¹ The neutrality treaty of Belgium, violated on the first day of the war by Germany, bore no criminal sanctions, and when Belgium citizens resisted occupation they ceased to be regarded as a neutral country.

The execution of Edith Cavell was the result of her public admission that she had assisted Allied soldiers trapped behind enemy lines to escape. The punishment of Cavell, while severe, did not constitute a legal violation of war crimes. The destruction of Louvain was clearly in contravention of several Hague Convention provisions, but taking and even killing of hostages did not so constitute a violation of the Hague Conventions.⁶²

⁵⁸ Ibid.

⁵⁹ Ball, 18.

⁶⁰ Taylor, 13.

⁶¹ Ibid.

⁶² Ibid.

The zeppelin raids similarly, fell between the gaps of the war crimes violations. The Hague Convention on land warfare prohibited the bombardment of undefended cities, but London was not an undefended city. The declaration of the 1907 Hague Convention prohibiting the discharge of explosives from “balloons, or by other new methods of a similar nature” had never been ratified by Germany, and therefore were not in force.⁶³ There were no agreements regarding the restriction of submarine warfare, excepting protection for hospital ships.⁶⁴

The use of poison or asphyxiating gas, while much less defensible, could be argued as being permissible since the Hague Convention on land warfare only prohibited their diffusion by “the use of projectiles.” The Germans could argue they had used cylinders, not projectiles.⁶⁵ The extermination of the Armenians by the Ottoman Empire was inapplicable to the Hague Conventions as the Armenians were citizens of the Ottoman Empire, and thus were not protected under the terms of any existing convention or treaty. The Hague Conventions were silent regarding the treatment of a nation’s own citizens.⁶⁶ Thus, how the Ottoman Empire treated its own citizens, the Armenians, was the prerogative of the Ottoman Empire.⁶⁷

In one of the most detailed studies of the First World War and war crimes, James

⁶³ “1907 Hague Convention,” reprinted in Weston, Falk, and D’Amato, 128-135.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ The long established principle of territorial sovereignty involves the exclusive right of nation-states to exercise power autonomously within their territory free from external authority or interference. See Henkin, Pugh, Schachter, and Smit, 1-50.

Wilford Garner concluded that with respect to a wide range of state conduct during the war, “the existing conventions are either silent, inadequate, or out of harmony with present-day conditions. There is hardly one of the Hague conventions that cannot be greatly improved in light of the experience of the recent war.”⁶⁸

Nevertheless, three main factors contributed to the favorable political climate for conducting war crimes trials against the Axis powers at the end of the First World War.⁶⁹ First, the public and political leaders in Great Britain and France had been sensitized to the idea of war crimes by Allied and Central Powers’ war crimes trials conducted during the war. The French tried German soldiers for the commission of criminal activity in the plunder of Rheims Cathedral and failing to grant quarter to French soldiers.⁷⁰ German courts tried French and British prisoners of war for their alleged criminal activity, and the British tried German sailors for the waging of unrestricted submarine warfare, treating captured Germans not as prisoners of war, but as war criminals.⁷¹

Second, the fierce propaganda against the German “Huns”, the brutality which Germany conducted the war, and the alleged war crimes committed by the Central Powers nations created a public outcry for their punishment, particularly Germany.

⁶⁸ James Wilford Garner, International Law and the World War, 2 vols. (London: Longmans, Green, 1920) , 2: 463, as cited in Roberts, “Land Warfare: From Hague to Nuremberg,” in Howard, Andreopoulos, and Shulman, Andreopoulos, and. Shulman, 153.

⁶⁹ Ball, 19.

⁷⁰ Ibid.

⁷¹ Ibid.

Third, the Hague Conventions had internationalized and legitimated acceptance of the idea of limiting warfare and punishing transgressors of the laws and customs of war.

Thus, the war crimes issue became the first action of the peace settlement discussions at Versailles in 1919.⁷² At the insistence of Britain's Lloyd George and France's George Clemenceau, the Committee of Enquiry into the Breaches of the Laws of War, comprising fifteen international law jurists from the Allied countries, was created on the first day of the conference on January 18, 1919.⁷³ The Commission was charged with looking at and reporting back to the peace conference delegates on three issues:

- (1) The facts surrounding the responsibility for starting the world war;
- (2) Whether the Central Powers had violated the Hague Conventions or other laws of war; and,
- (3) Proposing a process of trying accused war criminals.⁷⁴

Robert Lansing, the American Secretary of State, chaired the Commission. Lansing was skeptical regarding the efficacy of international law and opposed punishing Kaiser Wilhelm II or establishing a war crimes court.⁷⁵ In March 1919, the Commission reported back its findings. The Commission charged Germany and the Central Powers with widespread violations of the laws of war.⁷⁶ The report also charged that

⁷² Willis, 68; Taylor, 15.

⁷³ Willis, 69.

⁷⁴ Ball, 21.

⁷⁵ Willis, 74.

⁷⁶ "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," 29 March 1919, Report Presented to the Preliminary Peace Conference, American Journal of International Law 14 (1920): 95-96 (hereafter cited as 1919 Commission Report).

the Central Powers had acted with premeditation to launch a “war of aggression” in violation of treaties.⁷⁷

However, the report took notice that launching an aggressive war violated no international laws, but in the future such conduct should be condemned and made a penal offense. In advocating the trial of the Kaiser, the report most notably repudiated the defense of sovereign immunity for state officials in the conduct of warfare. The French and British believed Germany’s head of state, Kaiser Wilhelm II, “was responsible for international crimes and that superior orders might not serve as a defense in every case; [these views] added a new dimension to legal developments in international penal law.”⁷⁸

To implement the war crimes trials, the report recommended creating an international criminal court consisting of judges from all Allied nations to try German and Turkish heads of state and top military commanders for violating the laws of war and the laws of humanity.⁷⁹ The laws of humanity were primarily derived from the Preamble to the Hague Convention of 1907, referred to as the Martens Clause, named after the distinguished Russian international law jurist.⁸⁰ The Commission charged that the

⁷⁷ Ibid.

⁷⁸ Ball, 19.

⁷⁹ Willis, 75; M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” Harvard Human Rights Journal 10 (Spring 1997): 35.

⁸⁰ Ibid.; “1907 Hague Conference,” reprinted in Weston, Falk, and D’Amato, 128. The Martens’ Clause contained in the Preamble of the 1907 Hague Convention reads:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the

Central Power's leadership had violated the laws of war by ordering their militaries to commit illegal acts or had failed to prevent them. The final report listed some 895 alleged war criminals for prosecution, which ultimately were incorporated into the Versailles Peace Treaty in Sections 227 to 230.⁸¹ For the first time in history the Versailles Treaty established the precedent that punishment of war crimes could follow the cessation of hostilities, rather than the traditional granting of general amnesty for civilian and military personnel and leaders.⁸²

The 1910 Commission Report, while unanimous, contained Lansing's resounding "reservations," which in effect amounted to a dissent.⁸³ President Wilson was concerned about "victor's justice," and instructed Lansing to issue a minority report rejecting the creation of a High Tribunal and the trial of the Kaiser.⁸⁴ However, Lloyd George was adamant in announcing he would not sign a peace treaty that did not provide for the trial of the Kaiser. The two sides achieved a compromise, embodied in

rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

⁸¹ Sources conflict as to the number of alleged war criminals listed for prosecution. Telford Taylor stated that the Allies presented a list of 854 individuals. See Taylor, 17; Bassiouni stated that the Allies named 895 war criminals; see Bassiouni, "From Rwanda to Versailles," 26; Remigiusz Bierzanek, "War Crimes: History and Definition," in Bassiouni, *International Criminal Law*, 3 vols. (New York: Transnational Publishers, 1999): 34. Bierzanek states that the number of individuals listed was 901.

⁸² Ball, 22.

⁸³ Taylor, 15.

⁸⁴ Ibid.

Articles 227 to 230 of the Treaty of Versailles.⁸⁵ The compromise however, was not without its detractors. These war crimes sections of the Versailles Treaty were referred to as the “shame paragraphs,” or the Schmachparagraphen by Germany.⁸⁶ Attempts by the post-war German government to implement the “shame paragraphs” resulted in violent political upheavals that threatened to topple the government.⁸⁷

Article 227 called for the creation of a five-member tribunal to try the Kaiser.⁸⁸ One judge from each of the five countries of the United States, Great Britain, France, Italy, and Japan would comprise the five-member tribunal. However, the Kaiser was not charged with war crimes, but rather “a supreme offence against international moral-

⁸⁵ Willis, 80; Carnegie Endowment for International Peace, “The Treaty of Versailles,” The Treaties of Peace, 1919-1923, 2 vols. (New York: Carnegie Endowment for International Peace, 1924), 1:121-122.

⁸⁶ Ball, 23.

⁸⁷ The leader of the British Mission at the Leipzig Trials reported that the post-war German Government convinced the Supreme Council that an attempt to arrest many of those named on the Allies' list of war criminals would bring down the government. Claude Mullins, The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality, (1921): 9, as cited in Bassiouni, “From Rwanda to Versailles,” 19; Ball, 23; Willis, 85.

⁸⁸ “Treaty of Versailles,” Article 227, The Treaties of Peace, 1919-1923, 1:121; Article 227 reads:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

ity and the sanctity of treaties.”⁸⁹ Additionally, the Netherlands, who had granted asylum to the Kaiser, was requested to “surrender to them [Allies] the ex-Emperor in order that he may be put on trial.”⁹⁰ Articles 228, 229 and 230, called for trials of “persons accused of having committed acts in violation of the laws and customs of war” before military tribunals and required the German government to “hand over” the accused to the Allied nations for prosecution.⁹¹ Comparable provisions to that of Articles 228-230 were also written into peace treaties with Austria, Hungary, and Bulgaria.

Section 228 required the German government to “recognize the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.” Such persons, if found guilty, were to “be sentenced to punishments laid down by law.”⁹² Section 229 outlined the process of prosecution for the accused, and Section 230 required Germany and other defeated nations to “furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ “Treaty of Versailles,” Article 228, 229, and 230, Treaties of Peace, 1919-1923, 1:121-122. Article 228 states:

The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies. The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities. (emphasis added)

⁹² Ibid.

incriminating acts, the discovery of the offenders and the just appreciation of responsibility.”⁹³

The trial of the Kaiser never materialized as the Dutch refused to turn over the Kaiser for trial. The Dutch refused on the grounds that the charge against the Kaiser was unknown to Dutch law, and was not contained in any treaties which Holland had ratified. The Allied powers were divided over the wisdom of pursuing the matter fully through formal extradition procedures. Meanwhile, Holland attempted to discourage the Allies from making a formal extradition request. Holland was also bolstered in their refusal by diplomatic indications that the Allied request to hand over the Kaiser would not be backed by coercion.⁹⁴

Netherlands could justify its refusal based on a number of valid legal reasons.⁹⁵ The language of Article 227 only requested that the Dutch “surrender” the Kaiser, and contained no formal extradition language. Article 227 also charged the Kaiser for a crime that was not contained in any international criminal convention. Extradition, properly understood, was a formal legal process that required specification of a crime contained in a formal extradition treaty whereby one person may be transferred from one nation’s jurisdiction to another country’s jurisdiction to stand trial for that crime.⁹⁶

⁹³ “Treaty of Versailles,” Article 229, and 230; Treaties of Peace., 1919-1923, 1:122.

⁹⁴ Taylor, 16.

⁹⁵ Bassiouni, “From Rwanda to Versailles,”19.

⁹⁶ Over a decade later in 1933, the U.S. Supreme Court in Factor v. Laubenheimer, 290 U.S. 276, 287, 54 S.Ct. 191, 193, 78 L.Ed. 78 L.Ed 315 (1933), the court stated that “[t]he principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its constitution and laws, voluntarily exercise power to surrender a fugitive from justice to the country to which he has fled...the legal

Without a specific treaty governing the crime charged to Kaiser Wilhelm II, the Dutch were under no legal obligation to turn over the Kaiser to the Allies. Therefore, the Dutch could characterize the charges brought against Kaiser Wilhelm II as “political” and thus, the Dutch Government had valid legal grounds to reject Allied calls for the Kaiser’s surrender. Consequently, the Dutch refused to turn over the Kaiser, and he never left Holland -- remaining there until his death in 1941 at his castle in Doorn.

Article 227 highlights the highly politically sensitive nature of war crimes issues. It enabled the Dutch legally to refuse compliance with Allied demands, while placating the public who desired punishment of the German Kaiser.⁹⁷ Yet, public outcry in France, Belgium, and Great Britain remained strong for the punishment of German nationals for atrocities committed during the war. However, Lloyd George and Clemenceau were also aware that German anger and resentment to Article 228, which called for Germany to surrender its own citizens for foreign prosecution, was potentially strong enough to topple the fragile Weimar Republic government.⁹⁸ Faced with a difficult choice, George and Clemenceau chose to implement Article 228, and presented

right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty,” as cited in Henkin, Pugh, Schachter, and Smit, 1111.

⁹⁷ Bassiouni, “From Rwanda to Versailles,”19.

⁹⁸ The leader of the British Mission at the Leipzig Trials reported that the post-war German Government convinced the Supreme Council that an attempt to arrest many of those named on the Allies' list of war criminals would bring down the government. Claude, Mullins, The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality, (1921): 9, as cited in Bassiouni, “From Rwanda to Versailles,”19; Ball, 23; Willis, 85.

Germany with a list of over 800 individuals to stand trial, including many German military heroes and political leaders.⁹⁹

Reaction in Germany was one of fierce indignation and defiance. The political crisis was resolved by the German proposal to try the accused individuals before the German Supreme Court in Leipzig. Lloyd George, sensing an opportunity to appease public desires for war crimes trials while helping preserve the fragile Weimar Republic, impressed upon the French the advantages of accepting the proposal. The French agreed with George, and on February 17, 1920, the Germans were duly notified that the Allies had accepted their compromise proposal.¹⁰⁰

Germany, in order to satisfy Allied demands, passed legislation creating national laws to prosecute accused offenders before the Supreme Court. The Allies initially submitted a list with forty-five named individuals to stand trial before the German Supreme Court. Under German law, the Procurator General of the Supreme Court had discretionary authority to decide which cases to bring to trial.¹⁰¹

The Leipzig trials, as they are commonly referred, began on May 23, 1921 with four German enlisted men named by the British. Three men were accused of beating British prisoners with rifle butts. Three of the men were convicted and sentenced to six to ten months in prison. The fourth individual named by the British was a German U-

⁹⁹ Willis, 117.

¹⁰⁰ Taylor, 17; see note 81.

¹⁰¹ Taylor, 17.

boat submarine commander who was acquitted of the charge of sinking a British hospital ship on the defense of following superior orders.¹⁰²

The next case involved a charge brought by the Belgians against a German military policeman accused of torturing young children the policeman had arrested for alleged sabotage. The defendant was acquitted. The outraged Belgians condemned the trials and recused themselves of any further involvement. A similar response was provoked in the French whose case against General Stenger and four lower ranking military officers resulted in the acquittals of the General and three of the other four defendants. During the trials the German public spat upon the French delegates, who withdrew their delegation in protest and also refused further participation.¹⁰³

Of the forty-five individuals named for prosecution in the initial list drawn up by the Allies, only twelve military officers were ultimately prosecuted before the German Supreme Court.¹⁰⁴ Following the initial list of forty-five, the Allies did not participate in, nor held any proceedings against, any of the other 895 individuals named by the 1919 Commission. On January 6-7, 1922, the Germans were informed of a joint Allied declaration that the Leipzig court's decisions would not be considered as valid prosecu-

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Sentences for the convicted ranged from six months to four years. However, several of those convicted had their sentences suspended. The German crowd assembled outside the courtrooms cheered the accused during the trials, hailing the men as heroes and victims of foreign oppression. Consequently, the attempt to use the trials as a deterrent to future violations of humanitarian law failed, and instead devolved into a rallying point for nationalistic sentiment against perceived persecution and humiliation of Germans by the Allies. See Bassiouni, "From Rwanda to Versailles," 20.

tions under the terms of the Versailles Treaty.¹⁰⁵ The declaration also announced that, while repudiating the validity of the Leipzig trials, the Allies reserved all rights under Articles 228-230 of the Versailles Treaty to prosecute suspected German war criminals.¹⁰⁶

Thus, articles 228 to 231 continued to be a source of contention and animosity between Germany and the Allies, especially France.¹⁰⁷ The Allies found the German war crimes trials at Leipzig highly unsatisfactory, and the retaliatory actions taken by France against Germany agitated Franco-German relations throughout the 1920's. The Allies had good reason to believe that Germany had failed to make good faith efforts to prosecute their own war criminals.¹⁰⁸ The German Supreme Court – the Reichsgericht – convicted only a few defendants, and the two most notorious convicted war criminals escaped and disappeared. Even these two convictions were later overturned in a secret session of the Reichsgericht. Great Britain was satisfied to let the matter of war crimes go, favoring reconciliation with Germany over punishment.¹⁰⁹ But Belgium and France pushed ahead for further punishment.

¹⁰⁵ The Inter-Allied Commission on the Leipzig Trials was responsible for reporting on the progress of the trials. After two days of discussion on January 6 and 7, 1922 they issued their report calling the Leipzig trials “highly unsatisfactory.” See Willis, 140, quoting the New York Times, 15 January 1922, 19.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.; Willis, 142.

¹⁰⁸ Ibid.

¹⁰⁹ A majority of British politicians wanted to see the issue of war crimes trials disappear, reflecting the view of a British military intelligence report on the subject: “everybody concerned – most of all the Attorney-General – is only too anxious to let the whole war criminals question sleep. It only brings us trouble both with the French & with the Germans.” See Willis, 140, quoting Foreign Office, “Minute by R. F. Wigram on dis-

Subsequently, France and Belgium conducted hundreds of trials against German war crime suspects. The two countries also used the war crimes issue as a diplomatic weapon to force Germany to comply with the terms of the Versailles Treaty, particularly the war reparations.¹¹⁰ The Belgium and French trials ended completely in 1925 when the Locarno pact formally established German, French, and Belgium borders. Nevertheless, France continued to denigrate Germany by refusing to allow convicted Germans from entering French territory until 1929. German politicians, most notably Adolph Hitler would use these French slights as political capital to engender nationalistic fervor against the Allies in the interwar years. Germany bitterly resented having its soldiers convicted as war criminals by French and Belgium courts, and actively strove to erase the national humiliation they felt at the hands of their Allied victors in World War I.¹¹¹

The Commission also charged Turkish officials and other individuals with “crimes against the laws of humanity” for the 1915 massacres of Armenians.¹¹² The charge of violating the laws of humanity was based on the Martens Clause included in the Preamble of the 1907 Hague Convention. The Martens Clause states:

patch [sic] from Captain Woolcombe to C.H. Tufton,” 14 October 1921, Great Britain, Papers of the Foreign Office, Public Record Office, 371/5864, C20103/29/18.

¹¹⁰ A new French Government, headed by Premier Poincaré took a harsher view toward German war guilt than former Premier Briand. Poincaré sought the court-marshal over 2,000 Germans, and used the issue as diplomatic pressure to continue French occupation of the Ruhr and as means to exact unfulfilled reparation payments from Germany. See Willis, 143.

¹¹¹ Willis, 145.

¹¹² “1919 Commission Report,” reprinted in American Journal of International Law, 95-96.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.¹¹³

Turkey, in response to Allied pressures, convicted two individuals in April 1919 for murdering Armenians.¹¹⁴ However, the Turkish nationalist movement was growing, and Greek atrocities against Turks during that time elicited charges of hypocrisy for prosecuting Turkish individuals while excusing Greek crimes.¹¹⁵ Along with charges of hypocrisy, continued political instability in Turkey prevented further efforts to bring to justice those who had massacred the Armenians in 1915.

On a legal note the case involving the Armenians had serious legal problems as all the potential witnesses were among the massacred, in which case the prosecution was overly dependent on the cooperation of the uncooperative Turkish government.¹¹⁶ As a result of these issues, the Allies declined to seek criminal prosecution, and in 1923 the Treaty of Lausanne officially shielded the Armenians' killers from prosecution with a grant of amnesty.¹¹⁷

¹¹³ "1907 Hague Convention," reprinted in Weston, Falk, and D'Amato, 128.

¹¹⁴ Taylor, 18.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid; Bassiouni, "From Versailles to Rwanda," 17.

Inter-War Period: To Nuremberg

Despite the failure of the war crimes provisions of the Versailles Treaty, the savagery of World War I provoked public demands for new methods of limiting the excessive violence associated with modern warfare. Political leaders at the Paris Peace Conference understood however that any new measures would likely face stiff political opposition from nations more concerned with nationalist self-interests and self-defense. Nevertheless, the interwar period witnessed several efforts aimed at controlling the unrestricted waging of war. The most notable of these efforts were attempts at strengthening the Hague Conventions, defining and outlawing aggressive warfare, codifying international war crimes, and creating a permanent international criminal court. These four issues and the problems they pose for establishing an international criminal justice system are the same ones facing the establishment of the ICC nearly seventy-five years later in the last decade of the twentieth century.¹¹⁸

A meeting of the Advisory Committee of Jurists in 1920 to draft a statute for the Permanent Court of International Justice also looked into the possibility of establishing a permanent criminal court. The Advisory Committee offered as the rationale for setting up a permanent criminal court that only a permanent judicial institution would be largely immune to the political problems that had plagued Allied attempts at pursuing war crimes trials following World War I.¹¹⁹

¹¹⁸ Willis, 164-176; Ball, 30-34; Taylor, 18-20.

¹¹⁹ Willis, 167.

Albert de Lapradelle argued for the merits of an institution that could impartially “take action against those guilty of crimes against international justice, no matter what nation they belonged to.”¹²⁰ Lord Phillimore, who had drafted the first official British plan for the League of Nations, supported such a court believing it would contribute to the League’s goal of reducing international violence. Raoul Fernandes of Brazil, said in a statement that nearly echoes the present day U.S. position opposing the ICC, that “serious technical and political difficulties,” unless adequately addressed, may actually be “a menace to peace.”¹²¹

American jurist Elihu Root, while opposed to granting to the League or its judicial institutions de facto authority of a “super-state,” favored a gradual approach that allowed an international criminal tribunal to grow as states became more confident in the new system’s ability to function.¹²² Root thought that the manner in which the slave trade was increasingly suppressed could serve as a prudent model for how nations might approach the outlawing of international criminal activities.

Although the Advisory Committee was acutely aware of the political and legal difficulties involved in such a proposal, they nevertheless recommended to the newly formed League the creation of a High Court of International Justice to try violations of international law.¹²³ The League’s Assembly ignored the committee’s report and ac-

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.; Benjamin Ferencz, An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis, 2 vols. (New York: Oceana Publishers, 1980), 1:196-224.

cepted it without debate. As the report was submitted at the first meeting, it was not surprising that the Assembly members did not wish to consider a measure that proposed such sweeping changes to the international political system prior to the League's demonstrating its ability to function.¹²⁴ Sovereignty, newly acquired by some nations and so dearly preserved by others during the world war, would not quickly be sacrificed to the altar of an untested, and potentially oppressive, authoritarian international judicial body:¹²⁵

The League was strongly imbued with the Wilsonian conviction that the nation is the natural and proper unit of world politics, and that the only sound and moral basis for international order is a settlement which enables peoples to achieve autonomous existence within a system dedicated to the sovereignty of nations. Sovereignty was not a naughty word for the League; it was a symbol of liberty in international relations, comparable to democracy as a symbol of domestic freedom.¹²⁶

Thus, in the 1920's discussions and debates concerning an international criminal tribunal failed to materialize in the League or among governments.

Instead, the idea was preserved through study by private organizations composed of international lawyers, including Hugh H. Bellot, Vespasien V. Pella, Nicolas Politis, Henri Donnedieu de Vabres, Megalos Caloyanni and Quintiliano Saldaña.¹²⁷ These international lawyers drafted statutes for an international criminal court and code, published materials on the subject and advocated for the adoption of their proposals.¹²⁸

¹²⁴ Ibid.

¹²⁵ Claude, 53.

¹²⁶ Ibid.

¹²⁷ Willis, 164-176.

¹²⁸ Willis, 168.

In 1925, one of Pella's proposals was approved by the Interparliamentary Union, and the International Law Association in 1926 favored Bellot's draft statute. Later in 1926, the Association internationale de droit pénal was founded by several of these scholars to further advance the study of the issue.¹²⁹

The first post-war efforts aimed at limiting armaments met with failure. At the five-power Washington Conference of 1922, the attendees found it impossible to formulate a treaty limiting aerial warfare.¹³⁰ Elihu Root, the American jurist, was of the opinion that the conference missed a great opportunity to initiate an international criminal code. Root's proposal to outlaw unrestricted submarine warfare by equating it with piracy, and thus universally enforceable by any nation, was met with derision by military representatives.¹³¹

Largely due to the influential and widely read book Command of the Air (1921) by Italian air general Giulio Douhet there were no significant treaties regulating air warfare.¹³² Douhet's book, which preached the supremacy of air power in future wars, was viewed favorably among British and United States military commanders who consequently were investing heavily in the production of aircraft bombers for defense purposes.¹³³ Therefore, the failure of governments to reach agreements limiting aerial combat was not surprising.¹³⁴

¹²⁹ Ibid.

¹³⁰ Taylor, 18.

¹³¹ Willis, 166.

¹³² Taylor, 19.

¹³³ Ibid.

¹³⁴ Ibid.

However, the 1925 Geneva Protocol successfully prohibited poison gas. A majority of nations signed the poison gas prohibition Protocol, and thus it was considered legally binding upon signatory nations. The United States failed to ratify the Protocol until 1975 largely due to objections over its application regarding tear gas and herbicides.¹³⁵

In 1930, the London Treaty for the limitation of naval armaments was signed by eleven nations. The London Treaty provided that, “with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subjected,” and explicitly prevented the sinking of merchant ships unless the merchant ships had refused to stop or attacked the submarine and the “passenger, crew and ships papers” had first been put “in a place of safety” in consideration of location and sea and weather. In 1936, these rules were circulated to all other nations for the purposes of ratification, and thus at the onset of World War II, forty-eight countries had accepted it, including Germany and all other major powers.¹³⁶

Despite the enormous political and legal hurdles associated with creating institutional mechanisms to preserve peace, punish international war crimes, and codify war crimes, several international jurists worked diligently to produce international treaties and agreements towards these ends. Among the scholars working on the problem of defining and outlawing the waging of aggressive warfare was Nicolas Politas, the

¹³⁵ Ibid.

¹³⁶ Ibid.

prominent Greek ambassador to France. Politas, on account of his close governmental ties, was keenly aware of the political difficulties associated with the outlawing of war and the creation of an international criminal tribunal. Speaking before Columbia University in 1926 Politas recognized that “there was no use blinking the fact that any innovation in this direction tends to upset the ingrained habits of centuries.”¹³⁷ Politas along with many other international legal scholars viewed aggression in the form of warfare as the greatest evil from whose source sprang all other war crimes. Therefore, tackling the problem of aggression became the centerpiece of many of the efforts at this time in formulating mechanisms for the preservation of peace.¹³⁸

An early attempt to define and outlaw aggressive war was the 1924 Protocol for the Peaceful Settlement of International disputes, which Politas helped draft. The Protocol created a relatively simple formula for defining aggression. If any state resorted to war rather than except compulsory arbitration, as required by the Protocol, that state was designated as an aggressor nation and therefore subject to the imposition of sanctions by members states of the League of Nations. The treaty was accepted by all the League members and was poised to go into effect when a newly elected conservative British government balked at the idea citing concerns over practicality and national security. With the refusal of the British to join, the Protocol was dead.¹³⁹

¹³⁷ Willis, 169.

¹³⁸ Ibid., 170.

¹³⁹ Benjamin Ferencz, *Defining International Aggression: The Search for World Peace, A Documentary History and Analysis*, 2 vols. (Dobbs Ferry, NY: Oceana Publications, 1975), 1:10-18.

Given the difficulty of defining aggression, the League adopted a different tactic. Instead, the League adopted resolutions in 1925 and 1927 denouncing aggression as an international crime without defining aggression *per se*.¹⁴⁰ The Pan American Conference, meeting in Havana in 1928, resolved that a “war of aggression constitutes an international crime against the human species.”¹⁴¹ Although these devices indicated the evolving international climate of a moral aversion to war, they were not backed by any political or legal means of enforcement, and thus they were ineffective at preventing nation-state aggression.¹⁴²

Without exception the most notable of the interwar attempts at outlawing war was the Peace Pact of Paris of 1928, more widely known as the Kellogg-Briand treaty, which attempted to outlaw war outright.¹⁴³ The Kellogg-Briand treaty was produced in the climate of international amity that occurred between France and Germany in the mid-to-late 1920’s.¹⁴⁴ The Locarno Pact of 1925 had finally guaranteed the borders between the two nations. At that time France withdrew from the Ruhr, and Germany had begun making war reparations again, thus earning admittance to the League of Nations in 1926. For their efforts, the Foreign ministers of both countries, France’s Aris-

¹⁴⁰ Willis, 170.

¹⁴¹ *Ibid.*

¹⁴² Ian Brownlie, International Law and the Use of Force by States, (Oxford: Clarendon Press, 1963), 66-111.

¹⁴³ League of Nations, “Treaty for the Renunciation of War as an Instrument of National Policy,” 27 August 1928, League of Nations Treaty Series 94, no. 57, 1928, Stat. 2343: 46, reprinted in Reisman, and Antoniou, 4-5, (Hereafter the Kellogg-Briand Pact).

¹⁴⁴ Taylor, 19.

tide Briand and Germany's Gustav Stresemann, had shared the Nobel Peace Prize in 1926.

When the tenth anniversary of the United States entry into World War I was celebrated on April 6, 1927, France's Briand proposed honoring the date with a mutual renunciation of war between France and the United States.¹⁴⁵ Under public enthusiasm and pressure, American Secretary of State Frank B. Kellogg sought to extend their bilateral treaty to allow other nations to join. On August 27, 1928, representatives of fifteen nations met in Paris to sign the international treaty for the Renunciation of War as an Instrument of National Policy, more popularly referred to as the Kellogg-Briand treaty.¹⁴⁶ Forty-four nations ultimately signed the treaty including all the Great Powers, among them, Germany, with the exception of the Soviet Union.

While the treaty was lauded for its universal condemnation of war as an instrument of national policy, whether or not it made waging war criminal was debatable.¹⁴⁷ By failing to offer any specific remedies or criminal sanctions for its violation, the treaty legally resembled more of a non-binding resolution than a legally binding treaty backed with enforcement provisions.

In summary, at the start of World War II in 1939 as Telford Taylor notes in his book The Anatomy of the Nuremberg Trials, the laws of war were essentially the same as those established in the Hague and Geneva conventions, with the exception of treaty

¹⁴⁵ Ibid.

¹⁴⁶ "Kellogg-Briand Pact," reprinted in Reisman, and Antoniou, 4-5.

¹⁴⁷ Taylor, 20.

provisions on poison gas and submarines.¹⁴⁸ However, one major shift that had occurred was the internationalization of the subject of war and peace that was motivated by the ideals of establishing a world community.¹⁴⁹

The First World War had exposed the political and legal difficulties, including the substantial gaps in international law, regarding the successful prosecution of war crimes.¹⁵⁰ The First World War had also developed in the minds of the public and of statesman the possibility that nation-states could be held accountable for their actions in the course of a war.

Furthermore, the idea of preserving the peace through international organization, cooperation and international law, which helped regulate the conduct between nations during war and peace, had gathered enough support to sustain the creation of the League of Nations. As Professor Inis Claude has written “the League was the manifestation of a reform movement, an effort to improve the procedures and assist the operation of the world political system.”¹⁵¹ It was not intended to replace the multistate system. On the contrary, the League was “established in the faith that the goals of peace and security were to be achieved not by the revolutionary repudiation of sovereignty, but by the fulfillment of the constructive and cooperative potential of sovereign, self-governing peoples.”¹⁵²

¹⁴⁸ Taylor, 20.

¹⁴⁹ Willis, 176.

¹⁵⁰ Taylor, 13.

¹⁵¹ Claude, 55.

¹⁵² Ibid.

As the failed attempts at post World War I war crimes trials demonstrated, the foundational principles of the multistate system inhibited the successful prosecution of the violators of the laws of war. Heads-of-state and military leaders still enjoyed sovereign immunity from international prosecution. Sovereign nations were under no obligation to cooperate with international prosecutions. There was neither uniformity nor universality regarding the international laws of war. Nor was there uniform and universal agreement on the political and legal wisdom of establishing international war crimes tribunals. However, the legal thought behind the idea of holding individuals accountable for their actions in international community existed. In order to succeed, the post-World War II war crimes trials would need to challenge and alter those foundational principles of the multistate system.

In short, the international legal precedents established by the Nuremberg trials are built upon the idea of international war crimes tribunals arising out of the failed Allied attempts after WWI. The legal precedents established by the Nuremberg trials were created in the crucible of the Second World War whose brutality and barbarity exceeded even that of the First World War. As a result, the conclusion of the Second World War proved to be quite different from the events that followed the First World War.

CHAPTER 3

THE LEGACY OF NUREMBERG

On August 8, 1945, the four occupying powers of France, Great Britain, the Soviet Union, and the United States issued the London Charter establishing the International Military Tribunal (IMT), more commonly referred to as the Nuremberg trials.¹ The trials were named after the geographical location where they were held in Nuremberg, Germany. More than one year later on October 18, 1945, U.S. Supreme Court Justice Robert H. Jackson opened the Nuremberg trials with the following words:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason.²

The abortive efforts at punishing war criminals after the First World War influenced Allied decisions to prosecute German and Japanese individuals following World War II. Individual scholars in favor of punishing war criminals of the Second World

¹ United Nations, "Prosecution and Punishment of Major War Criminals of the European Axis," 8 August 1945, United Nations Treaty Series 279, 59, 1946, Stat. 1544: 82 (hereafter cited as London Charter).

² Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Alfred A. Knopf, 1992), 167.

War studied the legal precedents and political difficulties of that earlier experience and wrote numerous articles articulating the lessons learned from the first attempt to prosecute war crimes.³

Further discussion for an international criminal tribunal was stimulated by the rumors of widespread Nazi atrocities. The earliest calls for the creation of an international court during World War II came in 1941 from the London International Assembly of Parliamentarians.⁴ The Allies issued commitments for war crimes trials in the St. James Declaration of January 1942. On the following day the Allies issued the Moscow Declaration pledging to prosecute Nazi leaders before an international court, while remanding for national courts lesser war criminals. On that day Churchill, Roosevelt, and Stalin warned “let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.”⁵ In October of 1943 created the United Nations

³ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (London: Greenwood Press, 1982), 173.

⁴ Paul D Marquardt, “Law Without Borders: The Constitutionality of an International Criminal Court,” *Columbia Journal of Transnational Law* 33 (1995): 81.

⁵ United States, “Declaration on German Atrocities,” 30 October 1943, *Documents on American Foreign Relations*, vol. VI, July 1943-June 1944 (Washington, D.C.: Government Printing Office 1945): 231-232, cited in Bryan F. MacPherson, “Building an International Criminal Court for the 21st Century,” *The Connecticut Journal of International Law* 113 (Winter 1998): 8.

War Crimes Commission (UNWCC) to investigate war crimes violations and explore proposals for creating a war crimes court.⁶

The international lawyers and governmental representatives assigned to the UNWCC drew heavily on the war crimes investigative work of the 1919 Commission Report⁷ in their deliberations. In fact, the UNWCC was designed with the premise that the mistakes of lack of preparation and agreement, that had been the fatal flaw of the First World War attempts at war crimes trials, would not be repeated. The Chairman of the UNWCC stated that everyone concerned with that organization was mindful not to repeat the “fiasco of the Leipzig trials.”⁸

As the UNWCC collected evidence, the Four Major Allied Powers deliberated on how to deal with the issues of war crimes prosecution, as called for in the Moscow Declaration signed in 1943 by Stalin, Roosevelt and Churchill. British leaders, particularly Winston Churchill, who had first hand experience with the issue of war crimes in WWI, wanted to avoid those earlier mistakes, and thus, favored summary execution of high-ranking war criminals, like Hitler or Himmler. British leaders believed that “their ‘guilt was so black’” it was “beyond the scope of any judicial process.”⁹ British Foreign Min-

⁶ Ibid.; Cherif M. Bassiouni, “From Versailles To Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” Harvard Human Rights Journal 10 (Spring 1997): 21-23.

⁷ “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” 29 March 1919, Report Presented to the Preliminary Peace Conference, American Journal of International Law 14 (1920): 95-96 (hereafter cited as 1919 Commission Report).

⁸ United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (London: His Majesty’s Stationary Office, 1948), 2-3, 10-11, 111, 170-171; cited in Willis, 174.

⁹ Taylor, 29.

ister Anthony Eden told the War Cabinet, "I am convinced that we should avoid commitments to 'try the war criminals' and to 'hang the Kaiser (alias Hitler).'"¹⁰ Consequently the British favored summary executions for captured leaders and court-martial by national tribunals of lesser offenders upon conclusion of the war.¹¹ Great Britain feared German defendants would use the trial as a platform for propaganda to justify their misdeeds.¹²

President Roosevelt and the French disagreed with the British, and instead leaned toward the necessity of holding international war crimes trials for suspected war criminals. The Americans and French wanted the tribunal to record history, educate the world, and serve as a future deterrent.¹³ An unlikely ally, Josef Stalin also strongly favored war crimes trials for suspected war criminals.¹⁴ Stalin, as early as the St. James Declaration in 1942, advocated having international war crimes trials following the war.¹⁵

The Americans believed that their isolationism in the years following World War I and their failure to join the League of Nations were contributing factors in the causes of

¹⁰ United Kingdom, "Action of the German Authorities in Occupied Territory: Memorandum by the Secretary of State for Foreign Affairs," 5 October 1941, Papers of the Cabinet, 66/19, W.P. 41 (London: Public Record Office): 264; cited in Willis, 174.

¹¹ Willis, 173.

¹² Bassiouni, "From Versailles to Rwanda," 24.

¹³ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 54.

¹⁴ Bassiouni, "From Versailles to Rwanda," 23. However, within their territory the USSR was dealing with alleged war criminals by summary execution. See Taylor, 52.

¹⁵ Taylor, 25.

World War II.¹⁶ Thus, the Americans were determined to not make the same mistake twice, opting instead for a strongly international interventionist position in their foreign policy as a means for preserving world peace.¹⁷ The United Nations was an integral part of the U.S. vision for how to translate the mistakes of the League of Nations into the new organization's vital role in preventing future wars.¹⁸

The American international position was strongly advocated by Secretary of War Henry L. Stimson.¹⁹ Stimson, a protégé of Elihu Root, vociferously supported the creation of war crimes tribunals to try suspected German and Japanese war criminals. Stimson was opposed however by Treasury Secretary Henry Morgenthau, who rejected the war crimes trials approach, preferring the British view of summary executions for Axis military leaders.²⁰ Morgenthau also authored a radical proposal to deindustrialize the German industrial zone in Ruhr by destroying factories and closing down the mines to force the region to become pastoral and agrarian.²¹ That proposal, although soundly defeated, displayed the level of frustration by Morgenthau and others toward German aggression and the potential for future aggression.²² In the end, Stimson and Roosevelt's views prevailed among the U.S. government and in Great Britain, and the four major Allied powers created the IMT to punish German war criminals.

¹⁶ Willis, 174.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.; Ball, 46.

²⁰ Ibid.

²¹ Ball, 46.

²² Ibid.

However, the Allied decision to establish an international criminal court was only the first step. The drafting of the Charter of the International Military Tribunal had to overcome procedural and legal hurdles.²³ One difficulty was the four major Allied Powers had different national criminal procedures. The British and the United States shared common law and adversarial judicial systems, but France used a civil law system, and the Soviet Union relied upon a unique “socialist justice” judicial model.²⁴ The solution to the problem of different legal systems created a mixed system.

The IMT and its Charter were established jointly by the London Agreement of August 8, 1945.²⁵ The legal compromise contained both advantages and disadvantages to defendants, issues that would resurface in the operation of the International Criminal Court for the Former Yugoslavia (ICCFY).²⁶ According to Justice Jackson, the mixed legal Charter worked to the defendants’ advantage as they could choose either to take the stand or testify under oath in their own defense, or they could present an unsworn statement – an affidavit—at the end of the trial without having to be cross-examined.²⁷ However, the Charter worked to the defendants disadvantage by denying them the right to confront and cross-examine witnesses available to the prosecution, a right guaranteed

²³ Bassiouni, “From Rwanda to Versailles,” 24-25.

²⁴ Ibid.

²⁵ “Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,” 8 August 1945, Charter of the International Military Tribunal, United Nations Treaty Series 59, 1946, Stat. 1544, 1546: 82 (hereafter cited as the Charter of the IMT).

²⁶ Bassiouni, “From Versailles to Rwanda,” 24-25.

²⁷ Ibid.

in United States criminal law.²⁸ Instead, defendants had to rely on affidavits from the witnesses.

The London Charter contained seven articles and an annex.²⁹ The annex set forth the Charter of the International Military Tribunal, which consisted of seven parts and thirty articles. The Charter first stipulated the composition of the IMT as comprising the four Allies, France, Russia, Great Britain, and the United States. The Core of the IMT's jurisdiction was contained in Article 6:

[The IMT] shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes for which there shall be individual responsibility:

(a) Crimes against peace: namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy or the accomplishment of any of the foregoing.

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.³⁰

Article 7 rejected the defense of sovereign immunity, or "head of state" and article 8 stated "the fact that a defendant acted pursuant to [an] order of his Government or of a

²⁸ Ibid.

²⁹ "The London Charter," reprinted in Taylor, 645-653.

³⁰ Ibid., Article 6.

superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”³¹

The novel international concept of criminal conspiracy was included in article 9 and 10: “At the trial of any individual member of any group or organization the Tribunal may declare that the group or organization of which the individual was a member was a criminal organization.”³² The criminal conspiracy concept meant that once the IMT found a Nazi organization to be criminal, at the trial of individual members of that organization, “the criminal nature of the group or organization is considered proved and shall not be questioned.”³³

Each of the four Allied nations supplied their own chief prosecutors and staff that were responsible for the investigation, collection, and presentation of all evidence, including the examination of witnesses, the preparation and filing of indictments of the defendants. Article 9 guaranteed to the defendants a fair trial, which consisted of the procedural due process right to counsel, or to defend themselves, to have available for their scrutiny all evidence presented against them, and to present evidence at the trial “in support of defense, and to cross-examine any witnesses called by the prosecution.”³⁴

Article 24 laid out the procedural process of how the trials would proceed. It set forth the following order of the trial:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads “guilty” or “not guilty.”

³¹ Ibid., Articles 7 and 8.

³² Ibid., Articles 9 and 10.

³³ Ibid.

³⁴ Ibid., Article 9.

- (c) The prosecution shall make an opening statement.
- (d) The Tribunal shall ask the prosecution and the defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses of the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.
- (f) The Tribunal may put any question to any witness and to any Defendant, at any time.
- (g) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
- (h) The Defense shall address the court.
- (i) The Prosecution shall address the court.
- (j) Each Defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.³⁵

The most challenging task of the four Allied nations was defining the criminal subject matter of the war crimes trials.³⁶ Article 6(b) on war crimes proved the easiest to define as they had the strongest legal standing in international law.³⁷ War crimes in Article 6(b) included customary law contained in the 1907 Hague Conferences and conventional law as created by the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.³⁸

³⁵ Ibid., Article 24.

³⁶ Bassiouni, "From Versailles to Rwanda," 25-26.

³⁷ Bassiouni, "From Versailles to Rwanda," 26.

³⁸ "Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, 18 October 1907, reprinted in Burns H. Weston, Richard A. Falk, and Anthony D'Amato, Basic Documents in International Law and World Order, 2d ed. (St. Paul: West Publishing Co., 1990), 128 (hereafter cited as 1907 Hague Convention); League of Nations, "The 1929 Geneva Convention Relative to the Treatment of Prisoners of War," 27 July 1929, 118 League of Nation Treaty Series 343, 47, Stat. 2021.

Defining “crimes against humanity” was more difficult legally as this category was not a part of treaty law.³⁹ Therefore, the Allies avoided adopting a rigid legal interpretation of the principles of legality to avoid an ex post facto charge that could be challenged in court.⁴⁰ Instead “crimes against humanity” under Article 6(c) existed through a combination of sources of international law, specifically conventions, custom, and general principles of law.⁴¹ Therefore, the legal rationale for “crimes against humanity” was based on the theory of jurisdictional extension of war crimes. Jurisdictional extension of war crimes legally reasoned that since war crimes applied to certain protected people, namely civilians, during time of war, “crimes against humanity” merely extended the same protections as “war crimes” to the same protected people within a particular state provided that state action was tied to the initiation, and waging of an aggressive war or to war crimes.⁴²

The most controversial and most difficult to define was the category of “crimes

³⁹ Bassiouni, “From Versailles to Rwanda,” 26.

⁴⁰ Black’s Law Dictionary defines “ex post facto” as “A law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed. See Black’s Law Dictionary, 4th ed. Rev. (1968), 662.

⁴¹ Ibid.

⁴² Due to the fact that crimes against humanity required linking evidence for these crimes with the initiation and/or conducting of aggressive war, and that evidence was lacking, allegations of German crimes committed before 1939 were excluded. See Bassiouni, “From Versailles to Rwanda,” 26.

against peace.”⁴³ Formerly referred to as the crime of aggression, or waging of an aggressive war, “crimes against peace” was without precedence in international law, excepting the failed attempt to prosecute Kaiser Wilhelm II under Article 227 of the Versailles Treaty.⁴⁴ Article 6(a) defined “crimes against peace” as the directing or participating in a war of aggression against other nations in violation of treaties and the principles of international law. The definition represented the strongest legal rationale that could be made by the Allies. The Soviet Union wanted to add the wording, “by the European Axis” as to limit prosecution only to European nations and so prevent any possible prosecution of Soviet actions.⁴⁵ Justice Jackson, representing the United States at the London Conference refused. He argued that the crime of aggression was universal, and limiting it in the fashion proposed by the Soviets would amount to a “bill of attainder,” and thus constitute a clear violation of the U.S. Constitution to which the U.S. could not allow.⁴⁶

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid. Professor Bassiouni believes the rationale behind the Soviet Unions’ desire to limit crimes geographically to Europe was due in part to two things. One, the Soviets had no desire to codify a broad definition of crimes against peace that might be used later in the future against them. Second, they wished to avoid being held criminally liable for their 1940 invasion and occupation of Poland as a result of their secret Pact of Non-Aggression between the USSR and Germany. See also Taylor, 56-77.

⁴⁶ U.S. Constitution, art.1, sec 10. A bill of attainder is “a legislative act, directed against a designated person, pronouncing him guilty of an alleged crime, (usually treason) without trial or conviction according to the recognized rules of procedure, and passing sentence of death and attainder upon him.” See Black’s Law Dictionary, 4th ed. Rev. (1968), 162.

The U.S. position to make waging an aggressive war a crime under international law had clearly changed since World War I.⁴⁷ After WWI the U.S. held it was not a crime recognized by international law, but after WWII, they believed it was an international crime. The U.S. would retreat from their post-WWII position due to the political realities of the Cold War, once more holding the position that aggressive war was too difficult to define to be effectively outlawed.⁴⁸ Instead the Cold War era international community prohibited the use of force as set forth in the United Nations Charter except in cases of self-defense, in which case the use of force was permissible. The lack of a definition for aggression allowed nations to claim self-defense as a justification for use of force without any definition to constrain them.

Regarding the developing laws of war, the IMT Charter in Article 7 and 8 expanded and codified international law by removing the defense of “obedience to superior orders.”⁴⁹ The defense of “superior orders” had previously allowed individuals to plead that their actions were justified as they were obligated to follow the orders of a

⁴⁷ Bassiouni, “From Versailles to Rwanda,” 27.

⁴⁸ Ibid. In fact, an international convention explicitly making aggression an international crime has never existed. The General Assembly’s resolution in 1974 defining aggression, and adopted through consensus, is the only definition of its kind that exists. However, General Assembly resolutions are non-binding upon nation-states. See United Nations, General Assembly Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, 1974, U.N. Doc. A/9631: 143. Consequently, its definition has posed problems for the 1996 Preparatory Committee on the Establishment of an International Criminal Court. See United Nations, “Second Session of the Preparatory Committee on the Establishment of an International Criminal Court,” Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, paragraphs 212-93, 1996, U.N. Doc. A/51/22 (hereafter cited as Preparatory Committee Report).

⁴⁹ “The London Charter,” Articles 7 and 8, reprinted in Taylor, 645-653.

superior.⁵⁰ However, the judgments of the IMT did not adhere strictly to Article 8, and allowed the defense of superior orders when the subordinate had no moral choice in refusing to carry out the order.

As the trial opened, twenty-four persons were initially indicted.⁵¹ Of those, twenty-two were prosecuted. Three defendants were acquitted, the rest were found guilty. Twelve defendants were sentenced to death by hanging; three were sentenced to life imprisonment, and the remaining defendants found guilty were sentenced to prison terms ranging from ten to twenty five years. Hermann Goering committed suicide hours before his sentence of death by hanging could be carried out. All twenty-four defendants were German, and no other defendants from the European Axis powers were tried before the IMT. The proceedings, while generally considered to be just to the accused, were one-sided in that no Allied individuals were indicted or tried for alleged war crimes committed against Germany.⁵²

⁵⁰ "Superior orders," was the defense used in the trial of Peter von Hagenbach in 1474 for various crimes committed under his command, and was the defense most commonly used in war crimes trials following World War II. Von Hagenbach's plea that he was merely following the commands of his master the Duke of Burgundy was rejected. Instead, he was found guilty and sentenced to death. See Howard S. Levie, "Criminality in the Law of War," in M. Cherif Bassiouni, ed. International Criminal Law, 2d ed., 3 vols. (New York: Transnational Publishers, Inc., 1999), 1: 381; See also Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, ed., International Law Cases and Materials 3rd ed. (St. Paul: West Publishing Co., 1993), 383-384.

⁵¹ Taylor, 571-611; Victor Bernstein, The Holocaust – Final Judgment, (New York: Bobbs-Merrill Co., Inc., 1980); Richard Gallagher, Third Reich on Trial, (New York: W.W. Norton & Co., 1961); Whitney R. Harris, Tyranny on Trial: The Evidence at Nuremberg, (Dallas: Southern Methodist University Press, 1954).

⁵² Bassiouni, "From Versailles to Rwanda," 29.

Control Council No. 10 War Crimes Trials

In addition to the prosecutions of German nationals under the IMT Charter, Germans were also brought to stand trial by separate proceedings authorized by Allied Control Council Law No. 10.⁵³ CCL 10 permitted the Allies to prosecute Germans in the territories within Germany that each nation occupied and controlled. Thus, each of the four Allied major powers conducted trials under the authority derived from CCL 10. The proceedings of CCL 10 were different than the IMT proceedings, although they were patterned after the IMT's Charter.⁵⁴ The U.S. trials were conducted before a civilian judge, while France, Great Britain, and Russia held military trials.

From a legal perspective, prosecutions conducted under CCL 10 were domestic rather than international prosecutions. Due to Germany's unconditional surrender, the Allies had complete control over German-occupied lands and resources. Therefore, in theory CCL 10 trials in American occupied zones were exercising U.S. sovereign authority.⁵⁵ The same legal condition applied with respect to France, Great Britain and Russia.

⁵³ "Allied Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity," 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, reprinted in Benjamin Ferencz, An International Criminal Court: A Step Toward World Peace – A Documentary History and Analysis, 2 vols. (New York: Oceana Publications, 1980), 488 (hereafter cited as CCL 10).

⁵⁴ Bassiouni, "From Versailles to Rwanda," 29.

⁵⁵ *Ibid.*, 30.

The Far Eastern Commission and the International Military Tribunal for the Far East

The Far Eastern Commission (FEC) was established in Moscow in December 1945 for the purposes of formulating a policy for the Allied occupation of Japan and to oversee Allied policies in the Far East. The Commission, whose seat was in Washington, was composed of eleven states, with veto power granted to the four major Allies. The Commission created an advisory group known as the Allied Council for Japan, which consisted of the United States, Great Britain, China and the U.S.S.R., to whom the Commission reported its directives.

The FEC was essentially a political body, not an investigative body.⁵⁶ However, the Commission did serve an important function in granting political credibility for directing policies for the purposes of prosecution of suspected Japanese war criminals, their trials, the sentencing of those found guilty, and their release. In the final analysis however, "the far Eastern Commission became little more than a debating society, and when a peace treaty was finally signed with Japan, it died a quiet death."⁵⁷

General Douglas MacArthur in his official capacity as the Supreme Commander for the Allied Powers (SCAP) in the Pacific Theater, had control over Japanese occupational matters. MacArthur's political views dominated virtually every aspect of justice in the Far East.⁵⁸

⁵⁶ Bassiouni, "From Versailles to Rwanda," 31-35.

⁵⁷ *Ibid.*, 31.

⁵⁸ *Ibid.*

General MacArthur opposed the FEC's establishment as it allowed the U.S.S.R to exercise too great of a role and influence primarily through its power to veto any FEC action it deemed objectionable. As he stated, "The very nature of its composition and procedures eventually made the Far Eastern Commission ineffective."⁵⁹

General MacArthur, by virtue of his authority as the SCAP in the Pacific Theater, established the International Military Tribunal for the Far East on January 19, 1946, on behalf of the FEC.⁶⁰ As a result the IMTFE, unlike the IMT was not a treaty-based tribunal. Pursuant to his authority, General MacArthur also established the United States Military Commissions to try Japanese Military personnel in the Philippines and other areas of the Far East Military Theater of Operation. MacArthur, despite his almost dictatorial power in establishing the Far East war crimes tribunals, attempted to remain detached from the various legal proceedings, although his success in this matter remains suspect.⁶¹ The IMTFE granted General MacArthur the ability to grant clemency, reduce sentences and release prisoners on parole, a power that was completely absent from the IMT and CCL 10 Charters.⁶²

The IMTFE formally arraigned 28 defendants on 55 counts on May 3, 1946. On November 11, 1948, two years after the IMT's decisions, the IMTFE's judgment was rendered.⁶³ The defendants were charged with "crimes against peace," "war crimes,"

⁵⁹ Ibid., 32.

⁶⁰ "The IMTFE Charter," reprinted in Minear, 185-192.

⁶¹ Bassiouni, "From Versailles to Rwanda," 32.

⁶² Bassiouni, "From Versailles to Rwanda," 34.

⁶³ Phillip R. Piccagallo, The Japanese on Trial (Austin, TX: University of Texas Press, 1979), 14; Minear, 23-26.

and "crimes against humanity" just like the defendants in the Nuremberg trials.⁶⁴ However, unlike the Nuremberg trials, which arraigned organizations like the Nazi SS, no organizations were similarly charged in the Tokyo trials.⁶⁵ Accused war criminals were divided into Class A, B, and C. The first IMTFE proceedings were against 28 senior Japanese officials considered Class A suspected war criminals.

The proceedings of the IMTFE, and the work of the FEC, were quite dissimilar to the IMT, and the other war crimes trials conducted in Germany, which gave rise to a considerably greater amount of criticism toward the IMTFE.⁶⁶ Among the first major differences is that, unlike the IMT, members of the FEC were not acting in their individual capacity, but rather as representatives of their country's government. This led to a degree of politicization not felt in the IMT, which affected the internal functioning of the FEC and IMTFE, and the quality of legal justice produced by the IMTFE.⁶⁷

In 1949, the FEC issued a formal request to all nineteen Allied powers in the Far East that the war crimes trials for the Japanese should begin not later than September 30, 1949. Subsequently, forty-eight states signed the Treaty of Japan in San Francisco

⁶⁴ "The IMTFE Charter," reprinted in Minear, 185-192.

⁶⁵ The lone exception in the Far East trials was the Netherlands' military courts which prosecuted Japanese criminal groups for the commission of specific war crimes. See Piccagallo 177.

⁶⁶ R.B. Pal, International Military Tribunal for the Far East: Dissentient Judgment of Justice R.B. Pal, M.A., LL.D (Calcutta, India: P.C. Ray, 1953): Minear, 1-229, Bassiouni, "From Versailles to Rwanda," 33.

⁶⁷ Bassiouni, "From Versailles to Rwanda," 33-36.

on September 8, 1951.⁶⁸ The treaty provided in Article 2 for the transfer of all convicted war criminals to Japan to finish serving the remainder of their sentences under SCAP's control.⁶⁹ As a result, in the Far East between 1951 and 1957, all convicted war criminals were released from prison before serving their full sentences as a condition of being paroled or by commutation of their sentences.⁷⁰

The constitution of the FEC and the IMTFE led to proceedings fraught with procedural irregularities and judicial indiscretions. Consequently, the Japanese did not view individuals convicted of war crimes as outcasts, as happened in Germany, but rather as victims of unjust criminal proceedings.⁷¹ For the Japanese, the IMTFE, and

⁶⁸ Ibid., 34.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ In fact, several Class A war criminals found guilty by the IMTFE were chosen as members of Cabinet and one even became Prime Minister:

“Shigemitsu Mamoru, a career diplomat, who was Foreign Minister in Tojo Mideki's Wartime Cabinet and who signed on behalf of Japan the Instrument of Surrender on September 2, 1945, on board the [U.S. battleship] USS Missouri, was sentenced by the IMTFE to seven years imprisonment. He was released on parole 21 November 1950, and in November 1951 he was given clemency. Shigemitsu became Foreign Minister in December 1954. During his two years as Minister, he was instrumental in obtaining the Allies' clemency and ultimately, in 1957, the release of all Japanese held in captivity. On 7 April 1957, the Japanese Government announced that with the concurrence of a majority of the Allied Powers represented on the IMTFE, all major Japanese war criminals were granted clemency and unconditionally released forthwith. Kishi Nobusake, another Class A criminal suspect, was tried and convicted in further proceedings after the first Tokyo Trial, but later became Prime Minister in January 1956 and served until July 1960. He also held the portfolio of the Ministry of Foreign Affairs for some time in 1956.”

Letter from Dr. R. John Pritchard to M. Cherif Bassiouni, Jan. 30, 1996 (on file with the author); reprinted in Bassiouni, “From Versailles to Rwanda,” 34.

the other war crimes trials were not victors' justice, but victors' vengeance disguised as victors' justice.⁷²

Comparison of the Legal Bases for Setting up the IMT, CCL 10 and IMTFE

A comparison of the different legal mechanisms used by the various ad hoc tribunals created after the Second World is useful for summarizing the most important historical developments of international criminal law produced by these tribunals. Consequently it becomes apparent that the divergent legal mechanisms used in the three different judicial proceedings produced divergent results in regard to substance and procedure.

The IMT and IMTFE Charters were essentially the same with a few exceptions. Both Charters prosecuted and punished accused war criminals for "crimes against peace," "war crimes," and "crimes against humanity."⁷³ However, one exception is found in Article 5(c) of the IMTFE Charter. Article 5(c) allowed the prosecution for those "crimes against humanity" committed on the basis of persecution on political and racial grounds, whereas Article 6(c) of the IMT Charter included religious grounds as well.⁷⁴ The principle reason for including religious grounds in the IMT Charter was the Holocaust – the Nazi pogrom against those of primarily Jewish descent – and therefore the IMT contained a uniquely religious element.⁷⁵

⁷² Ibid., 35.

⁷³ Ibid., 37.

⁷⁴ "The IMTFE Charter," Article 5(c), reprinted in Minear, "Victor's Justice," 186-187; "CCL 10," Article 6(c), reprinted in Ferencz, An International Criminal Court, 488.

⁷⁵ Bassiouni, "From Versailles to Rwanda," 37.

In addition, with respect to “crimes against humanity,” the IMT Charter provided that inhumane acts committed against any civilian population” could be prosecuted. The IMTFE expanded the class of protected persons beyond civilians by eliminating the wording “against any civilian population.”⁷⁶ The broadening of the definition was reportedly designed “to make punishment possible for large-scale killings of military personnel in an unlawful war.”⁷⁷

Identical to the IMT and IMTFE Charters, CCL 10 also relied on the prosecution and punishment of crimes against peace," "war crimes," and "crimes against humanity."⁷⁸ However, whereas the IMT was established by treaty and the IMTFE by a military order, the CCL 10 conducted its proceedings pursuant to consensus decision by the four major Allies – France, Great Britain, the USSR and the United States – who occupied German territory at the conclusion of the war. The legal justification for CCL 10 was that the Allies were performing analogous governmental functions of the German government.⁷⁹ In effect the Allies were acting as the de facto German government in the absence of the recently defunct Nazi Reich. Therefore, this meant that the law the Allies were enforcing in the CCL 10 proceedings was German domestic law. But as each nation was in fact using their own judicial systems to orchestrate proceedings, the

⁷⁶ “The IMTFE Charter,” Article 5(c), reprinted in Minear, 186-187.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Bassiouni, “From Versailles to Rwanda,” 37.

national law was not German, but rather the national law of each of the respective Allied powers.⁸⁰

CCL 10 was nearly identical to the IMT Charter. Additionally, the three crimes identified in Article 2 of the International Military Tribunal for the Far East (IMTFE) were the same for CCL 10 and Article 6 of the IMT's Charter.⁸¹ The major difference between the definition of crimes in the Far East trials and the IMT proceedings is found in Article 2(c), concerning "crimes against humanity." In the IMTFE trials "crimes against humanity" did not require the nexus of initiating an aggressive war or war crimes in order to charge individuals for crimes committed against protected persons.⁸²

The CCL 10's definition of "crimes against humanity" differed from the IMT and IMTFE Charters in two ways. Article 2(c) of the CCL 10 expanded the list of crimes to include rape, imprisonment, and torture.⁸³ Second, it removed the requirement that "crimes against humanity" be linked to the war by eliminating the words, "before or during the war," contained in Article 6(c) of the IMT's Charter.⁸⁴ Moreover, the CCL 10 broadened the principles of legality with respect to "persecution." The CCL 10 Charter expanded the category of "crimes against humanity" by omitting the require-

⁸⁰ Ibid., 38.

⁸¹ Ibid.

⁸² "Special Proclamation: Establishment of an International Military Tribunal for the Far East," 9 January 1946, Treaties and Other International Act Series, No. 1589, 3, reprinted in Richard H. Minear, Victors' Justice: The Tokyo War Crimes Trial, (Princeton, NJ: Princeton University Press, 1971), 183-184 (hereafter cited as IMTFE Proclamation).

⁸³ "CCL 10," Article 2(c), reprinted in Ferencz, An International Criminal Court, 488.

⁸⁴ Ibid.

ment that “crimes against humanity” be in the “execution of or in connection with any crime within the jurisdiction of the Tribunal.”⁸⁵ Therefore, persecution as defined by CCL 10 could take place without requiring a connection to another crime.

As for the ability to commute sentences, the IMTFE granted that authority to General MacArthur, a power that was completely absent from the IMT and CCL 10 Charters. However, General MacArthur did not use that authority.⁸⁶

The separate military tribunals in the Far East proceedings were created by the FEC, and were in that regard similar to the CCL 10.⁸⁷ The respective Allied powers were responsible for prosecuting Japanese and persons of other nationalities who were their prisoners of war. However, each Allied power created its own procedures and applied its own laws in the operation of their military tribunals. Unlike the CCL 10, there existed no treaty or uniformly agreed upon law defining crimes. The largest point of difference was the legal authority wielded by General MacArthur far surpassed any similar authority wielded by one individual in the European Theatre. As Supreme Allied Commander of the Pacific, General MacArthur was the sole executor of the policy

⁸⁵ Article 6 of the IMT Chart defines “crimes against humanity” as those prohibited acts, “and other inhumane acts committed against any civilian population, before or during the war” (emphasis added). See “The London Charter,” Article 6 (c), reprinted in Taylor, 645-653. Whereas, CCL 10, Article 2(c) eliminates the nexus between international conflict and the commission of war crimes. However, the preamble of CCL 10 did contain a jurisdictional link to the IMT Charter, which contained the war nexus. Therefore, the CCL 10 tribunals were divided over whether individuals could be prosecuted for the commission of crimes against humanity against their own citizens in the absence of an international armed conflict. See Margaret McAuliffe deGuzman, “The Road from Rome: The Developing Law of Crimes against Humanity,” Human Rights Quarterly 22 (2000): 355-356.

⁸⁶ Ibid.

⁸⁷ Bassiouni, “From Versailles to Rwanda,” 32.

set forth by the FEC. As sole executor of policy regarding Japan, General MacArthur was able to achieve political goals sought by the United States in the Pacific Theater following the Japanese surrender.⁸⁸ Proof of General MacArthur's authority as sole executor of policy was evident in the FEC's decision to end prosecutions by 1950 and to repatriate to Japan by 1953 all those who were convicted.

One of the most revolutionary legal concepts produced by the German and Japanese war crimes trials was the charge of initiation of aggressive war. Supreme Court Justice Robert H. Jackson made the case for provisions to charge German and Japanese leaders with aggression, explaining that "sentiment in the United States and the better world opinion have greatly changed since Mr. James Scott and Secretary Lansing announced their views on matters of war and peace," with obvious reference to the First World War.⁸⁹

The post-World War II war crimes trials reflected the American view that initiating a war of aggression had risen to become part of customary international law which states were bound to follow. The progression of the outlawing of aggressive warfare as an uncoded war crime had occurred by virtue of a series of events that began with the Versailles Treaty's attempt in Article 227 to try the Kaiser, the passing of resolutions condemning aggression by the League and other international organizations, and the adoption of the Kellogg-Briand treaty outlawing war.⁹⁰

⁸⁸ Ibid., 33.

⁸⁹ Willis, 174.

⁹⁰ Bassiouni, "From Versailles to Rwanda," 26-28.

The Nuremberg tribunal members of the Nazi command structure were held to be individually accountable and were charged with the following substantive crimes: (a) crimes against peace; (b) war crimes; (c) crimes against humanity, and waging an aggressive war.

In addition to the favorable public and political climate for setting international legal precedents at Nuremberg, Allied legal responses to defenses put forth by Nazi war criminals' also provided an impetus for creating international law at Nuremberg. As a response to Nazi defendants' challenges to Allied jurisdiction, fundamental international legal principles were formulated to address these challenges:

1. The maxim nullum crimen sine lege, nulla poena sine lege states that there is "no crime without punishment," and "no punishment without law." These maxims form the principle of law that holds that where no doubt exists that the defendants knew that they were committing a wrong condemned by the international community, then it is not a violation of the principles of justice to punish them despite the absence of a highly specific international law.

2. Individuals are held responsible for their own actions even when their actions are justified as acts committed on the authority of the state.⁹¹

3. The fact that domestic law permits a person's actions is no defense for violations of international law; the international law trumps domestic law.

These principles form the foundation of individual criminal responsibility for violations of international law and therefore form the core of the Statute creating the ICC.

⁹¹ Marquardt, 81-82.

Nuremberg was also responsible for developing other substantive norms and principles of international criminal law.⁹² First, German officials were held criminally liable for acts committed against their own nationals, as well as nationals of other nation states. Thus, with the Nuremberg trials the precedent was set that individuals and states are responsible under international law for acts committed entirely within a states national boundaries. No longer did the principle of domestic sovereignty permit nations to do absolutely whatever it wished to its citizens without a guarantee of non-interference from the international community.⁹³

Second, the charge of waging aggressive war brought to an end the centuries old unqualified right of a nation to go to war. However, the charge of aggressive war also produced the greatest concerns for Allied nations who questioned its legality and legitimacy. In the end, despite their misgivings, the Allies went ahead with the decision to prosecute Nazi Germany for the crime of aggression. Bernard V.A. Röling, the Netherlands judge assigned to the Tokyo trials, stated that once the Allies had charged Germany with initiating an aggressive war, they felt compelled to make the same charge against Japan in the Tokyo trials.⁹⁴

As a result of using the charge of aggression against Japan, the Tokyo trials generated the most dissent out of all the World War II war crimes trials.⁹⁵

⁹² Ibid., 82-83.

⁹³ Ibid; Taylor, 612-641.

⁹⁴ Marquardt, 82-83.

⁹⁵ Bassiouni, "From Versailles to Rwanda," 31- 37; Minear, 3-182; Pal, 1-701.

First, Judge Röling partially dissented from the charge of the convictions against Japanese political leaders for their failure to prevent the war. Röling argued that omissions on the part of Japanese leadership for failing to stop the war did not establish their guilt.⁹⁶ Second, Indian Judge R. B. Pal dissented from all the convictions at Tokyo on the grounds that it was impossible to assess the “guilt” of states from a historical context. In addition, Pal argued it was even more difficult to assess blame for initiating wars against individual political leaders operating in an international and national system that lacked universally accepted international laws and judicial mechanisms for determining breaches of the peace.⁹⁷

Still, the criticisms of Pal, Röling and other scholars of the Tokyo trials, however valid, have done little to detract from the core principles of international law developed at Nuremberg or the precedent of criminalizing state authorized aggressive war.⁹⁸ Moreover, scholars have been quick to isolate the flaws in the Tokyo trials from the more respected judgments made at Nuremberg.⁹⁹

In general, the post-World War II trials brought to fruition many of ideas and proposals that had first appeared after World War I. Additionally, while few fundamentally new concepts came out of the World War II war crimes trials, the remarkable feat is that the Nuremberg and Tokyo trials happened at all. Unlike World War I, the victory of World War II resulted in the total defeat and occupation of Germany and Japan.

⁹⁶ Ibid.

⁹⁷ Pal, 177-701; Minear, 34-80; Piccagallo, 9-95, 209-215.

⁹⁸ Piccagallo, 209-215.

⁹⁹ Taylor, 612-641; Henry T. King, Jr., “Conference Paper: The Nuremberg Context from the Eyes of a Participant,” Military Law Review 149 (Summer, 1995): 40-41.

Germany and Japan's total defeat enabled the Allies to take complete control of both countries and carry out all aspects of the war crimes trials process virtually unopposed.¹⁰⁰

The Allies occupied Germany with over one million troops, and therefore had complete access and control of prisoners of war, witnesses, and government documents. The process of collecting evidence was greatly enhanced by the "Teutonic penchant for meticulous record keeping," as so aptly described by Telford Taylor.¹⁰¹ In so doing, the Allies achieved a result that was not possible after World War I. To a large degree the success of the war crimes trials after World War II was completely dependent on the total victory and control over the territory of the vanquished foes. As a result, fully implementing war crimes following World War I was in part prevented by the lack of a total victory over the Central Powers and the need to maintain political stability in those countries, particularly Germany and Turkey. However, the significance of the First World War lies in the germination of the ideas of war crimes which were then allowed to bear fruit and be given firm legal precedents as international law by the decisions of the war crimes tribunals at the end of World War II.

The first and most important judgment at Nuremberg crystallized the fact that international law applied to all individuals waging war, regardless if those individuals were the highest governmental leaders. The defense that as heads-of-state leaders were immune from prosecution based on the principle of sovereign immunity was forever

¹⁰⁰ Ibid.

¹⁰¹ Taylor, 57.

repudiated.¹⁰² Violations of international law were applicable to everyone following the judgment of Nuremberg, including heads-of-state.

The Nuremberg trials restricted the use of defenses against war crimes prosecution, including the defense of superior orders, act of state, and military necessity.¹⁰³ It created an entirely new category of international crimes – crimes against humanity – that was used to condemn Hitler’s brutal policy of exterminating six million people of Jewish ancestry and other people designated as racially inferior.¹⁰⁴ Most significantly, it confirmed that waging a war of aggression (the Nuremberg Tribunal used the term “crimes against peace”) violated international law for which individual leaders could be held criminally responsible.

These precedents laid the foundation for a new international legal order in international affairs. The Nuremberg principles “repudiated decisively the international anarchy of absolute sovereign states in which leaders and their followers could use force according to the ‘law of the jungle’”.¹⁰⁵ Hereafter, individuals engaged in the service of their countries during war would be subject to the dictates of international law.¹⁰⁶

However, despite the precedent setting nature of post-WWII war crimes trials Al-

¹⁰² Taylor, 612-641; Henry T. King, Jr., “Conference Paper: The Nuremberg Context from the Eyes of a Participant,” Military Law Review 149 (Summer 1995): 40-41.

¹⁰³ Willis, 175.

¹⁰⁴ Ibid.

¹⁰⁵ Willis, 175.

¹⁰⁶ Ibid.

lied optimism that the Nuremberg and Tokyo trials would act as a deterrent to future wars never reached fruition. In fact, as Eugene Davidson, the noted Nuremberg historian has suggested, “it may be argued that the uneasy peace that has endured between the major powers since World War II has been kept not because of, but despite, Nuremberg.”¹⁰⁷ Certainly, it can be argued that in the Cold War years, any serious attempt to enforce and apply the Nuremberg principles to certain conflicts around the world might have caused a world war.¹⁰⁸

Additionally, controversy and historical/legal debate still surrounds the Nuremberg and Tokyo tribunals as flawed judicial examples of “victors’ justice.”¹⁰⁹ The Nuremberg trials proceeded from the wills of the victorious Allied superpowers.¹¹⁰ Judicial prosecutions following World War II ran only one way; the Allies never subjected their conduct during the war to the same legal scrutiny applied to Germany and Tokyo. Thus, despite the fact that the fire bombing of Dresden, the bombing of Tokyo, and the dropping of atomic bombs on civilian populations in Hiroshima and Nagasaki arguably fit the definition of Allied war crimes – the “wanton destruction of cities, towns, or vil-

¹⁰⁷ Eugene Davidson, *The Nuremberg Fallacy: Wars and War Crimes since World War II*, (New York: Macmillan, 1973): 291.

¹⁰⁸ *Ibid.*

¹⁰⁹ Philip R. Piccagallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945-1951*, (Austin: University of Texas, 1979): 211.

¹¹⁰ David Marcella, “Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law,” *Michigan Journal of International Law* 20 (1999): 346.

lages, or devastation not justified by military necessity,” – the Allies excluded their own conduct in the war from the purview of the post-World War II war crimes trials.¹¹¹

The complaint of “victors justice” and selectivity in dispensing justice belie the persistent criticism that international justice is not blind; international criminal trials produce “uneven justice, unequal justice, and politicized justice.”¹¹² Furthermore, the deterrent value of the Nuremberg trials has been marginal if not altogether non-existent. Since the Nuremberg principles were set forth and later affirmed by the U.N. General Assembly, 250 armed conflicts are estimated to have broken out, including genocidal campaigns of violence in Tibet, Cambodia, Guatemala, Burundi, Indonesia, Paraguay, and within the Soviet Union.¹¹³

While many international scholars have denounced the lack of political will in allowing these atrocities to go unpunished, other equally persuasive scholars point out – such as the aforementioned Eugene Davidson – that sacrificing justice to preserve the world from a potentially catastrophic nuclear war world war is a virtue not a vice.¹¹⁴ Yet, for all the debate and scholarly examinations regarding the trials perceived moral and legal flaws, Nuremberg and Tokyo also marked a large step forward in developing the new international order envisioned by Wilson and others following World War I.¹¹⁵

Many contemporary scholars and social commentators lauded the trials as a turn-

¹¹¹ Ibid., 349.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Piccagallo, 213.

¹¹⁵ Willis, 175.

ing point in history. Walter Lippman, the famous American journalist, announced that the judgment at Nuremberg would be accorded by future generations as having the same historical status as the Magna Charta, the right of habeas corpus, and the Bill of Rights.¹¹⁶ International law expert Richard Falk stated that while “deeply flawed as moral education, however there is more to Nuremberg than its Judgment. Certainly the Nuremberg trial contributed to an international learning experience on world order...”¹¹⁷ Arthur Schlesinger Jr. stated the Nuremberg principles constituted, “along with other treaties, rudiments of an international consensus,” that merited international enforcement. He added, “such documents, outlaw actions that the world has placed beyond the limits of permissible behavior.”¹¹⁸

In sum, the Nuremberg trials created precedent-setting principles of international criminal law that are crucial to the foundation of a fully functioning ICC. Individuals are criminally liable for their conduct even if that conduct is committed under the protection of state granted authority under national law, and even if that conduct is ordered as a result of military or sovereign political commands: the defense of superior orders was no longer a justifiable defense in the eyes of the international community. Moreover, the norms by which an individual is judged do not necessarily require the same

¹¹⁶ Ibid.

¹¹⁷ Richard A. Falk, A Global Approach to National Policy (Cambridge, Mass.: Harvard University Press, 1975), 153.

¹¹⁸ Arthur M. Schlesinger, Jr., “The Necessary Amorality of Foreign Affairs,” Harper’s Magazine, August, 1971, 73; quoted in Piccagallo, 211.

specificity of a national penal statute so long as fundamental principles of justice are respected.¹¹⁹

Post-World War II to the Present: Developments Toward the Creation of the ICC

Following the epochal Nuremberg and Tokyo trials, supporters anticipated that further developments in international law would include the establishment of an international criminal court and an international code of criminal offenses.¹²⁰ Indeed, some progress in both these areas has been made. One of the first major acts of the United Nations General Assembly expressed approval for Nuremberg's legal principles and sponsored a Convention on the Prevention and Punishment of the Crime of Genocide.¹²¹ The Genocide Convention adopted by the United Nations in 1948 made genocide a punishable international offense.¹²² In 1949, the Geneva Conventions were revised, and subsequently additional changes were made in other international conventions regarding

¹¹⁹ However, there is considerable debate among legal scholars as to the limits of specificity that is required in international penal codes, the precise manner in which rule of law principles are protected, and the minimum guarantee of procedural and substantive principals of law. See Bassiouni, International Criminal Law, 1: 283-312.

¹²⁰ Marquardt, 83-84.

¹²¹ By General Assembly Resolution 95/1 of December 11, 1946, the U.N. General Assembly overwhelmingly affirmed "[T]he principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." See Bierzanek, 101-102, in Bassiouni, International Criminal Law, 3: 101-102.

¹²² MacPherson, 11.

the laws of war.¹²³ Specified “grave breaches” of the Geneva Conventions are considered crimes for which individuals are deemed personally responsible.¹²⁴

In the area of international crimes, international law expert M. Cherif Bassiouni has identified twenty-two categories of international offenses that rise to the status of international criminal law.¹²⁵ These offenses include terrorism, narcotics trafficking, environmental damage, stealing national treasures, and human rights violations. Yet, these offenses remained uncoded within a central code of offenses. Instead, the offenses of international law are contained in separate multilateral treaties with separate provisions and procedures for breaches and penalties. Toward the solution of that problem the United Nations General Assembly commissioned the U.N.’s International Law Commission (ILC) to formulate a Draft Code of Offenses Against the Peace and Security of Mankind and a Draft Statute for an International Criminal Court.

Two sides crystallized in the debate over the creation of a permanent international criminal court. Ricaldo Alfaro of Panama strongly advocated its creation. He felt an international criminal court was the logical extension of thirty years of effort and development of the rule of law.¹²⁶ Emil Sandstrum of Sweden objected to its creation just as strongly. Sandstrum concluded that the problems of jurisdiction, state cooperation, and enforcement would render successful establishment of a court so remote that its “immediate creation would do more harm than good to the development of international

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Marquardt, 85.

law.¹²⁷ After much spirited debate, the General Assembly authorized creating a committee to draft the statute for an international criminal court. The committee developed an initial Draft Statute in 1951, later revised in 1953.¹²⁸

The complete draft statute did little to ease the differing opinions over the proposed court. Moreover, in addition to the practical difficulties of jurisdiction, crimes, and enforcement, the Cold War complicated matters considerably. The opposition of the Soviet bloc countries proved to be a major obstacle to a court's creation.¹²⁹ When the Korean War broke out, Soviet opposition grew as concerns mounted that such a court would be used against them.

Among the plethora of criticisms raised by these countries to the proposed court were that any such court would violate national sovereignty, and interfere with the domestic affairs of United Nations member states in violation of Article 2(7) of the U.N. Charter.¹³⁰ Such a court would also infringe upon the sphere of jurisdiction of the International Court of Justice, and the Security Council's responsibility under Chapter VII of the U.N. Charter regarding matters related to the maintenance of international peace and security.¹³¹ Nor were the Soviet Union and the Soviet bloc countries alone in their

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ U.N. Charter, Article 2(7) states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are the essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

¹³¹ U.N. Charter, Chapter VII, Article 39 states:

concerns. The United States was equally opposed to the creation of the court for similar reasons, although they framed their opposition in terms of procedural objections not on principle.¹³² It was apparent that both the U.S. and the U.S.S.R did not wish to be subject to any judicial review for which they lacked veto power or an option not to accept jurisdiction.¹³³

As it became apparent that the political deadlock was insurmountable at this juncture in the Cold War era, more states became convinced that the creation of an international criminal court was premature, even if state support existed in principle.¹³⁴ If the political reality precluded the establishment of an international criminal court, then progress in drafting a court statute were essentially futile. The project of codifying the laws of war and humanitarian law protecting civilians suffered a similar fate, although the difficulty of defining aggression was the main obstacle in this area.¹³⁵ Consequently, until progress could be made in codifying international crimes, the ILC decided to defer the matter of the creation of an international criminal court. The final blow came in 1957 when the Sixth (Legal) Committee, on the recommendation of the ILC,

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

¹³² Marquardt, 86.

¹³³ Ibid.; Bassiouni, "From Versailles to Rwanda," 52.

¹³⁴ Ibid..

¹³⁵ Ibid.

indefinitely postponed consideration of both the court and the code of crimes.¹³⁶ It was widely regarded that the ILC's recommendation was meant to lay to rest the issue.¹³⁷

Even though the United Nation's efforts at establishing a permanent international criminal court derailed in 1957, the issue did not go away. As in the interwar period between the two world wars, academic interest kept the issue alive.¹³⁸ In the 1970s, scholarly interest waxed, and while it generated no practical governmental progress, the propagation of proposals prevented the issue from disappearing altogether. Among the reasons for scholarly involvement in the early 1970's were the suspected war crimes violations in the Vietnam war and the Bengali war of secession.¹³⁹ Two conferences, one sponsored by the World Peace Through Law Center in 1971, and the other by the Foundation for the Establishment of an International Criminal Court in 1972, produced two draft statute proposals. Although a larger audience was lacking, expertise in the field was not, and this meant the issue could survive at least intellectually until the international community of nations was once more ready to take up the issue.¹⁴⁰

At the same time, evidence suggested international interest in an international criminal code was on the rise. That interest resulted in a series of conferences held between 1975-1979 sponsored by the International Association of Penal Law that produced a draft code of international offenses. Remarkably, in 1974, the General Assem-

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Marquardt, 87.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

bly finally managed to adopt a definition of aggression.¹⁴¹ The problem was what to do with it. The General Assembly's resolutions were non-binding, so the definition existed without legal mooring.¹⁴² Furthermore, when the Secretariat attempted to persuade the General Assembly to move to the next step of working on the code of international offenses, and a court to enforce them, the member states balked.¹⁴³ It was not until 1981 when the General Assembly would again consider the issue of the code.¹⁴⁴

While it was impossible to produce a comprehensive draft code of international crimes, and an international criminal court bogged down in political rancor and opposition, the post-World War II decades witnessed significant changes in substantive international criminal law. The multilateral approach to creating treaty law, which had developed slowly in the late 19th and early 20th centuries, mushroomed rapidly in the post-war period.¹⁴⁵ The rapid growth of international law is brought about primarily through international crisis periods. Thus, after World War II, maximum effort was turned toward internationalizing the most significant legal principles developed in the aftermath of that war in the Geneva Conventions and the Genocide Convention.¹⁴⁶

However, circumstances and the passage of time dictated concerns for smaller-scale crimes. As international drug trafficking grew and became a more serious problem for countries, interest in criminalizing this activity created a series of international

¹⁴¹ Ibid.

¹⁴² UN Charter, Chapter IV, Articles 10, 11, 12, 13 and 14.

¹⁴³ Marquardt, 87.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid., 88.

¹⁴⁶ Ibid.

conventions to deal with the problem.¹⁴⁷ From these conventions international criminal laws targeting drug trafficking emerged.

An even greater concern was generated by the rise in terrorism in the 1960's and 1970's, as the international community focused its efforts on containing the violence. Although reaching agreement upon which groups were freedom fighters, as opposed to terrorists, proved impossible, certain proscribed acts were criminalized through multilateral treaty law. Thus, while international conventions and multilateral treaties continued to produce proscribed offenses, the effort was piecemeal and lacked the comprehensiveness of a code of crimes necessary for the creation of a permanent international criminal court. The development of international crimes arose out of crisis management rather than any deliberate United Nations forethought and planning.¹⁴⁸

These developments in international criminal law in the 1960's and 1970's developed wholly independent of any consideration of a centralized enforcement mechanism, international legislative or adjudicatory institutions of international criminal law.¹⁴⁹ The multilateral instruments and institutions resulted from political necessity of controlling international violence and crime, and were wholly dependent on national processes of investigation, jurisdiction, and enforcement for implementation and prosecution.

However, the independent development of law in these areas stimulated general international criminal law in two very important ways. First the increase in multilateral conventions broadened the content of international criminal law beyond the narrow con-

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

finest of the most egregious violations of crimes against humanity. Second, the new conventions created new areas of international crimes that had significant ramifications for “high international politics.”¹⁵⁰ States now regarded terrorism and narcotrafficking to be matters of grave importance involving issues of national security.¹⁵¹ Ultimately these threats to national security renewed calls for a permanent criminal court to enforce these international crimes.

In 1989, the International Law Commission began anew to draft a statute for a permanent international criminal court.¹⁵² The ILC’s renewed interest came about as a result of the international drug trade. A.N.R. Robinson, the Prime Minister of Trinidad and Tobago, proposed the idea of a permanent international criminal court as a way to deal with the problem of drug traffickers who were wreaking havoc upon smaller country’s judicial and law enforcement systems with intimidation, violence, and the threat of assassination.¹⁵³

In 1989 with the support of a coalition of Latin American and Caribbean states, the Trinidadian government requested a General Assembly agenda item to consider the creation of an international criminal court with jurisdiction over international drug of-

¹⁵⁰ Ibid., 89.

¹⁵¹ Ibid.

¹⁵² Marcella, 13.

¹⁵³ Ibid.; Marquardt, 90; United Nations, Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the Secretary-General, UN General Assembly Official Records, 44th Sess., Annex 44, Agenda Item 152, 1989, UN Doc. A/44/195, as cited in Mahnoush H. Arsanjani, “Developments in International Criminal Law: The Rome Statute of the International Criminal Court,” The American Journal of International Law 93 (January 1999) 22.

fenses.¹⁵⁴ The request included reference to the 1988 U.N. Narcotics Convention that had made drug trafficking an international crime, which “threatens to engulf small States and afflicts even the super Powers,” and that an international criminal jurisdiction was needed “for prosecuting and punishing offenders who command the means to evade the jurisdiction of domestic courts.”¹⁵⁵

The General Assembly responded by requesting that the ILC resume its efforts on the creation of an international criminal court.¹⁵⁶ The request, which emphasized drug crimes, was treated favorably by the ILC. The United States delegate to the ILC reported “broad agreement, in principle, on the desirability of establishing a permanent international criminal court” and general agreement that it was a “particularly favorable time” to create such a court.¹⁵⁷

At the same time, turmoil engulfed the former Yugoslavian Republic as it disintegrated following the breakup of the former Soviet Union and the easing of the Cold War. In the former Yugoslavia a wave of violence and terror swept over that part of Europe triggering reports of atrocities that the continent had not witnessed since World War II. These reports of war crimes created renewed interest and calls for the creation of a criminal court.¹⁵⁸

¹⁵⁴ Ibid.

¹⁵⁵ Marquardt, 91.

¹⁵⁶ United Nations, General Assembly Resolution 44/39, UN GAOR, 44th Sess., Supp. No. 48, 1989, UN Doc.A/44/195, 311.

¹⁵⁷ Marquardt, 91.

¹⁵⁸ Ibid., 93-94; Marcella, 351-353; MacPherson, 14; Ball, 121-154.

Thus, the political climate and the obviating circumstances of Yugoslavia – later in Rwanda – factored heavily in the Security Council’s decisions to create ad hoc tribunals for the prosecution of war crimes in these two areas of conflict. Reports of war crimes committed in Rwanda and the Balkans spurred renewed calls for the creation of a permanent international criminal court. The UN’s International Law Commission produced a draft statute in 1993, which led to the eventual creation by the General Assembly in 1995 of the Preparatory Committee on the Establishment of an International Criminal Court (“Preparatory Committee”).¹⁵⁹

The purpose of the Preparatory Committee was to produce a draft statute that would serve as the basis for a convention to be adopted at an international diplomatic conference. Approval for an international conference was secured, and following the completion of the eighth session of the Preparatory Committee in April 1998, the date was set for a five-week conference to consider the draft statute. The five-week diplomatic conference was held in Rome in June and July of 1998, and ultimately produced a Rome Statute of the International Criminal Court to create the world’s first international criminal court. Many nations have since ratified the treaty. Yet, the U.S. has stated it will not be one of them.¹⁶⁰ As the ICC edges closer to the sixty ratifications it needs to become international law, the U.S. remains convinced of the Statute’s defects, and thus remains

¹⁵⁹ United Nations, Revised Report of the Working Group on the Draft Statute for an International Criminal Court, U.N. GAOR, 48th Sess., 1993, U.N. Doc.A/CN.4/L.490; United Nations, Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum, U.N. GAOR, 48th Sess., 1993, U.N. Doc.A/CN.4/L.490/Add.1.

¹⁶⁰ Congress, Senate, Committee on Foreign Relation, Is A UN International Criminal Court in the U.S. National Interest?, 105th Cong, 2nd sess., 23 July 1998.

opposed to the creation of the ICC. What are the U.S. objections to the ICC, and do they have any merit? A description of the U.S. objections to the ICC and an assessment of those objections is the topic of the next chapter.

CHAPTER 4

ASSESSING AMERICAN OBJECTIONS TO THE INTERNATIONAL CRIMINAL COURT

The following chapter assesses specific United States objections to the ICC Statute (see copy of ICC Statute in appendix). The chapter begins with an overview and background of the official U.S. position prior to the Rome Conference in 1998 regarding the type of court sought by the U.S. In this first section the key U.S. positions are listed. The chapter then describes the general institutional features of the ICC Statute as finalized at the Rome Conference. In this section the specific ICC mechanisms and articles are identified that the U.S. has criticized and predicted will lead to a flawed Court. Finally, the chapter assesses those particular ICC mechanisms and supporting articles. The assessment is done by carefully analyzing the language of those articles to ascertain whether or not they will lead to the ICC's flawed results that the U.S. has predicted.

United States Positions Prior to the 1998 Rome Conference

The United Nations General Assembly voted to hold Preparatory Committee meetings (PrepCom) beginning in 1996 for the purposes of preliminary drafting and negotiating of the substantive and procedural issues underlying the establishment of the ICC.¹

¹ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 195.

The U.S. State Department under President Clinton's direction emphatically argued from the beginning of PrepCom meetings in 1996 the key positions that the U.S. stated were non-negotiable. The largest concern for the U.S. were the issues involving how the jurisdiction of the ICC could be triggered, whether the authority to refer cases to the Court would be vested in states parties, the degree of independence and authority exercised by the ICC Prosecutor, and whether the Security Council could control what cases came before the ICC.² These issues can be simplified as pertaining to three interrelated areas:

- 1) The ICC's jurisdiction;
- 2) The role and function of the Office of the Prosecutor;
- 3) The relationship between the ICC and the United Nations Security Council.

In terms of the overall goal sought by U.S. negotiators of the ICC treaty, David Scheffer, Ambassador-at-large for War Crime Issues, stated the U.S. position that actions of U.S. citizens, particularly the military, "will always remain beyond the conceivable reach of such an [international criminal] court."³

U.S. ambassador to the U.N. Bill Richardson also reaffirmed the overall U.S. position in a speech before the General Assembly on October 31, 1996. In that speech, Richardson, while emphasizing the long-standing U.S. commitment to the establishment

² Congress, Senate, Committee on Foreign Relation, Subcommittee on International Operations, Is A UN International Criminal Court in the U.S. National Interest?, 105th Cong, 2nd sess., 23 July 1998 (hereafter cited as ICC Senate Hearing).

³ Joe Stork, "The ICC in Focus," International Criminal Court 3, no. 4 (1998): 1.

of the ICC in principle cautioned other nations that his country had serious concerns with the proposed ICC:

There are some who argue that the Security Council will politicize the work of the Court, that it will undermine the Court's independence. [Regarding the perception] that the Security Council is a political body, and its actions are therefore wholly suspect...while individual governments and individual Tribunal staff are objective, non political, and reliable,...The Security Council transcends the individual political views and agendas of each specific member. It is an institution with checks and balances and an essential objective mission to fulfill...There is also a need for checks and balances with respect to the decisions of a single Prosecutor, who in theory could be influenced by personal and political considerations. If the Prosecutor had sole discretion to initiate investigations and file complaints—as some delegations have sought under the rubric of “inherent jurisdiction”—the results could be more idiosyncratic, possibly even more political, than the decisions of the Security Council [emphasis added].⁴

Two years later, on the eve of the commencement of the Rome Conference on June 17, 1998, Ambassador Bill Richardson repeated U.S. policy toward the ICC. Richardson's statement contained basic principles of American policy, in addition to emphasizing the categorically firm stance of the U.S. by use of the word “must” sixteen times in the following excerpt of that speech:

The world must not underestimate the importance of our collective efforts here today. The creation of a permanent International Criminal Court must represent a singular statement of consensus: genocide, crimes against humanity, and the most serious war crimes are never acceptable...But it must be the world community that creates the Court....The Court must be built on the firm ground on international consensus, and enjoy international support....[W]e must also recognize the reality of the international system today...As we craft a Court that reflects our ideals, we must remember that it will not operate in a political vacuum. Experience teaches us that we must carefully distinguish between what looks good on paper and what works in the real world.... It [the ICC] must be a part of the international order, and supported by the international community. ...[T]he U.S. believes that the Security Council must play an important role in the work of a permanent court, including the Court's

⁴ Bill Richardson, Speech on 31 October 1996 before the United Nations General Assembly, as quoted in Ball, 203.

trigger mechanism. The [Security] Council must be able to pursue the aims of peace. The Council must be able to refer critical situations to the Court for investigation and must be able to instruct countries to cooperate with the Court if necessary and appropriate within its powers....[T]he Court must operate in coordination—not in conflict—with the Security Council... [T]he ICC must work in coordination, not in conflict, with states. The Court must complement national jurisdiction and encourage national state action wherever possible...[W]e must not turn an International Criminal Court—or its Prosecutor—into a human rights ombudsman, open to, and responsible for responding to, any and all complaints from any source....An International Criminal Court will succeed only if governments draft a treaty that melds effectively the proper role of individual states, their national judicial systems, the Security Council, and the UN itself. The U.S., which has been so instrumental in establishing international tribunals from Nuremberg to Arusha [Rwanda], will continue to seek actively the achievement of this important objective.⁵

Scheffer reiterated the U.S. position regarding a Security Council controlled ICC when he announced that the “Security Council needs to be a very significant player in the operation of this court.”⁶

Detailing specifics of the U.S. policy on the jurisdiction of the ICC, David Scheffer officially stated “Official actions of a non-party state should not be subject to the Court’s jurisdiction if that country does not join the treaty, except by means of a Security Council action under the U.N. Charter.”⁷ The U.S. sought a jurisdictional scheme that would only allow cases to come before the ICC if the state of the nationality of the prospective defendant consented to the ICC’s participation.⁸

⁵ Ibid.

⁶ T.R. Goldman, “A World Apart? U.S. Stance on a New ICC Concerns Rights Groups,” Legal Times, June 18, 1998, 16.

⁷ ICC Senate Hearing, 14.

⁸ M. Cherif Bassioni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,” The Cornell International Law Journal, 32 (1999): 458.

On the subject of the ICC Prosecutor, the U.S. officially announced their position in the U.S. State Department release entitled, "Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor,"⁹ submitted to the Rome Conference on June 22, 1998. In that statement the U.S. stipulated:

The United States is strongly of the view that the principles of prosecutorial independence and effectiveness...will be best served by, the structure proposed by the ICC under which the Prosecutor's authority to embark on an investigation is triggered by a referral by a State or the Security Council (emphasis added). "¹⁰

Yet, the proposal favored by a majority of other countries in Rome was an ICC Statute whereby cases could be initiated by referrals from one of four sources; either a State, the Security Council, the Prosecutor, or any other interested party, including victims, non-governmental organizations or any other reliable source, all of whom could refer cases to the ICC Prosecutor.¹¹ A referral is a request to the prosecutor to investigate the situation to determine if one or more persons should be charged for a crime.¹² Human rights groups were particularly strong advocates of an independent prosecutor, believing that the U.N. Security Council would be averse to referring situations to the

⁹ Proprio Motu literally means on his or her own motion.

¹⁰ "The Concerns of the United States Regarding the Proposal for a Proprio Motu Prosecutor," in ICC Senate Hearing, 147-150 (hereafter cited as U.S. Concerns of Proprio Motu Prosecutor).

¹¹ Peggy E. Rancillio, "From Nuremberg to Rome: Establishing An International Criminal Court and the Need for U.S. Participation," University of Detroit Mercy Law Review 77 (Fall 1999): 183.

¹² Ibid.

Court. It was also felt that an independent prosecutor would allow victims of crimes to come forth and initiate investigations against the perpetrators.¹³

However, the United States rejected the proposals for an independent Prosecutor. The U.S. also rejected the idea that other entities and individuals should be allowed to initiate an investigation by the Prosecutor.¹⁴ Senator Rod Grams articulated U.S. concerns in a hearing before the U.S. Senate: "The [ICC] prosecutor will have the power to initiate prosecutions without a referral from the Security Council or state parties. There will be no effective screen against politically motivated prosecutions from being brought forward."¹⁵ Ambassador Scheffer suggested that there existed a legitimate reason for referrals to come from member states or the Security Council. He said:

The value of having a government refer it or the Security Council refer it is they are accountable to somebody. They are accountable either to their people, their populace, for doing so, or the Security Council is accountable to the United Nations system. We believe that that fundamental principle of accountability should be at the core of referrals to this court.¹⁶

The U.S. outlined five main reasons for rejecting the creation of a "proprio motu," in an official statement on the proposal of a proprio motu prosecutor.¹⁷ First, the U.S. rejected as "entirely cynical the notion that the community of States is so lacking in moral and political courage that when faced with an atrocity meriting the attention of the

¹³ Ball, 192.

¹⁴ "U.S. Concerns of Proprio Motu Prosecutor," in ICC Senate Hearing, 147.

¹⁵ "Opening Statement of Senator Rod Grams," ICC Senate Hearing, 3.

¹⁶ ICC Senate Hearing, 23.

¹⁷ "U.S. Concerns of Proprio Motu Prosecutor," in ICC Senate Hearing, 147.

Court, not one State will respond.”¹⁸ Instead, the U.S. cited the ad hoc tribunals created to investigate atrocities in Rwanda and the former Yugoslavia republic as evidence of the willingness of the United States and other States to address serious crimes of international concern.¹⁹

Second, the U.S. rejected as simplistic the attitude that a system of State and Security Council referrals can only politicize the office of the Prosecutor, while the proprio motu will be inherently apolitical and impartial.²⁰ The U.S. stated that the debate surrounding the subject cast the United States and other States as acting on purely “political” grounds. Advocates for an independent prosecutor defined “political” in a pejorative sense denoting partisanship and self-interest, while maintaining that individuals and non-governmental organizations are beyond motivations of self-interest and partiality.²¹

Third, the U.S. argued that state involvement is critical to the functioning of the ICC.²² In supporting their contention for an active state role, the U.S. argued that proponents for an independent prosecutor neglect the fact that State and Security Council referrals will have a positive “political” impact.²³ State and Security Council referrals demonstrate political will and political support that are vital to the prosecutor’s work. The U.S. summarized its position on the efficacy of active state involvement as follows:

¹⁸ Ibid., 148.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² ICC Senate Hearing, 14.

²³ “U.S. Concerns of Proprio Motu Prosecutor,” in ICC Senate Hearing, 149.

Under the proprio motu model, we fear it will become too easy for the States Parties to abdicate their responsibilities and simply leave it to individuals, organizations and the Prosecutor himself to initiate cases without the starting foundation of political will and commitment that only States can provide.²⁴

Fourth, the U.S. found unpersuasive the arguments that an independent prosecutor will make decisions to pursue investigations solely on legal criteria, and thus avoid any questioning of the Prosecutor's motives, impartiality, or independence.²⁵ The U.S. rationalized that granting the Prosecutor the authority—and responsibility—to investigate all credible allegations would overwhelm the resources of the Prosecutor. Inevitably with such an overwhelming volume of allegations to review, the Prosecutor would be forced to reject many of those complaints, including those that are unsuitable for prosecution. Among the complaints found unsuitable will be referrals that are directed toward an individual, have their basis in political motivations, and those being dealt with by national judicial systems, which will invariably disappoint the organizations and individuals who are the source of the allegation.²⁶

However, some of these complaints will meet the requirement of legal merit contained in the draft Statute as possessing a “reasonable basis” on which to pursue an investigation. Thus, the U.S. reasons, a simple legal checklist will be inadequate to decide between the large volume of legally meritorious allegations, and consequently “the Prosecutor will be required to make decisions of policy in addition to those of law.”²⁷

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

The effect of increasing the amount of sources from which the Prosecutor receives allegations will substantially increase the instances where the Prosecutor must reject apparently suitable referrals, resulting in charges of impartiality and criticism from groups unhappy with the Prosecutor's choices. The U.S. position concludes, "In sum, the proprio motu proposal risks routinely drawing the Prosecutor into making difficult public policy decisions which the Prosecutor is neither well-equipped nor inclined to make."²⁸

Fifth, the U.S. also opposed the role of judges in reviewing decisions of the prosecutor, adding that granting review authority to judges allows them to substitute their policy preferences for those of the prosecutors. Finally the U.S. opined that allowing the prosecutor's office to use information from non-governmental and individual sources would overwhelm the office. The U.S. cited as evidence the nearly 30,000 complaints received by the U.N. Human Rights Commission in 1997.²⁹

To summarize, the U.S. pursued several non-negotiable points regarding the establishment of the ICC. The main U.S. objections as the Rome Conference got under way in June 1998 were:

- (1) The Prosecutor must not have the authority to independently initiate an investigation absent a referral to investigate from either a government that is a state party to the treaty or the Security Council. The Prosecutor would only be permitted to initiate an investigation upon either a referral from a government that is a state party to the ICC treaty or the Security Council.

²⁸ Ibid.

²⁹ Ibid.

- (2) As a precondition to the exercise of jurisdiction of the Court over a crime, both governments must be parties to the treaty.
- (3) Under its Chapter VII responsibilities of the UN Charter the Security Council must be able to review matters that come before the Court.

The Rome Statute Emerges

As the representatives arrived in Rome for the start of the Rome Conference the United States had three major unresolved issues from the PrepCom meetings: (1) What type of relationship would be reserved for the U.N. Security Council and the ICC? (2) What would be the functions, duties and scope of authority of the Prosecutor's Office? (3) What core crimes would comprise the jurisdictional subject matter of the Court? The central debate before and during the Rome Conference was the "scope of the U.N.'s Security Council involvement in deciding whether or not the ICC takes up a particular case." Would the permanent members of the Security Council be permitted to veto the ICC's ability to investigate and to prosecute war criminals?³⁰

The United States arrived in Rome with a PrepCom ICC draft that reflected the U.S. position regarding the Security Council's role.³¹ Article 23(1) of the PrepCom draft stated reflected the U.S. position that only states that ratified the treaty and the Se-

³⁰ Goldman, 1.

³¹ David J. Scheffer, "Developments in International Criminal Law: The United States and the International Criminal Court," The American Journal of International Law 93 (January 1999): 13.

curity Council could refer “situations” to the Prosecutors Office for initiation of an investigation.³²

However, a competing option permitted the Prosecutor’s Office independently to initiate investigation proceedings on its own authority absent a state or Security Council referral.³³ The U.S. delegation sought to prevent the inclusion of a Prosecutor’s Office with the authority to initiate ICC proceedings on its own. The U.S. by requiring a Security Council referral would have preserved the veto of the United States over possible investigations. In the U.S.’s official view, “If neither the Security Council nor any state endorses action by the Court, the prosecutor would act without a critical and essential base of international consensus.”³⁴

The majority of the other delegates at the Rome Conference disagreed with the U.S. position. They supported an independent Prosecutor based on the rationale that only a truly independent prosecutor would be able to investigate situations states would rather avoid.³⁵ Approaching midnight on the final day of the Conference, the U.S.

³² Ball, 198.

³³ Mahnoush H. Arsanjani, “Developments in International Criminal Law: The United States and the International Criminal Court,” The American Journal of International Law 93 (January 1999): 27.

³⁴ “U.S. Concerns of Proprio Motu Prosecutor,” in ICC Senate Hearing, 148-150.

³⁵ The group of nations opposing the U.S. position, called the Like-Minded Group, was led by Great Britain, Canada, and Argentina and ultimately included over eighty nations. The Like-Minded Group, working with the 264 Non-Governmental Organizations (NGO’s) and human rights groups in Rome to participate in the proceedings, advocated for a strong and independent ICC that would create a truly independent Prosecutor, “free of Security Council (read U.S.) control.” See Ball, 199.

sought to introduce a last minute amendment regarding jurisdiction.³⁶ The U.S. amendment requested that ICC jurisdiction must be subject to the consent of the state of the nationality of the defendant, and that a non-state party's nationals could only be investigated upon a Security Council resolution to that effect.³⁷

Norway blocked a vote on the U.S. amendment with a no action motion.³⁸ The U.S. motion for an amendment would only come to a vote if the no action motion were defeated. However, Norway's no action motion passed overwhelmingly, and the U.S. amendment was tabled permanently.³⁹

When the final vote was taken, the U.S. had failed in its attempt to limit ICC jurisdiction to the consent of states. Absent a Security Council referral, the ICC can proceed with a case if a state party has submitted a complaint or the Prosecutor initiates a case involving a state-Party to the treaty where either the crime was committed or the accused is a national. A state that is not a party to the treaty can also accept ICC jurisdiction on an ad hoc voluntary basis. The U.S., unhappy with the final ICC Statute, joined six other nations – Iraq, Libya, Qatar, Yemen, China and Israel – in voting against the treaty on July 17, 1998.⁴⁰

³⁶ Bassioni, "Negotiating the Treaty of Rome," 458.

³⁷ Ibid.

³⁸ The no action motion, according to parliamentary rules, is a motion to take "no action" on a motion on the table, which effectively removes the issue from further consideration at that time. Ibid., 459.

³⁹ Ibid.

⁴⁰ Thomas W. Lippman, "Worldwide War Crimes High Court Is Approved Delegates Overrule U.S. Objections," Washington Post, 18 July 1998, sec. A, p. 1.

Overview of the ICC Statute: Structure and Functioning of the International Criminal Court

The International Criminal Court is an institution created by an international treaty whose authority and powers are derived from the will of the State-Parties to the treaty.⁴¹ The treaty contains the Statute of the Court, which outlines the Court's major functions, duties, rules, and procedures of operation.⁴² The Statute will be binding only on State-Parties and enters into force once sixty nations have ratified the treaty.⁴³ The ICC jurisdiction is intended to complement that of national criminal justice systems, and can prosecute only when national courts are unwilling or unable to prosecute for the crimes contained within the Court's criminal subject matter.⁴⁴ In addition, the Court can only prosecute for crimes committed after the treaty enters into force.⁴⁵ The ICC is dependent upon the cooperation of nation-states for conducting its operations, including the work of investigations, prosecutions, extradition, and enforcement.⁴⁶

The Statute is composed of 128 Articles organized into thirteen parts. An opening preamble sets forth the purpose and historical context for the need of a permanent inter-

⁴¹ M. Cherif Bassiouni, "Policy Perspectives Favoring the Establishment of the International Criminal Court," Journal of International Affairs 52, no. 2 (Spring 1999): 797.

⁴² United Nations, "Rome Statute of the International Criminal Court," 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53rd sess., 1998, U.N. Doc. A/CONF.183/9 (hereafter cited as ICC Statute).

⁴³ Ibid.

⁴⁴ Ibid., Preamble.

⁴⁵ Ibid., Article 24.

⁴⁶ Ibid., Part 9, Articles 85-102.

national criminal court.⁴⁷ Part 1 contains four articles that establish the Court as a “permanent institution” headquartered at The Hague.⁴⁸ In addition, the Statute creates a Court having “international legal personality,” and provides that the “Court may exercise its functions and power...on the territory of any State Party and, by special agreement, on the territory of any other State.”⁴⁹ The Court will have jurisdiction “over persons for the most serious crimes of international concern,” and operate as “complementary to national criminal jurisdictions.”⁵⁰

The crimes contained within the Court’s jurisdiction are broadly determined to be the “most serious crimes of international concern.” The Statute’s four categories of crime are genocide, crimes against humanity, war crimes, and the crime of aggression.⁵¹ The Statute provides definitions for genocide,⁵² crimes against humanity,⁵³ and war crimes.⁵⁴ The crime of aggression, however, is within the Court’s jurisdiction once the crime is defined.⁵⁵

Part 2, Jurisdiction, Admissibility and Applicable Law, composed of seventeen articles (Articles 5-21), form the core of the statute. This part categorizes and defines

⁴⁷ Ibid., Preamble.

⁴⁸ Ibid., Articles 1 and 3.

⁴⁹ Ibid., Article 4.

⁵⁰ Ibid., Preamble.

⁵¹ Ibid., Article 5.

⁵² Ibid., Article 6.

⁵³ Ibid., Article 7.

⁵⁴ Ibid., Article 8.

⁵⁵ Ibid., Article 5(2). The crime of aggression enters into effect seven years after the treaty enters into force, if a definition can be agreed upon by the State-Parties.

the crimes, establishes the process of referring cases to the Court (the trigger mechanism), defines criteria for admissibility, and lists the applicable law.⁵⁶

Part 3, General Principles of Criminal Law, composed of twelve articles, sets forth the statute's substantive criminal law, which forms the foundation of the basis for individual criminal responsibility and grounds for excluding criminal responsibility.⁵⁷ This part states clearly that the court has jurisdiction over "natural persons."⁵⁸ However, the Court will not have jurisdiction over any over any person under the age of eighteen at the time the crime was committed.⁵⁹ Articles 22 and 23 contain the principles of nullum crimen sine lege and nulla poena sine lege.⁶⁰

Part 4, Composition and Administration of the Court, comprises nineteen articles.⁶¹ The Court establishes four elements of the ICC: a Presidency with three judges;⁶² a section creating an Appeals division,⁶³ a Pre-Trial and a Trial Division,⁶⁴ a Prosecutor's Office,⁶⁵ and the Registry to perform administrative duties.⁶⁶ The court is

⁵⁶ Ibid., Part 2, Articles 5-21.

⁵⁷ Ibid., Part 3, Articles 22-33.

⁵⁸ Ibid., Article 25(1).

⁵⁹ Ibid., Article 26.

⁶⁰ Ibid., Articles 22-23.

⁶¹ Ibid., Part 4, Articles 34-52.

⁶² Ibid., Article 38.

⁶³ Ibid., Article 39.

⁶⁴ Ibid.

⁶⁵ Ibid., Articles 15, 42.

⁶⁶ Ibid., Article 34.

to have eighteen judges, nominated and elected by states parties.⁶⁷ The judges are elected as full-time personnel and shall perform their functions on that basis.⁶⁸ However, the Statute anticipates and supports the likelihood that some judges may serve on a part-time basis depending on the Court's caseload.⁶⁹

The specific U.S. objections are contained in Part 2 on Jurisdiction, Admissibility and Applicable Law. Examining article 124, the opt-out clause, and what exactly that means, along with Articles 12 and 13 regarding jurisdiction, are necessary to assess the question of whether U.S. claims about the nature of the ICC's exceptional authority are accurate. In assessing objections to the Office of the Prosecutor, Articles 14 and 15 are analyzed. Finally, Article 16, which defines the role of the Security Council, is analyzed at the conclusion of the chapter.

Assessing The U.S. Objections to the ICC Statute Jurisdictional Objections

Article 12 and 13 contain the relevant provisions that determine the necessary requirements that the Court must have in order to initiate an investigation. In conjunction, these articles permit the Court to exercise a form of limited jurisdiction over the nationals of non-state parties with regard to the core crimes as set forth in Article 5. The jurisdictional regime created a two-track system. The first track permits the ICC to exercise jurisdiction over all states involved in the conflict regardless of whether any of the states involved are parties to the treaty. Article 13(b) states:

⁶⁷ Ibid., Article 36.

⁶⁸ Ibid., Article 35.

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

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;⁷⁰

The second track permits the Court to exercise jurisdiction over states, even if they are non-state parties to the treaty, providing that one of two requirements is met. The first requirement necessitates either the state where the alleged crime occurred is a party to the ICC treaty, or the accused is a national of a state that is a party to the Statute. The second requirement is the acceptance of ICC jurisdiction for non-state parties providing either the accused is a national or the alleged crime was committed on their soil.

Appearing before the Senate Foreign Relations Committee in Washington, DC, July 23, 1998, Ambassador-at-Large for War Crimes Issues and head of the U.S. Delegation in Rome, David Scheffer, while acknowledging that certain U.S. objectives were achieved, stated that, "serious risks remain because of the document's provisions on jurisdiction."⁷¹ The U.S. wanted a court that would have required both countries to be parties to the ICC treaty, "or at a minimum, would have required that only the consent of the state of nationality of the perpetrator be obtained before the court could exercise jurisdiction."⁷² Scheffer stated that, because the ICC created a jurisdictional regime in the manner it did, the ICC as currently structured does not "serve the cause of interna-

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ ICC Senate Hearing, 14.

⁷² Ibid.

tional justice.”⁷³ Specifically, the U.S. objection to the jurisdictional structure of the court is stated as such:

Since most atrocities are committed internally and most internal conflicts are between warring parties of the same nationality, the worst offenders of international humanitarian law can choose never to join the treaty and be fully insulated from its reach absent a Security Council referral. Yet multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty.⁷⁴

There are two parts to the U.S. objection surrounding the jurisdictional regime of the ICC. The first part is a factual claim. The factual claim states that internal atrocities committed by states against their own nationals are exempted from ICC jurisdiction absent a Security Council resolution. As a result, the U.S. asserts that the worst forms of international crimes – those committed by dictators such as Pol Pot, and Saddam Hussein against their own nationals – will escape prosecution barring Security Council actions.

The second part of the U.S. objection concerns the ICC's jurisdiction. The U.S. claims that the ICC's jurisdiction permits states to join the treaty and by exercising the opt-out clause of Article 124 exempt their forces from ICC prosecution while subjecting the nationals of states that do not join the treaty to the Court's jurisdiction.⁷⁵ The primary objection of the United States is that the ICC jurisdiction, in conjunction with Article 124 containing the opt-out clause, the Prosecutor's power, and the Security Coun-

⁷³ Ibid.

⁷⁴ Ibid.

cil's role combine to create an ICC that will fail to "serve the cause of international justice."⁷⁶

A fictitious scenario involving country X is used to analyze the first part of the U.S. objection regarding jurisdiction. Country X, which is not a party to the ICC treaty, is alleged to have committed crimes as set forth in Article 5 of the Statute against its own civilians on its territory. In such a circumstance, several factors must be present in order to initiate an ICC investigation. First, the crimes that country X is alleged to have committed must fall within the crimes set forth in Article 5 of the ICC Statute. Article 5 defines the crimes falling under the ICC's jurisdiction as:

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.⁷⁷

Assuming that evidence exists that the above crimes have been committed after the date the ICC enters into force, the next step is to determine whether or not the ICC can obtain jurisdiction over the crimes. The next factor to consider is country X's non-party status to the ICC treaty. Since country X is not a party to the ICC treaty, Article

⁷⁵ Ibid.

⁷⁶ Ibid., 12.

⁷⁷ However, the crime of aggression remains outside the Court's jurisdiction for a minimum of seven years after the treaty enters into force, and a satisfactory definition is agreed upon by two-thirds of the state parties to the treaty. See "ICC Statute," Article 5.

12 (1) does not apply as it refers to state acceptance of jurisdiction with respect to states that become a party to the ICC Statute:

A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.⁷⁸

An ICC investigation still could be triggered if country X voluntary accepted the ICC's jurisdiction as stated in Article 12(2):

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.⁷⁹

Country X's voluntary acceptance of ICC jurisdiction could happen if country X's government, the alleged perpetrator of the crimes, were ousted and replaced by a government that accepted ICC jurisdiction to investigate the former regimes alleged atrocities.

However, Scheffer uses the scenario wherein the atrocity is committed by a state against its own nationals, and the state refuses to accept ICC jurisdiction. Thus, Article 12(2)(a) and (b) does not apply since, as in the fictional scenario of country X, the accused state, and the "state on the territory of which the conduct in question occurred," are one in the same.⁸⁰ Country X's alleged atrocities are exactly the type of scenario that is criticized by Scheffer and the United States. In these types of situations Article

⁷⁸ Ibid., Article 12(1).

⁷⁹ Ibid., Article 12(2).

⁸⁰ Ibid., Article 12(2)(a)(b).

12 does not apply since a state is committing atrocities against its own citizens, and is not a party to the treaty.

Moving from the fictitious to the concrete, the examples of Pol Pot's extermination of Cambodian citizens in the late 1970's and Saddam Hussein's alleged gassing of the Kurds in Iraq in 1988 are real world examples that would fall within the fictitious scenario of county X just described.⁸¹ In these two examples – Iraq and Cambodia – states have committed crimes against humanity, and, or, genocide, against their own nationals on its own territory.

Thus, in the examples of Cambodia and Iraq the ICC could not exercise jurisdiction over the alleged crimes committed by these governments. The only way a non-party state can be prosecuted for crimes committed against its own nationals within its territory is by a referral from the Security Council as set forth in Article 13(b), which states:

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

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;⁸²

Therefore, the criticism leveled at the ICC's jurisdictional regime by the United States

⁸¹ Anthony Clark Arend and Robert J. Beck, International Law and the Use of Force (New York: Routledge, 1993), 98, 112, 121-123; Roy Gutman and David Rieff, ed., Crimes of War: What the Public Should Know, (New York: W.W. Norton & Co., 1999), 155-156.

⁸² "ICC Statute," Article 13(b).

through its Ambassador-of-War Crimes, David Scheffer, is accurate. Under the Statute there is no authority for the ICC to prosecute a nation that is not a party to the Statute for violations of international humanitarian laws against its own civilians on its territory, unless, and only if the situation were referred to the ICC prosecutor by a Security Council referral.⁸³

However, there exists a second part of the United State's critique of the Statute's jurisdictional regime. Scheffer alleges that "because of the extraordinary way the Court's jurisdiction was framed...a country willing to commit war crimes could join the treaty and opt-out of war crimes jurisdiction for 7 years, while a non-party state could deploy its soldiers abroad and be vulnerable to assertions of [ICC] jurisdiction."⁸⁴

Scheffer's objection reflects U.S. policy which maintains that states should have the opportunity to assess the effectiveness and impartiality of the Court before subjecting its nationals to its jurisdiction.⁸⁵ This position was balanced with the U.S. recognition of the advantages of a broad ICC jurisdiction to prosecute international war crimes.

⁸³ As a result some scholars have suggested the ICC's jurisdiction is both too broad and too narrow resulting in the worst of both worlds. The jurisdiction is broadly defined to allow the possibility of exposing peacekeepers participating in humanitarian missions in internal armed conflicts to ICC prosecution. At the same time the jurisdiction is too narrow as to allow non-states parties to the treaty to perpetrate the worst forms of crimes against its own citizens and yet be immune from prosecution absent a Security Council referral. See Ruti Teitel and others, "Panel: The International Criminal Court: Contemporary Perspectives and Prospects for Ratification," New York Law School Journal of Human Rights 16, no. 2 (Spring 2000): 519.

⁸⁴ ICC Senate Hearing, 14.

⁸⁵ Ibid.

To balance the tension between the principles of broad jurisdiction against the principle that a state must have an opportunity to assess the Court's effectiveness, the U.S. accepted the idea of automatic jurisdiction of the Court over the crime of genocide, but not for the category of crimes against humanity and war crimes.

For the category of war crimes and crimes against humanity the U.S. favored a proposal that would allow a country to exempt its nationals from ICC prosecution for a period of up to ten years during which time the Court's effectiveness could be ascertained.⁸⁶ At the end of the ten-year period the state could choose one of three options: (1) to accept the Court's jurisdiction over all the Statute's core crimes, (2) to extend the opt-out provision, or (3) to withdraw from the treaty altogether. The U.S. proposal was defeated, and instead a proposal was accepted that allows countries to exempt its nationals from being prosecuted for war crimes for a seven-year period. According to Scheffer, in the worst case scenario, Article 124's seven-year opt-out clause allows state parties to charge other nations who have not joined the ICC with war crimes while exempting its own nationals from war crimes prosecution.

Is Scheffer's assertion accurate? Can a country join the treaty, exercise the opt-out clause and charge other nations for war crimes committed on their soil? Could Saddam Hussein charge U.S. soldiers for alleged crimes within Iraq, while choosing to exempt its own conduct from the ICC jurisdiction by joining the treaty and exercising the opt-

⁸⁶ Ibid.

out clause? In order to answer that question it is necessary to examine the language of the opt-out clause in Article 124. Article 124 states:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.⁸⁷

Therefore, it is possible for a nation such as Iraq to join the treaty and exercise the opt-out clause.

Furthermore, since the opt-out clause is only available to countries that join the treaty, the U.S. by failing to join would not enjoy the right to exempt its nationals from war crimes prosecution in the ICC. Therefore, in theory a country such as Iraq, could violate war crimes and exempt its nationals from ICC prosecution under Article 124, while subjecting U.S. nationals to possible prosecution before the ICC for acts committed by U.S. troops in that nation's territory. Thus, it is entirely possible for Iraq to join the ICC and charge the U.S. with war crimes violations for potential acts committed as part of the ongoing U.S. military operations in Iraq while exempting its own troops from war crimes violations for at least seven years.

In summary, Article 124, the opt-out clause, in concert with Article 12 authorizes state-parties to the ICC treaty to refer situations of the armed forces of a non-state party to the ICC for prosecution while exempting its own nationals from prosecution for war

⁸⁷ "ICC Statute," Article 124.

crimes. Therefore, the U.S. objection that the ICC Statute permits states to join the treaty and enjoy temporary prosecution from war crimes while subjecting states that fail to ratify the Statute to the ICC's jurisdiction, is an accurate assessment.

The Role and Function of the Office of the Prosecutor

The United States consistently opposed the creation of an independent prosecutor with authority to initiate investigations on his or her own.⁸⁸ Speaking before the U.S. Senate Committee on Foreign Relations, David Scheffer explained the U.S. position on the role of the prosecutor:

The treaty also creates a proprio motu -- or self-initiating prosecutor -- who, on his or her own authority with the consent of two judges, can initiate investigations and prosecutions without referral to the court of a situation either by a government that is party to the treaty or by the Security Council. We opposed this proposal, as we are concerned that it will encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion.⁸⁹

The U.S. was opposed by other countries that believed an independent prosecutor was necessary to act in cases where investigations of alleged crimes ran contrary to a state's interest.⁹⁰ The theory behind the creation of the independent Prosecutor was to "prevent favoritism and ensure that suspected criminals from all sides of the conflict are treated fairly."⁹¹ Advocates argued an independent Prosecutor would ensure impartiality by

⁸⁸ "U.S. Concerns of Proprio Motu Prosecutor," in ICC Senate Hearing, 147.

⁸⁹ ICC Senate Hearing, 14.

⁹⁰ Ball, 199.

⁹¹ Bryan F. MacPherson, "Building An International Criminal Court for the 21st Century," Connecticut Journal of International Law 13 (Winter 1998): 57.

possessing the authority to refer cases to the Court acting on their own initiative, absent any State or Security Council referral.

In the end, the U.S. opposition to the independent prosecutor met with defeat. Instead, the ICC created an independent prosecutor that the U.S. criticized as having far too much power and too little accountability. Articles 15 and 54 create the institution of the independent Prosecutor. The Prosecutor's duties and responsibilities include evaluation of evidence, initiation of investigations of alleged crimes, and the prosecution of defendants.⁹² Thus, in addition to allowing referrals to the Court to come from states and Security Council referrals, the independent prosecutor can investigate allegations of applicable crimes upon information from victims, non-governmental agencies, or other reliable sources.⁹³

All referrals regardless if originating from a State, the Security Council, or any other source, must be submitted to the Prosecutor, who has sole authority to reject or continue with an investigation. The authority for referring situations to the Court is contained in Article 13. Article 13 creates a jurisdictional scheme that allows cases to come before the Court for investigation by three different routes, either by a State, the Security Council, or by the Prosecutor:

Article 13: Exercise of jurisdiction

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

⁹² "ICC Statute," Articles 15 and 54.

⁹³ Ibid., Articles 13 and 15.

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.⁹⁴

Article 13, regardless of the source of the referral, grants the Prosecutor the function of receiving applications for investigations.⁹⁵ Thus, the Prosecutor has the responsibility for receiving all referrals made to the Court. The responsibility and power of the Prosecutor appears to be broad as he or she is the sole recipient of all referrals to the ICC.

Article 13 stipulates who can make referrals, while Article 14 goes further by describing the process of what happens after a referral is received. Article 14 affirms that States “may refer to the Prosecutor a situation...requesting the Prosecutor to investigate.”⁹⁶ By use of the word “requesting” the Prosecutor has the initial authority to decide whether a request for an investigation is accepted or denied. Furthermore, Article 14 grants the Prosecutor the authority of “investigating a situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”⁹⁷ Article 14 states:

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed request-

⁹⁴ Ibid., Article 13.

⁹⁵ Ibid.

⁹⁶ Ibid., Article 14.

⁹⁷ Ibid.

ing the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.⁹⁸

The word “situation” as used in Article 14 of the ICC Statute refers to two things.

First, it is designed to prevent referrals that target individuals alleged to have committed violations of the Statute’s crimes.⁹⁹ Two, the word “situation” refers to the authority of the Prosecutor to investigate a conflict in its entirety, and thereby prevents limiting the Prosecutor to investigating the alleged criminal activities of only one party, one individual, or one incident.¹⁰⁰

Thus, if country X refers a case to the Court involving country Y, the Prosecutor, acting under Article 14, is not limited to solely investigating country X’s allegation, but can broaden the investigation to include any possible violations that may have been committed by both sides. The rationale behind giving the Prosecutor the power to investigate the entire situation rather than one incident, individual, or group, is that neither State in a conflict should be able to shield its nationals from investigations for alleged commission of crimes falling within the jurisdiction of the Court. In other words, the Prosecutor can, should, and, in theory, must have the authority to investigate all parties

⁹⁸ Ibid.

⁹⁹ Bassiouni, “Policy Perspectives Favoring the Establishment of the International Criminal Court,” 759.

¹⁰⁰ Ibid.

involved in an armed conflict in order to avoid any hint of bias toward any of the parties.¹⁰¹

The idea of authorizing the Prosecutor to investigate all parties to a conflict and thus determine the direction of the investigation has long been supported by the U.S.:

[W]e reiterate the longstanding position of the United States that no one, not the Security Council, not States, nor any entity nor individual should be able to control the direction of the Prosecutor's investigation by referring a particular case against a particular person.¹⁰²

However, the Statute, while attempting to avoid charges of biased prosecutions, will nevertheless be unable to escape these charges for the following reasons.

Since, as noted earlier, many of the referrals to the Court will originate from an internal armed conflict, there is a high probability that all the warring sides in the conflict will charge the other with the ICC Statute's core crimes.¹⁰³ As referrals are submitted to the Prosecutor's office from the warring parties, the pressure will likely be tremendous for the Prosecutor to investigate all parties' allegations against each other in order to avoid criticisms of partiality or bias. Therefore, in an attempt to avoid criticisms of bias, investigations will likely result for the entire situation, that is of all parties to a conflict.

In addition, the Prosecutor has sole authority to perform investigations and decides what crimes, if any, have been committed and by whom. As the Prosecutor alone bears the burden of investigation, determination of charges, and naming the defendants, there

¹⁰¹ Ibid.

¹⁰² "U.S. Concerns over the Proprio Motu Prosecutor," in ICC Senate Hearing, 148.

¹⁰³ Ibid., 50-56.

is likely to be considerable pressure placed on the Prosecutor in the initial investigation stages. Indeed, a great deal of “lobbying” will be going on, not just toward the Prosecutor, but toward the public.¹⁰⁴ Public opinion campaigns are likely to be directed by all parties in an attempt to portray themselves as blameless, while portraying the other side as blameworthy.¹⁰⁵ Thus, if the United States were involved in a conflict that generated referrals to the Prosecutor, it is anticipated that considerable pressure will be brought to bear upon the Prosecutor to investigate claims against the U.S. as to avoid charges of favoritism and bias on the part of the Prosecutor.¹⁰⁶

While the U.S. supports the idea that no entity or individual should be able to steer the direction of a Prosecutor’s investigation, the U.S. adamantly opposes giving the power of the Prosecutor to initiate cases on his or her own. However, Article 15 of the ICC Statute gives to the Prosecutor, proprio motu status, that is, the power to initiate investigations acting on his or her own authority. Article 15(1) states:

The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.¹⁰⁷

Article 15(1) raises the question of what does “on the basis of information on crimes within the jurisdiction of the Court” mean?¹⁰⁸ Who or what is the source of that information? Article 15(2) answers this question. Article 15(2) gives the Prosecutor the authority to analyze the “seriousness of the information received,” from sources that in-

¹⁰⁴ Ibid, 8-16.

¹⁰⁵ Ibid.

¹⁰⁶ Teitel, 519.

¹⁰⁷ Ibid., Article 15(1).

clude states, the subsidiary organs of the U.N., intergovernmental, non-governmental, and other reliable sources, in written or oral form. Article 15(2) says:

The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.¹⁰⁹

Article 15(2) also gives power to the Prosecutor to seek out “additional information” from entities and individuals, and “other reliable sources that he or she deems appropriate.”¹¹⁰ The Statute does not define “reliable” nor “appropriate,” instead leaving their interpretations to the Prosecutor’s discretion.¹¹¹ Thus, authority rests with the Prosecutor to determine what “other reliable sources that he or she deems appropriate.”¹¹² The words “reliable” and “appropriate” without definition are vague, and thus open to subjective determinations of the Prosecutor. The accountability rests with the Prosecutor’s discretion.

Article 15(3) authorizes the Prosecutor to determine whether or not a referral for investigation merits a, “reasonable basis to proceed” subject to review by the three judge Pre-Trial Chamber. Article 15(3) states:

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the

¹⁰⁸ Ibid.

¹⁰⁹ Ibid., 15(2).

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

Rules of Procedure and Evidence.¹¹³ (emphasis added)

Once the Prosecutor has determined that a complaint shall go forward, the Pre-Trial Chamber must also agree “that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court,” in which case, “it shall authorize the commencement of the investigation.”¹¹⁴ Article 15(4) states:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.¹¹⁵

Therefore, the requirement of a Pre-Trial Chamber review of a Prosecutor’s request to investigate acts as a check on Prosecutorial power.¹¹⁶ However, David Scheffer argues this check is inadequate since the Prosecutor need only convince two of three judges for the investigation to continue, as set forth in Article 57.¹¹⁶ Moreover, even if the Pre-Trial Chamber rules to deny the commencement of an investigation, Article 15(5) still enables the Prosecutor to submit new evidence to the Pre-Trial Chamber that could reopen the case:

“The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.”¹¹⁷

¹¹³ Ibid., Article 15(3).

¹¹⁴ Ibid., Article 15(4).

¹¹⁵ Ibid., Article 15(4).

¹¹⁶ Ibid., Article 57(1).

¹¹⁷ Ibid., Article 15(5).

Thus, article 15(5) clearly contains the possibility of a case continuing even after the Pre-Trial Chamber rejects a petition for an investigation. The language of Articles 15(5) and 15(6) grant authority to the Prosecutor to review new facts and evidence. Article 15(5) and 15(6) also allow the Prosecutor to submit those new facts and evidence to the Pre-Trial Chamber for the purposes of having them reverse their previous decision to allow an investigation to continue. Specifically, Article 15(6) states:

If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.¹¹⁸

The only thing it is reasonable to conclude the Prosecutor cannot do when his or her request for further investigation has been denied is to collect new information. However, delegates and scholars at the Rome Conference have represented Article 15 as preventing a Prosecutor from investigating a situation if the Pre-Trial Chamber rules to deny the Prosecutor's request. In fact, the language used by Professor Michael Scharf suggests that the Prosecutor cannot even launch an investigation unless given approval by the Pre-Trial Chamber. Appearing before the Senate Subcommittee on International Operations on June 23, 1998, Professor Scharf, stated:

The safeguard against an independent prosecutor...is in article 15 which requires the approval of a three-judge pretrial panel before the independent prosecutor can launch an investigation..."¹¹⁹

¹¹⁸ Ibid., Article 15(6).

¹¹⁹ "Statement of Professor Michael P. Scharf before the Senate Subcommittee on International Operations," in ICC Senate Hearing, 61.

A careful examination of article 15 reveals that Scharf's statement is not entirely accurate. Article 15(1) and 15(2) clearly grants the Prosecutor the authority to launch an investigation into any situation around the globe regardless of issues involving jurisdiction, admissibility, or Pre-Trial Chamber review. In fact, the Prosecutor has a considerable degree of latitude in investigating any matter involving potential violations of the ICC's criminal subject matter. All procedural checks upon the Prosecutor come after an investigation has already commenced. After information has been gathered in an investigation, then the Prosecutor reviews the information and determines, on his or her own judgment whether or not to proceed with the investigation by requesting permission from the Pre-Trial Chamber. Since a Prosecutor has the authority to initiate investigations on his or her own, and can request information for any reliable source that the Prosecutor deems appropriate, a request to the Pre-Trial Chamber to investigate seems to be a mere formality.¹²⁰

A number of international scholars are fairly consistent in their opinion that Article 15(4) indicates that a negative ruling by the Pre-Trial Chamber would prevent the Prosecutor from further investigation.¹²¹ Article 15(2) gives the power of the Prosecutor to "analyze the seriousness of the information received (emphasis mine)."¹²² By

¹²⁰ While the language of the ICC may not refer to evidence collection, including witness preparation as an "investigation," it would appear a de facto investigation is occurring when any prosecutor in any legal system is gathering and examining evidence, and interviewing witnesses.

¹²¹ Bassiouni, "Policy Perspectives Favoring the Establishment of the International Criminal Court," 798; Arsanjani, 26-29; Ball, 212; ICC Senate Hearing, 61.

¹²² "ICC Statute," Article 15(2).

writing into Article 15(2) the word received and not collected or gathered, it is reasonable to conclude that the authors of the Statute intended for the Prosecutor's investigation to cease once the Pre-Trial Chambers has denied his or her request for commencing an investigation.

However, by allowing the Prosecutor to review new facts and evidence submitted to him or her, the Statute's Articles 15(5) and 15(6) clearly authorizes the Prosecutor to accept new evidence. Permitting the Prosecutor to accept new evidence tacitly acknowledges the right of parties to submit new information to the Prosecutor. What is the source of this new information? Referring back to Article 15(2), the source is "information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or any other reliable sources that he or she [Prosecutor] deems appropriate..."¹²³ Additionally, the Prosecutor is given the power to review new facts and evidence, and thus while technically the Prosecutor is no longer investigating and gathering new facts and evidence, the Statute clearly assumes that someone is still gathering and collecting new evidence.

Some scholars have noted that Article 18 acts as a prosecutorial check. Article 18, which was proposed by the U.S., requires the Prosecutor to notify all states regarding a matter under review. If the state of the accused decided to investigate, the Prosecutor would have to defer to the state's investigation unless the Pre-Trial Chamber decided otherwise.¹²⁴ However, the language of Article 18 is unclear regarding at what point the

¹²³ Ibid., Article 15(2).

¹²⁴ Ibid., Article 18.

Prosecutor has to notify states of an on-going investigation. For example, if a Prosecutor receives information on a crime in a particular country from one credible source is the Prosecutor bound to notify the parties identified in the crime at that juncture, or can the prosecutor attempt to verify the facts first before notifying parties? The Statute is unclear and vague on this question.¹²⁵

The Role of the Security Council

Leading up to start of the Rome Conference the central question still to be decided was the role of the Security Council. The U.S. sought a criminal court that would have required a Security Council referral in addition to consent of the states to initiate ICC jurisdiction. The U.S. position was seen as too restrictive by many delegations and NGO's who feared Security Council members would not refer situations involving their allies.¹²⁶ Many participants at the Rome Conference believed that the real motivation behind the U.S. policy for a Security Council controlled Court is the view "that it must be able to veto any effort [by the Prosecutor] to investigate and prosecute."¹²⁷ The U.S.,

¹²⁵ Ibid., Article 18(1): "When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecution initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States, which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned." See "ICC Statute," Article 18(1).

¹²⁶ Elisa Massimino, a member of the NGO, Lawyers Committee for Human Rights, commented that the U.S. position, which advocated a veto power for the Security Council, "would eviscerate the court's effectiveness," as cited in Ball, 199.

¹²⁷ Norman Dorsen and Morton H. Halperin, "Justice After Genocide," Washington Post, 13 May 1998, sec. A, p. 1.

and the rest of the world realized that by requiring a Security Council referral to initiate investigations the U.S. could effectively block any investigation by the Prosecutor.

As the Rome Conference got under way in late June of 1998, the delegates worked from an International Law Commission draft statute that preserved the Security Council's control over the activation of the Court.¹²⁸ Without the consent of the all states with an interest in the case, the ICC needed a Security Council resolution to investigate. Article 23(1) of the PrepCom draft stated that only states that ratified the treaty and the Security Council could refer "situations" to the Prosecutors Office for investigation.¹²⁹

Before the Rome Conference Singapore offered a compromise proposal that was ultimately accepted and written into the ICC Statute. Included in the Statute as Article 16, it proposed giving the Security Council the authority to forestall ICC investigations and prosecutions for one year. Article 16 states:

Article 16

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.¹³⁰

Thus, unanimous consent is needed by all the permanent members plus a majority of the entire Security Council to pass a resolution to delay an investigation. In doing so, the

¹²⁸ David J. Scheffer, "Developments in International Criminal Law: The United States and the International Criminal Court," The American Journal of International Law 93, (January 1999): 13.

¹²⁹ Ball, 198.

¹³⁰ "ICC Statute," Article 16.

balance of power shifts away from any one member's ability to block an investigation. Instead, all permanent members must be in agreement to block an investigation, which is a considerably higher bar to achieve. Fifty-three nations supported the Singapore proposal's one-year deferral; the United States and four other nations wanted a deferral time of an "unspecified number of years."¹³¹

[The Security Council retains the right under Article 13 to refer situations to the Prosecutor. While the Prosecutor is obligated to investigate, he or she is not bound to submit the matter to the Pre-Trial Chamber to continue with Court proceedings. However, when the Security Council does refer a matter there is no requirement that the states be parties to the treaty. Furthermore, states are bound by the terms of the U.N. Charter under the Security Council's Chapter VII authority to comply with the dictates of the Council.¹³² Thus, with a Security Council referral state cooperation can be enforced with embargoes, the freezing of assets of heads-of-state and their supporters, and/or by authorizing the use of force.¹³³

¹³¹ Ball, 213.

¹³² UN Charter, Chapter VII, Article 39 states:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

¹³³ Ibid.

CHAPTER 5

ASSESSING U.S. OBJECTIONS FROM A THEORETICAL PERSPECTIVE

This chapter focuses on problems of the ICC's criminal definitions with respect to the principle of legality. In particular, this chapter will examine the problem of the ICC's crimes from a theoretical perspective using legal theorist Lon Fuller's analysis of the rule of law. Prospects for the ICC's success are made more difficult by definitional problems within the criminal subject matter of the Court. Major William K. Lietzau, the Deputy Legal Counsel to the Chairman of the U.S. Joint Chiefs of Staff, has raised concerns that the lack of clarity and preciseness in the ICC's definition of crimes will cast doubt that the ICC is operating under the Rule of Law.¹ Consequently, Major Lietzau argues that greater effort and attention should be paid to defining precisely the crimes contained within the Statute.²

¹ William K. Lietzau, "Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court." Cornell International Law Journal 32 (1999): 478.

² *Ibid.*, 480.

The Problem: Defining Crimes Within the ICC Statute

In the early stages of the PrepCom negotiations, the U.S. delegates articulated the view that the long-term success of the Court would depend upon judicial integrity.³ Participants must view the Court's judicial procedures and mechanisms as producing impartial and fair outcomes. The U.S. believes that if the Court fails to be perceived as impartial, institutional credibility will be insufficient to secure state cooperation.

State cooperation with the Court is crucial to its institutional survival.⁴ Under the principle of complementarity national courts retain the right of first jurisdiction with respect to the alleged commission of crimes contained within the ICC.⁵ Complementarity is consistent with existing criminal law systems, which grants national courts primary jurisdiction over any crime committed within their borders.⁶ The ICC takes over jurisdiction when national courts cannot or will not prosecute, or have voluntarily given jurisdiction to the ICC.⁷

In the event the ICC obtains jurisdiction, all Court requests, including investigations, ensuring evidence collection procedures, witness participation, the issuance of ar-

³ Congress, Senate, Committee on Foreign Relation, Subcommittee on International Operations, "Testimony of David Scheffer Before the Committee on Foreign Relations," Is A UN International Criminal Court in the U.S. National Interest?, 105th Cong, 2nd sess., 23 July 1998, 13 (hereafter cited as ICC Senate Hearing).

⁴ Ruti Teitel, et al, "Panel: The International Criminal Court: Contemporary Perspectives and Prospects for Ratification," New York Law School Journal of Human Rights 16 (Spring 2000), 548-549.

⁵ United Nations, "Rome Statute of the International Criminal Court," 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. GAOR, 53rd sess., 1998, U.N. Doc. A/CONF.183/9 (hereafter cited as ICC Statute); Article 17(1)(a)(b).

⁶ Teitel, 505.

⁷ "ICC Statute," Article 17(1)(2).

rest warrants, and the apprehension of suspected criminals, require nation-state cooperation to be carried out effectively.⁸ On its own, the ICC has no authority or enforcement powers to compel state cooperation. Only the Security Council, using its Chapter VII enforcement powers of the UN Charter, can coerce states to participate in Court proceedings. As it is likely that situations will arise that justify ICC investigation but not Security Council participation, the need for state cooperation is even more important if the Court is to carry out effectively its mandate. Thus, the U.S. stressed the need for an impartial and fair Court with which states would be willing to cooperate.

In order to achieve the requisite judicial integrity, the U.S. made certain that the Court included in the ICC's final draft an article that would more precisely define crimes, procedures, and rules for the use of evidence.⁹ Article 9 of the ICC Statute inserts into the Statute "Elements of Crime," which are equivalent to the U.S. legal system's "Elements of Proof" that stipulate the necessary requirements necessary to obtain a conviction, including rules governing evidence, witnesses, and burden of proof standards.

The inclusion of the Elements of Crime and the Rules and Procedures for Evidence reflected the tension in creating the ICC Statute between the common law judicial systems of the U.S. and Great Britain, and the civil law judicial systems, as used throughout Europe and many parts of the world.¹⁰ The tension between these two systems is most

⁸ Ibid., Article s 86-102.

⁹ Ibid., Article 9.

¹⁰ M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court." Cornell International Law Journal 32 (1999): 443-469.

evident in the emphasis both systems place on balancing the need to secure convictions versus the rights of the accused.

A minimum of procedural rights was included in the Statute to satisfy effectively the U.S. delegations as David Scheffer pointed out in his testimony before Congress.¹¹ The inclusion of the Elements and Procedures alleviates much of the due process procedural concerns of the U.S. However, it does not satisfy the U.S. objections over the definition of crimes in the Statute. The problem for the U.S. is the definitions are too vague and imprecise and thus violate core legal principles that comprise the western legal traditions of the “rule of law.”

The U.S. contends that in failing to define sufficiently and adequately the Court’s crimes the ICC will deliver verdicts that are neither impartial, fair, nor follow internationally recognized minimum rule of law guarantees.¹² Without judicial integrity, states will be unwilling to cooperate with the ICC, resulting in a weak and ineffectual Court. To avoid this, the U.S. argues that the ICC crimes need more sufficient definitions to satisfy the principle of the rule of law.

The Inner Morality of Law

Lon Fuller makes the case that any legal system follows certain moral principles.¹³ He refers to these legal principles as the “inner morality of law.” He maintains that while a government can regulate and control behavior using any number of various

¹¹ ICC Senate Hearing, 14.

¹² Lietzau, 478.

¹³ Lon L. Fuller, The Morality of Law, 4th ed. (New Haven, CT: Yale University Press, 1969.)

methods, it does not necessarily make that system a system of law. In interpreting how crimes are defined and applied, courts in the U.S. employ a clear-statement principle of the “rule of law.”

As articulated by L. Fuller in The Morality of Law, the rule of law principle is present in a legal system “in which legal rules exist, are clear rather than vague, do not apply retroactively, operate in the world as they do in the books, and do not contradict each other.”¹⁴ According to Fuller a legal system that lacks the “rule of law” violates the theory of the inner morality of law, and is therefore a flawed, partial and unfair legal system.

Fuller bases his theory on the idea that law is a system of general rules designed to regulate and control conduct by humans endowed with the capacity for deliberation and choice. Fuller lists eight ways that a legal system can fail, and correspondingly, eight principles of the “inner morality of law,” that cause a legal system to succeed.¹⁵ The eight ways in which a legal system can fail are: (1) having no rules at all so that everything relies on ad hoc decisions; (2) failure to make the laws public; (3) applying laws retroactively, which therefore offers no guidance regarding what is lawful and unlawful; (4) a failure to make rules understandable; (5) enacting rules that are contradictory; (6) issuing rules that are beyond people’s power to follow; (7) changing the rules so fre-

¹⁴ Cass R. Sunstein, “Interpreting Statutes in the Regulatory State.” Harvard Law Review 103 (December 1989): 471.

¹⁵ Fuller, 33-94.

quently people cannot ascertain what conduct is expected of them; and, finally (8) incongruity between the rules as publicized and their administration.¹⁶

Conversely, the eight demands of the inner morality of law are: (1) the generality of law, meaning the use of rules to govern human conduct; (2) rules must be publicly promulgated; (3) rules must be prospective and not retro-active; (4) rules must be defined with clarity; (5) rule cannot contradict one another; (6) laws must be able to be followed, meaning that they cannot require the impossible; (7) legislative inconstancy, that is changing laws too frequently must be avoided; and (8) congruency should exist between official action and the declared rule.¹⁷ If there is a total failure to provide any of the eight demands, Fuller writes that it “does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in a Pickwickian sense in which a void contract can still be said to be one kind of contract.”¹⁸

Fuller’s theory flatly rejects the legal positivism of John Austin, which maintains that laws are laws because they are commands issued by a sovereign backed by the threat of sanction.¹⁹ Austin made a central distinction between the question of whether a law formed part of the positive law and whether or not it was a good or just law. Thus, “What is the law?” is quite distinct from “What ought the law be?”²⁰ On this subject Austin writes, “The existence of law is one thing; its merit or demerit another. Whether

¹⁶ Ibid., 39.

¹⁷ Ibid., 45-91.

¹⁸ Ibid., 39.

¹⁹ Andrew Altman, Arguing About Law, 2nd ed. (London: Wadsworth Publishing Company, 2001), 68.

²⁰ Ibid.

it be or be not is one inquiry; whether it be or not be conformable to an assumed standard, is a different inquiry.”²¹

However, Fuller rejects the general characteristic of legal positivism that equates law “as a one-way projection of authority, originating with government.”²² Instead, Fuller notes that the law, if it is to function as a regulatory system, must take into account the relationship between citizens and governments. For example, Fuller raises the question of what constitutes legitimacy “to a written constitution for a country just emerging from a period of violence and disorder in which any thread of legal continuity with previous governments has broken.”²³ The answer is found in the acceptance of the citizens of the constitution.

Similarly, Ronald Dworkin speaks of “law beyond law,”²⁴ a social consensus that inspires us continually to discern the “best route to a better future”²⁵ by defining “the people we want to be and the community we aim to have.”²⁶ It is within the bounds of this kind of negotiated social consensus that transitional societies, which are frequently devoid of obvious shared normative values, must establish the legal legitimacy of their

²¹ J.W. Brown, ed., The Austinian Theory of Law, (Littleton, CO; Rothman, 1983), 71, cited in Altman, 68.

²² Fuller, 204.

²³ Lon L. Fuller, “Positivism and Fidelity to Law – A Reply To Professor Hart,” Harvard Law Review 91 (1958), 630.

²⁴ Ronald Dworkin, Laws Empire (1986), 409; quoted in Charles Villa-Vicencio, “Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet.” Emory Law Journal 49 (Winter 2000): 207.

²⁵ *Ibid.*, 413.

²⁶ *Ibid.*

new governments. An analogous circumstance is drawn in regard to the creation of the ICC, which attempts to establish a wholly new international criminal justice system.

The ICC contains many of the elements necessary for meeting the principle of the rule of law. Article 24 states that laws will not be applied retroactively and that the rule of lenity, which requires Courts to resolve ambiguities in favor of defendants, will apply.²⁷ Article 22, contains the principle of nullum crimen sine lege (no crime without a punishment), which states that laws will not be applied retroactively.²⁸ Article 20, contains the principle of no bis in idem, or double jeopardy, which prevents trying a person twice for the same offense.²⁹

However, the main contention that is examined in this chapter is that inadequately defined crimes violate legal principles that require laws to be clear rather than vague. While not explicitly stated by the U.S., the implication of Fuller's theory of the inner morality of law may lead to the conclusion that the ICC is a theoretically flawed Court. Therefore, if the ICC contains crimes that are ill-defined and lack specificity, this strengthens the claim that the inner morality of law is violated by the ICC Statute, resulting in a theoretically flawed Court.

Criminal Liability for Ill-Defined Crimes

The United States Constitution states that vague or ill-defined criminal statutes violate due process, and are therefore considered unconstitutional. In *Lanzetta v. New Jer-*

²⁷ "ICC Statute," Article 24.

²⁸ *Ibid.*, Article 22.

²⁹ *Ibid.*, Article 20.

sey, the Supreme Court noted that the “Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law.”³⁰

In another case, Screws v. United States, the Supreme Court declared that due process requires statutory specificity “to give due notice that an act has been made criminal before it is done and to inform [the] accused of the nature of the offense charged, so that he may adequately prepare and make his defense.”³¹ Constitutional concerns over potential due process violations related to the ICC’s core crimes raise several issues. Each separate issue is listed and then given more consideration in ensuing paragraphs.

Constitutional guarantees provided to accused persons by the United States Constitution are not necessarily afforded to persons accused in other nations.³² The Supreme Court ruled that American constitutional rights do not apply to crimes committed outside the United States, or to violations of laws of foreign nations.³³ In addition, the U.S. federal courts have also held that the Sixth Amendment is non-applicable to extradition hearings. In Marten v. Warden, the 11th Circuit federal court held that there is no due process right to a “speedy extradition.”³⁴ The 9th Circuit also held in Oen Yin-Choy v.

³⁰ Lanzetta v. New Jersey, 306 U.S. 452 (1939).

³¹ Screws v. United States, 325 U.S. 91, 128 (1954).

³² Kenneth J. Harris and Robert Kushen, “Prosecuting International Crime: Surrender of Fugitives to the War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with the U.S. Constitution,” Criminal Law Forum 7, no. 3 (1996): 561, 597.

³³ Neely v. Henkel, 180 U.S. 109 (1901).

³⁴ Marten v. Warden, 993 F. 2d 824, 825 (1993).

Robinson that the right to confront adverse witnesses does not apply to extradition.³⁵

Therefore, the claim is advanced that there is no merit to the argument that the U.S. cannot become a party to the ICC if U.S. constitutional protections are not included in the ICC Statute.

However, a second issue is the fact that any treaty which violates the Constitution cannot bind the United States. The Supreme Court held in Reid v. Covert that “no provision of an [international] agreement may contravene any of the prohibitions or limitations of the Constitution applicable to any exercise of authority by the United States.”³⁶ The U.S. Senate Foreign Relations Committee explained that it had no doubt whatsoever that “no treaty can override or conflict with the Constitution. The Constitution is paramount. [See] Reid v. Covert, 354, U.S. 1 (1957).”³⁷ The Committee had made the above statement to explain the reservation attached to the ratification of the Genocide Convention.³⁸ The Committee fully anticipated that at some future time the International Court of Justice would interpret the Genocide Convention in a manner that would require the U.S. to adopt measures that would be unconstitutional.³⁹

In making a forceful statement restating the Supreme Court’s decision in Reid v. Covert, the Senate Foreign Relations Committee was making it crystal clear that the U.S.

³⁵ Oen Yin-Choy v. Robinson, 858 F. 2d 1400, 1406 (9th Circuit 1988).

³⁶ Reid v. Covert, 354 U.S. 1 (1957); quoted in Congress, Senate, Report of the Senate Foreign Relations on the International Convention on the Prevention and Punishment of the Crime of Genocide, Exec.O., 81st Congress, 1st sess., Exec. Rep. 99-2, 99th Cong., 1st sess., 1985: 20.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid., 20-21,

Senate would never give its advice and consent to a treaty that could be perceived to violate constitutional protections. The Senate's stand has great significance for assessing U.S. objections to the ICC Statute. If it can be affirmed that the ICC's Statute would, in all likelihood violate constitutional due process, then the prospects of the U.S. ratifying the treaty are seriously diminished.

One solution to the problem of the conflict between ICC provisions and the U.S. Constitution is to sidestep the issue altogether by describing the ICC as a non-Article III court, which is not bound by U.S. law.⁴⁰ The U.S. Constitution states:

[T]he 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. The Judges, both of the supreme and inferior courts, shall hold their offices during good Behavior, and shall...receive...a Compensation, which shall not be diminished during their Continuance in Office.⁴¹

As the ICC is not a creation of the U.S. Congress, nor does the President nominate its judges, the ICC is arguably a non-Article III court.⁴² Legal scholar Paul Marquardt, in advocating for non-Article III status, claimed that since the ICC will exercise authority derived from the international community of nation-states, the ICC would not merit Article III court consideration.⁴³ Marquardt also asserts that even if the U.S. investigated and detained alleged war criminals for the ICC, it would still not warrant Article III

⁴⁰ Paul D. Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court." Columbia Journal of Transnational Law 33, no. 1 (1999): 104-106.

⁴¹ U.S. Constitution, art. 3, sec. 1.

⁴² Daniel J. Brown, "The International Criminal Court and Trial in Abstentia." Brooklyn Journal of International Law 24, no. 3 (1999): 789.

⁴³ Marquardt, 106.

status. In short, states Marquardt, “International courts are simply separate from the system of United States courts governed by Article III.”⁴⁴

Moreover, the Supreme Court ruling in Hirota v. MacArthur bolsters precedence for the ICC as a non-Article III court.⁴⁵ In that case, the Supreme Court held that because the Tokyo Tribunal was created under the authority of U.S. Supreme Allied Commander General Douglas C. MacArthur, it “is not a tribunal of the United States.”⁴⁶

However, there are flaws in the above argument. The ICC is based on the principle of complementarity, which grants primary jurisdiction to national courts. As such, any proceedings of the ICC in the U.S. national courts would be operating not as international courts but rather as U.S. courts. For example, while extradition proceedings in U.S. courts may not have to provide full constitutional guarantees, such as the right to a speedy trial, these courts are still Article III courts operating as part of the U.S. judicial system. Thus, the question of whether or not the ICC proceedings in U.S. courts must provide all constitutional protections to defendants is a different question than whether the court is acting as an Article III court. Any ICC proceedings in U.S. courts would arguably merit full constitutional protections of any criminal defendants, since any court operating in the U.S. would be national in character, and thus would have to be an Article III Court.

Theoretically, the tension between U.S. constitutional guarantees and the ICC Statute raises a larger issue. Within the framework of Fuller’s “inner morality of law” there

⁴⁴ Ibid.

⁴⁵ Hirota v. MacArthur, 338 U.S. 197 (1948).

⁴⁶ Ibid.

exists the possibility of the theoretical incompatibility between the theories of the rule of law as applied in accordance with the U.S. Constitution versus the rule of law's application in countries with a civil law tradition.

Problems of Definition

The ICC Statute lists four crimes as the subject matter jurisdiction of the Court.⁴⁷

They are listed in Article 5, then given fuller consideration in Articles 6, 7, and 8. Article 5 reads:

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Article 6 of the Statute defines genocide, which is taken from the original genocide convention in 1949.⁴⁸ However, Article 6 only contains a portion of that original convention. Article 6 states:

For the purpose of this Statute, "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;

⁴⁷ "ICC Statute," Article 5.

⁴⁸ "Convention on the Prevention and Punishment of the Crime of Genocide," 9 December 1948, Treaties and International Agreements Registered or Filed or Reported with the Secretariat of the United Nations 78, no. 277.

- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁴⁹

The crime contained within the Statute, including genocide, are restatements of customary international humanitarian offenses, excepting some minor changes.⁵⁰ The problem, however, is that simply restating the customary norms as set forth in the genocide convention is insufficient for the demands of criminal specificity.⁵¹ Customary norms as contained within the Geneva and Hague Conventions, as well as other relevant treaties were created as general norms whose implementation, and subsequent preciseness was left for states to create with domestic legislation.⁵²

Leaving implementation of Geneva and Hague Convention norms to domestic legislation causes two problems for the ICC. The ICC is based on the principle of complementarity, which means national courts will obtain primary jurisdiction and the ICC will prosecute cases only when countries are unwilling or unable to prosecute. While deferring to national courts preserves their sovereign autonomy, the judicial results will vary from country to country. Each country will have different judicial systems, rules, and procedures, as well as varying interpretations of the crimes contained within the ICC Statute. In one sense this preserves the original intent of the creators of the Geneva and Hague Conventions, who envisioned the implementation of the treaties' provisions as being uniquely tailored to each nation. However, with the ICC designed to provide uni-

⁴⁹ Ibid.

⁵⁰ United Nations, Report of the Preparatory Commission on the Establishment of an International Criminal Court, U.N. GAOR, 51st Sess., Supp. No. 22, 1996, U.N. Doc. A/51/22, 16.

⁵¹ Lietzau, 482.

⁵² Ibid.

formity and universality in interpreting the laws of war and peace it leaves the question unanswered of how the ICC will accept the national judicial decisions.⁵³ In effect the Statute places the ICC in the role of a “supreme court” of the world for war crimes.

Under the terms of Rome Statute, the ICC will have the power of judicial review over national criminal justice systems, since the ICC determines when a nation is “unable or unwilling” to prosecute for war crimes.⁵⁴ Article 17(2) states:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

But under the principle of complementarity the ICC leaves the responsibility of creating more precise definitions of the customary norms and treaties, which comprise the ICC’s criminal subject matter, up to individual nations within the international community.

Specifically, in order to meet Rule of Law standards for criminal law specificity, these customary norms must find expression as criminal provisions that transform the general

⁵³ Paul Dubinsky, “Panel: The International Criminal Court: Contemporary Perspectives and Prospects for Ratification,” New York Law School Journal of Human Rights 16 (Spring 2000): 535.

⁵⁴ “ICC Statute,” Article 17(2).

proscriptions into crimes with specificity accompanied by elements of proof. Next, laws created at the macrolevel of states must be converted to the microlevel of individuals to determine individual criminal culpability. Presumably the ICC will then bring these laws into a consistent international framework. These steps constitute the set of general tasks associated with the application of international criminal law from the level of theory to practice.⁵⁵

The specific method required to perform this task is to review a multiplicity of factual scenarios to attach guilt only when the accused is criminally liable in both deed and intent.⁵⁶ The goal, from a military standpoint is to balance the prosecution of genuine war crimes against preventing the prosecution for justifiably defensible military acts. The difficulty of “enhancing certainty and predictability...[is]no easy task, especially in warfare scenarios where violence and aggression necessarily lie at the root of state action.”⁵⁷ How the ICC can accomplish that task without infringing upon the sovereignty of national judicial systems remains to be seen.

In relation to the definition of genocide, Article (6)(a) is reasonably straightforward; the reference to “killing” is the least vague part of the article.⁵⁸ However, Article (6)(b) states, “Causing serious bodily or mental harm to members of the group.”⁵⁹ There is no definition as to what constitutes “serious.” or “mental harm.” The elements of crime which were created under the authority of Article 9 contain no useful guideline.

⁵⁵ Lietzau, 483.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ “ICC Statute,” Article 6(a).

⁵⁹ Ibid., Article 6(b).

Precedent is generally lacking, as the Genocide Convention was only applied for the first time in the Rwanda and Yugoslavia war tribunals. The criteria for commission of genocide is defined as “acts committed with intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such.”⁶⁰

In the Elements of Crime, “whole or in part,” is clarified as “serious bodily or mental harm to one or more persons.”⁶¹ Strictly construed, genocide under the ICC Statute could occur if only one person was subject to “serious mental or physical harm” with a view toward causing the death of that person. The Elements further define “killing” as stated in Article 6(a) as being interchangeable with the term “caused death.”⁶² Using the term “caused death” appears to create further difficulties. If an auto accident causes the death of a person of a protected group under the definition of genocide, technically that conduct, if proven to be intentional, would constitute genocide.

Similarly, many other hypothetical scenarios could be drawn where “death” is caused, particular during an armed conflict. The qualifying statement that limits broadness in the definition of genocide is the “intent” requirement “to destroy, in whole or in part.”⁶³ Presumably, the qualifying statement was intended to prevent solitary deaths, but one individual technically is still a “part” of a protected group.

⁶⁰ Ibid., 6.

⁶¹ United Nations, “Finalized Draft Text of the Elements of Crimes,” June 2000, Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add. 2; Article 6(b) (hereafter cited as Elements of Crimes).

⁶² Ibid., Article 6(a)(1), footnote 2.

⁶³ “ICC Statute,” Article 6.

Article 6 part (c) equates genocide with “deliberating inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”⁶⁴ Once again the Elements of Crimes stipulate that technically one need only cause the death of one person to meet the definition of genocide.⁶⁵ Conceivably, Article (6)(c) could apply to a sanctions situation, such as in Iraq. However, just what constitutes the meaning of “deliberating inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” is unknown. There is no guidance, and presumably ICC judges will decide on a case-by-case basis, which causes great concern for the U.S.

Parts (d) and (e) of the definition of genocide are equally vague in meaning. Part (d) states that genocide exists when there is a campaign to reduce the rate of pregnancy in order to limit population growth.⁶⁶ At least one international lawyer has questioned the forethought behind part (d), and believes that while the Statute’s drafters had some “paradigm of evil” in mind, they were not forthcoming in their meaning.⁶⁷ The vagueness of this definition leaves open the possibility of a variety of interpretations, ranging from Nazi-like forced sterilization to U.N. sponsored birth control programs. Moreover, discussion papers were not very helpful for clarifying the definition.⁶⁸ One PrepCom

⁶⁴ Ibid., Article 6(c).

⁶⁵ “Elements of Crimes,” Article 6(a)(1).

⁶⁶ “ICC Statute,” Article 6(d).

⁶⁷ George Fletcher, “The International Criminal Court: Contemporary Perspectives and Prospects for Ratification,” in Ruti Teitel, New York Law School Journal of Human Rights 16 (Spring 2000), 525.

⁶⁸ “UN Preparatory Commission for International Criminal Court concludes first session at HQ,” M2 Presswire, 2 March 1999, 1999 West Law, 12607695, reprinted in David

paper circulated in March of 1999 stated “Genocide by preventing births would occur if the accused imposed measures that were intended to prevent births within a group.”⁶⁹

It would appear that the crime bears a relationship to the manner of how measures to prevent pregnancies are imposed on a population. Thus, conceivably Planned Parenthood could be construed as imposing measures designed to prevent births by counseling all clients on forms of birth control. However, Planned Parenthood’s operation surely cannot be the type of activity the ICC’s drafters had in mind when considering conduct that rises to the level of genocide.

Part(e) of the definition of genocide is equally problematic. Article 6(e) states, “forcibly transferring children of the group to another group.” As the definition now stands, the practice of finding homes for children of one group and placing them with another would be consistent with the above definition. Professor George Fletcher states that drafters surely did not intend for this to be so, however they left the definition vague enough to allow for this form of strict reading. Professor Fletcher suggests that what the drafters had in mind was an act similar to the taking of Aborigine children in Australia and forcing them to be raised in White homes in order to assimilate them into another culture.⁷⁰

Article 25, section 3, in conjunction with the definition of genocide raises specific U.S. constitutional questions. Article 25, section 3, provides for various forms of par-

Nill, “National Sovereignty: Must It Be Sacrificed to the International Criminal Court?” BYU Journal of Public Law 14, no. 1 (1999): 119-150.

⁶⁹ Ibid.

⁷⁰ Fletcher, 526.

ticipation in a criminal offense which render the person liable for criminal prosecution.⁷¹ Article 25(3)(e) would appear to violate constitutionally protected free speech. Article 25(3)(e) states:

e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.⁷²

In effect, writing or speaking of population transfers may violate this provision and render the person liable for the crime of genocide. The above article would invariably constitute a challenge to constitutionally protected free speech.⁷³ Only in the circumstance where the speech or writing was likely to cause an imminent likelihood of inciting others to commit genocide would the above provision of the ICC Statute be permitted in U.S. law.

The definition of genocide in Article 6 is fairly representative of the imprecise nature of the definition of crimes contained in the ICC Statute. Although the crimes against humanity in Article 7 are better defined than the Article 8 war crimes, Article 7 still contains similar definitional problems. According to international law scholar M.Cherif Bassiouni, the language of Article 7 is clear, and yet he acknowledges “some of the prohibited acts are mere labels whose elements will need to be established in the future.”⁷⁴ The lack of specificity and elements clarifying crimes against humanity raises

⁷¹ “ICC Statute,” Article 25(3).

⁷² Ibid., Article 25(3)(e).

⁷³ U.S. Constitution, Amendment 1.

⁷⁴ Bassiouni, 461.

“questions about their conformity to the requirements of the principles of legality contained in Article 22,” which requires that laws be “strictly construed.”⁷⁵

Article 8 is more problematic owing to the fact that customary laws of war often reflect negotiated law of war treaties where consensus was more valued than clear, precise terminology.⁷⁶ Militaries are typically loath to bind their forces through restrictive precise language, and therefore the practice of the laws of war has been one of general proscriptions rather than narrowly tailored ones.⁷⁷

Some examples illustrate this point. In Article 8, one of the first war crimes listed is that of “willfully causing great suffering, or serious injury to body or health.”⁷⁸ Agreement upon what exactly that means is completely lacking.⁷⁹ The problem, Major Lietzau notes, is that “great suffering” is a common result of war, even among “protected” civilian persons.⁸⁰ Other examples of ambiguous wording are “wounding treacherously,”⁸¹ “attacking...buildings which are undefended,”⁸² and “persecution,” defined as “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”⁸³

⁷⁵ Ibid. ; “ICC Statute,” Article 22.

⁷⁶ Lietzau, 483.

⁷⁷ Ibid.

⁷⁸ “ICC Statute,” Article 8(2)(a)(iii).

⁷⁹ Lietzau, 487.

⁸⁰ Ibid., 488.

⁸¹ “ICC Statute,” Article 8(2)(b)(xi).

⁸² Ibid., Article 8(2)(b)(v).

⁸³ Ibid., Article 7(1)(h) and (2)(g).

As this chapter concludes it is clear that the crimes examined here represent only a fraction of the definitional difficulties that will need to be worked out to attain the level of specificity required by criminal justice systems operating under Fuller's Rule of Law requisites. However, the uniqueness of the ICC is that there is no supra-legislator that can more adequately define the crimes. One scholar has stated that one of the things that the ICC may do very well is "provide clarity and uniform interpretation to international human rights and humanitarian law."⁸⁴ It is precisely because international humanitarian law is so lacking in clear and specific definitions that the United States is troubled by the ICC's treatment of the criminal subject matter.

If the ICC is establishing precedents as to uniform interpretations of command responsibility, genocide, and war crimes, it will be doing so as a treaty organization that not all states will join. Advocates of the ICC would like to believe the precedents set in international law by the Court may ultimately bind all states. Indeed as mentioned above, many scholars believe that the function of interpreting law is one of the advantages toward creating the ICC.

However, the precedential value will occur without many states' – including the U.S.'s – consent. That is deeply troubling to the U.S. which feels such important matters should not be left up to judges operating without proper and effective oversight in a treaty based organization that not all states will join.⁸⁵ Although the ICC tries to steer away from making the claim that it will be creating binding law,⁸⁶ nevertheless, the deci-

⁸⁴ Dubinsky, 535.

⁸⁵ Leitzau, 512-529.

⁸⁶ "ICC Statute," Article 10 states:

sions made by the ICC will come to occupy a space in international law as part of the evidence for the existence of customary international law, which is binding on all states.⁸⁷

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

⁸⁷ Article 38 of the Statute of the International Court of Justice identifies the sources of international law as deriving from four categories; (1) treaties, (2) international customs, (3) general principles of law common to all legal systems, and (4) judicial precedents along with the teachings of international law experts. See J.L. Brierly, The Law of Nations, 5th ed. (Oxford: Clarendon Press, 1955), 57-66.

CHAPTER 6

CONCLUSION

On July 18, 1998 the Convention creating the ICC was opened for signature at Il Campidoglio in Rome. Within two hours of the opening for signatures twenty-six countries had signed the Treaty.¹ A little over a year later, by October 1999, eighty-nine states had signed and four states had ratified the Treaty.² The rapidity with which nation-states have joined the Treaty demonstrates the wide support the ICC enjoys among the world community. Perhaps with that in mind former President Clinton decided to sign the treaty on the last day it was open for signatures.³

However, the Senate has made it clear they will not ratify the treaty.⁴ Clinton's signing of the ICC treaty does not bind the U.S. to the treaty until the Senate gives their advice and consent and ratifies the treaty. However, under the Vienna Law of Treaties,

¹ M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court," Cornell International Law Journal 32 (1999): 467.

² United Nations, "Rome Statute of the International Criminal Court, Ratification Status," United Nations Official Website, [ratification status on-line]; available from <http://www.un.org/law/icc/statute/status.htm>; Internet; accessed 16 May 2001.

³ On December 31, 2000, on the last day the treaty was open for signature, President Clinton signed the ICC Statute.

⁴ Congress, Senate, Committee on Foreign Relation, Subcommittee on International Operations, Is A UN International Criminal Court in the U.S. National Interest? Subcommittee on International Operations, 105th Cong, 2nd sess., 23 July 1998 (hereafter cited as ICC Senate Hearing).

a state's signature does bind it to refrain from defeating the purpose of that treaty.⁵ The U.S. waited almost forty years to ratify the Genocide Convention, and given the widespread support for the ICC, many scholars have predicted that the ICC will be operational long before the U.S. ever becomes a state-party to the treaty.⁶

The reality that the U.S. will not be a party to the ICC Statute raises an important question. Since the U.S. will not participate in the ICC why is it important to assess U.S. objections? At the outset, it is difficult to envision the efficient functioning of the ICC without U.S. participation. International legal scholars point out the example of the U.S. failure to participate in the League of Nations as one possibility that represents the worst-case scenario.⁷ At worst, the ICC will not only be ineffective, but also acerbate international tensions, potentially fueling conflicts and prolonging wars.

Nevertheless, advocates remain cautiously optimistic, seeing in the creation of the ICC a momentous step forward in institutionalizing international criminal justice mechanisms. Yet, they also realize the ICC is no panacea for all the ills of mankind. The tendency among ICC advocates is to view the U.S. as refusing to hold their own conduct accountable to the same rule of law they impose on others. The ICC advocate's viewS on U.S. opposition makes it easier for proponents of the ICC to dismiss U.S. objections without really analyzing their content. However, dismissing U.S. objections

⁵ United Nations, "Vienna Convention on the Law of Treaties," 23 May 1969, United Nations Treaty Series, 1115, Article 8, 331, 336.

⁶ Christopher Blakesley and others, "Panel: Association of the American Law Schools Panel on the International Criminal Court," American Criminal Law Review 36, no. 2 (Spring 1999): 223-254.

⁷ William S. Shepard, "Restraining Gulliver: American Exceptionalism and the International Criminal Court," Mediterranean Quarterly 11, no. 1 (2000), 69.

without fully considering their merits fails to appreciate the validity of those criticisms. Assessing U.S. objections to the ICC becomes important because their validity could act as a predictor of future ICC results, allowing policy makers and leaders to anticipate the effect of those results and respond accordingly. For example, if it can be determined that in a particular instance the aggressive pursuit by the ICC of a suspected war criminal could lead to the destabilization of a region, the U.S. can use its power to prevent that particular ICC prosecution.

The paradox of the twentieth century is that although more international cooperation and international treaties have been used to mitigate and prevent the violence of war, it has also produced more death and destruction than any other century in history.⁸ The treaties represented the world's attempt through the use of the international law to reduce the horrors of war, the instability they produce, and the lives they destroy. Yet, repeatedly the attempts to reduce the sheer brutality of men toward other men have failed. The post-World War II war crimes trials at Nuremberg and Tokyo reflect humanity's desire to right wrongs and punish international transgressors who commit heinous acts that "shock the conscious of mankind."⁹

⁸ Professor Rudi Rummel documents that as many as 170 million persons have been murdered by their own governments. See Rudolph J. Pummel, Death By Government 9, 1994, as cited in Michael P. Scharf, "The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg," Albany Law Review 60 (Spring 1997): 861.

⁹ The Preamble to the ICC states:

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

See United Nations, "Rome Statute of the International Criminal Court," 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of

Will the passage and successful establishment of a permanent international criminal court complete the missing link in an international criminal justice system that began with the International Military Tribunal (IMT) trials at Nuremberg? The U.S. has responded with a definite answer of no. It is the position of the U.S. that the ICC adopted at Rome, and destined to become a fully functioning institution before long, suffers from institutional flaws that hinder, not support the application of international justice. This study examined the thesis posited by the United States that deficiencies in the institutional structures of the ICC would render the criminal court inadequate to accomplish its stated objectives of punishing and deterring the worst forms of international criminal atrocities.¹⁰

The thesis analyzed particular institutional features of the ICC to assess the claims of the U.S. against the actual language of the Statute to determine if the U.S. claims merited consideration. In testing the U.S. hypothesis this thesis confined the scope of its inquiry to four features of the ICC Statute:

- (1) The jurisdiction of the ICC;
- (2) The authority and powers of the Office of the Prosecutor;
- (3) The role of the United Nations Security Council; and,
- (4) The crimes that the ICC will be enforcing.

an International Criminal Court, U.N. GAOR, 53rd sess., 1998, U.N. Doc. A/CONF.183/9 (hereafter cited as ICC Statute).

¹⁰ The Preamble to the ICC Statute articulates its objectives:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

The method used to assess the specific U.S. objections was a careful analysis of the language of the disputed articles of the ICC Statute to ascertain whether or not U.S. claims are accurate. The materials that have been used in this study are derived from both primary and secondary sources. The primary source material is official government documents pertaining to the ICC, including the treaty Statute that legally creates the Court, and U.S. and UN documents. The secondary source materials come from books and academic journals.

To provide the context for the impetus behind the ICC creation, the thesis examined the history of twentieth century attempts at establishing international judicial mechanisms to prosecute the crimes of war, genocide, and crimes against humanity. The historical chapters focused on the failed WWI war crimes trials, and the successful WWII trials in Nuremberg and Tokyo. The Nuremberg and Tokyo trials are not only the inspiration but also the source of the international law upon which the ICC is founded.

Before the twentieth century international law had nothing to say regarding individuals; it provided legal personality only to nations. Individuals were recognized in international law only in the context of their being a citizen of a country, such that when an individual was wronged it was really the citizen's country that had rights to redress of grievances. An individual without a country possessed no rights recognized by international law. Consequently, citizens had no rights outside the context of their nationality. Prior to, and throughout much of the twentieth century, if a citizen were wronged by their government, international law was silent.

Then in 1899 the first Hague Conference was held. Nations assembled in recognition of their mutual benefit to regulate their conduct both to prevent wars and to mitigate the horrors that stemmed from wars. Credit falls to the Russian Czar Nicholas II for calling the first Hague Conference, as credit falls to the Hague Conference for producing the first international codification of the laws of war.¹¹ At the second Hague Conference, another Russian, international jurist Feodor de Martens gets credit for writing into international law a whole new category of crimes that sets the revolutionary tone in international law in the twentieth century.¹²

The Martens Clause, contained in the Preamble of the 1907 Hague Convention, moved onto the stage of international law the recognition and protection of the lives and rights of individuals. The Martens Clause gave recognition to the category of crimes against humanity, which brings protection to civilians in war.

The first test at implementing the laws of war erected at the Hague Conferences ended in failure as the “Guns of August” erupted in the summer of 1914 with the outbreak of WWI. The Hague represented the first international efforts to humanize the conduct of the participants in war. Yet, the First World War was anything but humanized; it was the most brutal war ever fought up to that time. It was a war of metal and

¹¹ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (London: Greenwood Press, 1982), xi

¹² The Martens’ Clause contained in the Preamble of the 1907 Hague Convention reads:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established

machines that delivered men up to their deaths, not in the hundreds, but in the thousands. World War I has become an iconographic symbol for the horrors of war evoking images of trenches and barbed wire strewn battlefields littered with pockets of poison gas and the bodies of dead soldiers cut down by machine guns, their faces covered with gas masks.¹³

At last when the “Guns of August” were silent, the victorious Allies were in no mood to be conciliatory. They charged Kaiser Wilhelm II for violations of the laws of nations and pursued his punishment before an international tribunal. Although the efforts at war crimes were unsuccessful, the trials became the legal genesis behind the Nuremberg and Tokyo trials. In 1943 the Allies created the United Nations War Crimes Commission (UNWCC) to investigate formally war crimes violations and explore proposals for creating a war crimes court.¹⁴ UNWCC examined the work of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to determine the direction that the post-WWII trials should take.¹⁵ The UNWCC wanted to make sure the mistakes of WWI were not repeated.

among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

¹³ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 9-25.

¹⁴ Cherif M. Bassiouni, “From Versailles To Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” Harvard Human Rights Journal 10 (Spring 1997): 21-23.

¹⁵ “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” 29 March 1919, Report Presented to the Preliminary Peace Conference, American Journal of International Law 14, no. 1 (1920): 95-96 (hereafter cited as 1919 Commission Report).

The 1919 Commission recommended charging the Kaiser for initiating the war. The effort failed in the politically-charged atmosphere of post-WWI Europe, but it served as the basis for the idea behind charging the Germans and Japanese after WWII for waging an aggressive war.¹⁶ World War I also sought to punish Turkey for mass execution of Armenians in 1915, turning back centuries of tradition and international law that gave states the right to treat its own nationals as they willed. The effort failed, but it is significant for establishing the precedence for the idea that citizens are entitled to international protections even from their own governments. In bringing their charges against the Kaiser and Turkey, the Allies relied on the work of The Hague Conferences and the Martens Clause. WWI gave legal life to the ideas of The Hague; the task that lay before the world was making them binding international law.¹⁷

Nuremberg served as the midway point between the failed application of the ideas of war crimes after WWI and the successful finalization in 1998 of a treaty to create the world's first permanent international criminal court. Nuremberg is instrumental for the developments in international law that make the ICC possible. The idea of a permanent criminal court was broached by the 1919 Commission but never really considered.¹⁸ The idea was broached again after WWII but stalled in the post-War political stalemate of the Cold War.¹⁹ Finally the idea was brought to life in the 1990's. Nuremberg cre-

¹⁶ Willis, xi.

¹⁷ Ibid., 3-6.

¹⁸ Ibid., 166.

¹⁹ Howard Ball, Prosecuting War Crimes and Genocide (Kansas: University Press of Kansas, 1999), 86-93; Paul D Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court," Columbia Journal of Transnational Law 33, no. 1 (1995): 83-92.

ated the international legal precedents upon which the ICC is based. “The lasting contribution of Nuremberg was to make individuals responsible for their actions,” said Jutta Limback, president of Germany’s Supreme Court.²⁰ In 1945 the victorious Allies created the London Charter. Article 6 of that Charter created three categories of international war crimes for which individuals, including heads-of-states and military leaders, could be held criminally liable, and therefore tried before a court of law. In 1946, the General Assembly of the newly-created United Nations affirmed and codified the general principles behind the Nuremberg trials into international law. Article 6 of the Nuremberg’s Charter made three crimes punishable by the Nuremberg judges:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy or the accomplishment of any of the foregoing.

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.²¹

²⁰ Ball, 92.

²¹ United Nations, “Prosecution and Punishment of Major War Criminals of the European Axis,” 8 August 1945, United Nations Treaty Series 279, 59, 1946, Stat. 1544: 82 (hereafter cited as London Charter); Article 6.

The General Assembly codified these principles into international law in 1946 as well as the other legal precedents set at Nuremberg. The others principles codified by the General Assembly were:

Principle I: There is individual responsibility for war crimes.

Principle II: Individual responsibility lies in international law, regardless of whether domestic law has no such provisions.

Principle III. “Head of State” is no longer an immunizing defense against war crimes charges.

Principle IV. “Superior Orders” is no longer a defense against war crimes charges, “provided a moral choice was in fact impossible.”

Principle V: A person charged with war crimes has “the right to a fair trial on the facts and the law.”

Principle VII: Complicity in the commission of the above war crimes is a crime in international law.²²

Revolutionary ideas in international law that began with the first attempts to codify crimes at The Hague, and continued with the legal precedence of efforts to punish a head-of-state, Kaiser Wilhelm II after WWI, finally took international legal existence at the Nuremberg trials. With the Nuremberg Principles came the ushering in of a new era in international law. No longer was international law silent on how a nation treated its own citizens. Following in the line of logic contained in the 1907 Marten’s Clause, international law now said that even in wartime there are limits “to what governments may use as a means of killing and what they may do even to their own citizens; such issues may appropriately be judged by an international tribunal and, most important, those who gave the orders and those who carried them out both bear full responsibil-

²² Ball, 87.

ity.”²³ The Hague Conferences had begun a revolution in international law that attempted to bring war under the rule of law.²⁴

The ICC brings together the unfinished legacy of the World War II tribunals, creating a permanent international criminal court to hear cases involving the most serious violations of the laws and customs of war that for whatever reason are not prosecuted by national criminal justice systems. The ICC however, is not a perfect institution. The specific objections addressed by the United States point out difficulties in the ICC’s ability to deliver on the promise of finishing the legacy of Nuremberg. The largest concern for the U.S. were the issues involving how the jurisdiction of the ICC could be triggered, whether the authority to refer cases to the Court would be vested in states parties, the degree of independence and authority exercised by the ICC Prosecutor, and whether the Security Council could control what cases came before the ICC.²⁵

In regard to the ICC’s jurisdiction the thesis addressed the following problem identified by the U.S. The way the ICC jurisdiction is framed, the worst forms of violence committed by a nation against its own citizens will go unpunished unless the Security Council refers that case to the ICC. Does the ICC permit the worst forms of international atrocities occurring within nations to go unpunished absent Security Council involvement, while exposing a nations peacekeepers operating in a humanitarian mission to the potential risk of prosecution by the ICC?

²³ Willis, xi.

²⁴ Ibid., 5.

²⁵ ICC Senate Hearing , 1- 32.

The answer is yes. Article 12 only grants the ICC jurisdiction if one of the parties, either the nation of the accused, or the nation where the crime was committed has either ratified the treaty or consented to the ICC having jurisdiction to try the case.²⁶ Since in all likelihood the leaders of nations most likely to commit atrocities against their own citizens – the Hitlers of the world – will not join the treaty, the only way the ICC can prosecute such crimes is if the Security Council, acting under Article 13(b), refers the situation to the Court.²⁷

The U.S. also cited concerns that a nation could join the treaty, exercise the opt-out clause for war crimes and thereby exempt its forces from prosecution for that crime. Therefore, the U.S. claimed, a nation's forces could commit war crimes with impunity while at the same time refer cases involving other nations to the ICC to stand trial. The analysis of the relevant ICC Articles 12 and 24 confirms that the U.S. claim is true. Article 124, the opt-out clause, in concert with Article 12 authorizes state-parties to the ICC treaty to refer situations of the armed forces of a non-state party to the ICC for prosecution while exempting its own nationals from prosecution for war crimes. Therefore, the U.S. objection that the ICC Statute permits states to join the treaty and enjoy

²⁶ "ICC Statute," Article 12.

²⁷ The only way a non-party state can be prosecuted for crimes committed against its own nationals within its territory is by a referral from the Security Council as set forth in Article 13(b) of the ICC Statute which states:

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

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

temporary prosecution from war crimes while subjecting states that fail to ratify the Statute to the ICC's jurisdiction is an accurate assessment.

There is also a practical problem with the way the ICC jurisdiction is framed. Many chroniclers of the Nuremberg trials have pointed out that one of the keys to success was the fact that the Allies had occupied Germany with over a million troops and thus had access to all witnesses and evidence.²⁸ In the situation involving an atrocity such as the massacres in Cambodia, territorial occupation by a victorious army will not be the case. Cambodia would have not only to give up the accused for trial but also cooperate to provide evidence. Another alternative would be if the nation, in this example, Cambodia, were to prosecute the suspected war criminals themselves.

However, when these atrocities occur, the government that committed the crimes is typically still in power as was the case with Cambodia. In those cases the Security Council would have first to make a determination if the situation was a threat to international peace and security and then decide whether to pursue military options either to apprehend and/or overthrow the leaders and others responsible. While it may seem callous, arguably few situations would be so severe as to muster Security Council support for military options. Even in 1991, when the Security Council, led by U.S. troops, repelled the Iraqi army from Kuwait, a ground offensive to occupy Baghdad and overthrow Saddam Hussein was politically unfeasible. Similarly, the NATO operation in Kosovo could not generate support for a ground offensive to protect ethnic Albanians from Serbian forces.

²⁸ Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Alfred A. Knopf, 1992), 57.

The problem is an old one. It is one thing to declare that international law permits prosecution of individuals for universally condemned crimes. It is quite another to have that person in custody and have access to all evidence.²⁹ Once more it would appear that force alone can deliver the Saddam Hussein's and Pol Pot's to the world to stand trial. Moreover, without support from the world's largest superpower, the U.S., it is hard to fathom how the ICC will solve this age-old problem.

The thesis also assessed the U.S. claim that the ICC Prosecutor's authority is overly broad and contains too few checks and balances. Furthermore, the thesis assessed the U.S. contention that too little authority is given to the Security Council in determining what cases come before the Court. Finally, the thesis examined theoretical problems associated with the lack of clarity and preciseness in the ICC's definition of crimes that would undermine the ICC's ability to operate under the Rule of Law.²⁹

Professor Bryan MacPherson acknowledges the broad authority granted to the Prosecutor:

Rather than rigid rules that would undermine the international court, however, decisions on whether to proceed should be left to the prosecutor's discretion, after considering the totality of the circumstances. When a state is actively investigating a matter, the prosecutor could consider, *inter alia*, the quality of the state investigation, the likelihood of a fair and successful prosecution, and whether the state or the international court will be better able to obtain relevant evidence and custody of the accused. The prosecutor might consider why the national court acquitted the suspect or why national authorities declined to prosecute. If, for example, the international court has obtained additional evidence that was not considered by the national authorities, an international trial might well be reasonable.

²⁹ William K. Lietzau, "Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court," Cornell International Law Journal 32 (1999): 478.

If the consequence of not taking jurisdiction would be trial by a possibly biased state, international court jurisdiction should be strongly favored.³⁰

This thesis, after reviewing the Office of the Prosecutor, concludes that the U.S. claim regarding the overly broad scope of authority given to the Prosecutor is accurate, as Professor MacPherson affirms. Article 15 highlights the confirmation of the U.S. claim on the Prosecutor's expansive powers.

Article 15(1) gives the Prosecutor the power to initiate investigations on his or her own.³¹ After initiating an investigation, Article 15(2) grants the Prosecutor the authority to decide if the case warrants further investigation or should be dismissed.³² If the Prosecutor agrees that the case should go forward, then Article 15(3) states the Prosecutor must submit a request to the Pre-Trial Chamber, "together with any material collected."³³ Article 15(3) allows victims to also testify before the Pre-Trial Chamber. After the Prosecutor has submitted a request to the Pre-Trial Chamber, Article 15(4) authorizes the Pre-Trial Chamber judges to review the evidence, and determine whether "there is a reasonable basis to proceed with an investigation."³⁴ The judges acting under Article 15(4) must also decide if the "case appears to fall within the jurisdiction of the Court," and if the answer to both of these determinations is in the affirmative, then the judges, "shall authorize the commencement of an investigation."³⁵

³⁰ MacPherson, 41- 42.

³¹ "ICC Statute," Article 15(1).

³² Ibid., Article 15(2).

³³ Ibid., Article 15(3).

³⁴ Ibid., Article 15(4).

³⁵ Ibid.

However, Article 15(5) states that the judges' refusal to allow an investigation to proceed does not prevent the Prosecutor from making a "subsequent request...based on new facts or evidence regarding the same situation."³⁶ Article 15(6) says that if the Prosecutor, after a review of the evidence, concludes that there is no reasonable basis for an investigation, that decision must be communicated to those who provided the information.³⁷ The Prosecutor, pursuant to Article 15(6), reserves the right to consider additional information "submitted to him or her."³⁸ Additionally, the Prosecutor is given the power to review new facts and evidence, and thus while technically the Prosecutor is no longer investigating and gathering new facts and evidence, the Statute clearly permits the collection of further evidence.

Based on these Articles it is difficult to determine how the lack of a Pre-Trial Chamber authorization for an investigation effectively prevents the Prosecutor from proceeding with gathering more evidence. If there is no reasonable basis to continue with an investigation, then why is the Prosecutor permitted to receive and submit new evidence and facts? In fact, it appears that the check on the Prosecutor's ability to continue with an investigation by having obtained authorization of the Pre-Trial Chamber is largely illusory. This is because non-governmental organizations and individuals are free to perform the Prosecutor's "leg work" in finding new facts and evidence, and the Statute essentially allows the unlimited opportunity to continue to present and submit any new facts or evidence found. Thus, for defendants, a Pre-Trial Chamber's findings

³⁶ Ibid., Article 15(5)

³⁷ Ibid., Article 15(6).

³⁸ Ibid.

that the evidence does not support further investigation, does not prevent anyone from unlimited investigations and inquiries in attempting to find the “smoking gun” that will convince the Pre-Trial judges finally to deliver an indictment.

In addition, this thesis finds that the U.S. claim regarding the inadequate role of Security Council is the least problematic of U.S. claims examined. The Security Council still has the authority to refer cases to the ICC for investigation, and is the only institution that can compel non-state parties to the treaties to cooperate with the Court under its Chapter VII powers.³⁹ In fact, it can be argued that the ICC grants to the Security Council a powerful instrument to use to influence recalcitrant nations. However, one major weakness with the role designed by the ICC for the Security Council is what to do when one of the permanent members of the Security Council is the nation that is being investigated. If that scenario, if the investigation depends on a Security Council resolution to make it happen, the veto power will protect the nation from the ICC’s judicial scrutiny, thus potentially subverting justice.

However, in other cases involving other nations, the Security Council can wield the power of an ICC prosecution and trial. For example, if Saddam Hussein commits atrocities against his own citizens once the ICC has gone into effect, the Security Council could refer Saddam Hussein for investigation even if Iraq failed to join the treaty. If Iraq refused to comply with an investigation, or if after a period the ICC ruled that a parallel Iraqi investigation was inadequate, the Security Council could use any of the enforcement measures, including military force, contained in Chapter VII of the UN

³⁹ “ICC Statute,” Article 13(b).

Charter to force Iraq to comply. A failure by Iraq to comply would also create international public opinion against them such that they would be branded an outlaw and rogue nation.

To illustrate another example, if another massacre occurred similar to the Khmer Rouge's massacres in Cambodia in the late 1970's, the Security Council could refer the killings to the ICC. Conceivably, any recalcitrance by the Khmer Rouge in cooperating with the ICC would incur Security Council enforcement measures, which may be enough to prevent further violence. Furthermore the gravest crimes would be less likely to merit a veto from one of the five permanent members especially with the end of the Cold War superpower stalemate between the U.S. and the U.S.S.R.

The U.S. would have required either the consent of the state of the accused or Security Council approval before a case could be heard before the ICC, and as such, the ICC, without U.S. consent, could never have investigated U.S. nationals. However, a case can go forward if the state where the alleged crime occurred consents to ICC jurisdiction. In such a case even if the U.S. refused to agree with an ICC investigation, according to the ICC treaty, the case could still go forward if the country where the crime occurred agreed. The U.S. could shield its nationals by getting the Security Council to defer the investigation for up to a year as provided for in Article 16 of the Statute. That Article provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁴⁰

⁴⁰ "ICC Statute," Article 16.

There are several problems with using that Article as a shield, however. First, the Security Council must act under Chapter VII. Chapter VII only applies if the Security Council determines that there is “a threat to the peace, breach of the peace or act of aggression.”⁴¹ Second, a majority of the Security Council, including all permanent members, must be in favor of the twelve-month postponement.

Finally, this thesis examined possible theoretical difficulties contained within the Statute criminal subject matter that may ultimately determine whether the Court succeeds or fails. To appreciate fully the magnitude of the attempt to hold individuals, accountable on an international scale for the most serious crimes against humanity is difficult to assess from such a close historical vantage point. However, the U.S. has apparently pointed out a central problem of the Court. The Court will never function as envisioned without acceptance of the legitimacy of its decisions. Legitimacy requires following what Lon Fuller describes as the “inner morality of law.” Two theoretical problems in particular are especially relevant to the ICC and Fuller’s theory of law. The (a) issue of clarity and (b) the congruency between the crimes as stated and the crimes as enforced will challenge the Court in its functioning.

For the first time, the world will attempt consistently to apply and enforce customary norms and treaties outlawing war crimes, genocide, and crimes against humanity. Without concise and clear definitions, just and equitable outcomes will depend on judges. Judicial interpretation has been generally one of the areas many observers have expected that the Court will do well. It is important to remember quantity is not quality.

⁴¹ UN Charter, Chapter VII.

Once the treaty goes into force, presumably the ICC judges will be quite active interpreting and setting precedents. The quantity of decisions will not be a concern; yet, how well the law evolves, and whether it reflects the high-minded principles the treaty was founded on, depends upon a great deal more than enlightened intention. Textual ambiguities and defining the elements necessary for the requirements of criminal prosecution, while not as controversial as the functions of the Prosecutor, invariably may prove to be the most important work that determines the Court's success.

The ICC represents a worthy attempt to bring enforcement to international humanitarian law. Unfortunately, the attempt to move the world toward international justice may not yield the progress advocates envision. The Court, in order to be successful must earn its reputation for justice and equity; it must find its moral compass, its own inner morality of law. It is overly simplistic to believe that because the Court is built, justice will follow. As Lon Fuller points out, any functioning legal system requires the presence of certain elements in order to regulate and control human conduct successfully. Equally important is the degree of acceptance and willingness of participants to engage actively in the ongoing project of governing conduct between peoples. The extent to which communication and cooperation can occur between nation-states and the Court will, in the final analysis, determine if the ICC matches its lofty goals with practical application.

APPENDIX

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

Adopted by the United Nations Diplomatic Conference of Plenipotentiaries
on the Establishment of an International Criminal Court on 17 July 1998

[* as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999]

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

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

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;

- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

Genocide

For the purpose of this Statute, "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 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance

with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9 Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

- 3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11

Jurisdiction *ratione temporis*

- 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
- 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12

Preconditions to the exercise of jurisdiction

- 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
- 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

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

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

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

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes

that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

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

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
 - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor

initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21 Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22 Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 31

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and

reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32

Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34

Organs of the Court

The Court shall be composed of the following organs:

- (a) The Presidency;
- (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
- (c) The Office of the Prosecutor;
- (d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:
 - (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

- (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
- (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

- (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

- (i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37 Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38 The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor;
and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and

seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39 Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40 Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42

The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.
7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.
8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.
 - (a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;
 - (b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;
9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43 The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.
2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.
6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with

expertise in trauma, including trauma related to crimes of sexual violence.

Article 44

Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.
3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45

Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46

Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
 - (a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
 - (b) In the case of the Prosecutor, by an absolute majority of the States Parties;
 - (c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47 **Disciplinary measures**

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48 **Privileges and immunities**

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49 **Salaries, allowances and expenses**

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties.

These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - (a) Any State Party;
 - (b) The judges acting by an absolute majority; or
 - (c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.
4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53

Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or

prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - (c) Fully respect the rights of persons arising under this Statute.
2. The Prosecutor may conduct investigations on the territory of a State:
 - (a) In accordance with the provisions of Part 9; or
 - (b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
 - (a) Collect and examine evidence;
 - (b) Request the presence of and question persons being investigated, victims and witnesses;
 - (c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
 - (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
 - (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
 - (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
 - (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
 - (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56

Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

- (f) Taking such other action as may be necessary to collect or preserve evidence.
- 3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.
- (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
- 4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 Functions and powers of the Pre-Trial Chamber

- 1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
- 2. (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
- (b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
- 3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - (a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - (b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
 - (d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.
 - (e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to

article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest
or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
 - (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
 - (b) The arrest of the person appears necessary:
 - (i) To ensure the person's appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
2. The application of the Prosecutor shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
 - (c) A concise statement of the facts which are alleged to constitute those crimes;
 - (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
 - (e) The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
 - (a) The name of the person and any other relevant identifying information;
 - (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
 - (c) A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.
5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application

requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

- (a) The name of the person and any other relevant identifying information;
- (b) The specified date on which the person is to appear;
- (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
- (d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59 Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - (a) The warrant applies to that person;
 - (b) The person has been arrested in accordance with the proper process; and
 - (c) The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).
5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.
2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
 - (a) Waived his or her right to be present; or
 - (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:
 - (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
 - (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any

charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

- (a) Object to the charges;
- (b) Challenge the evidence presented by the Prosecutor; and
- (c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

- (a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
- (b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;
- (c) Adjourn the hearing and request the Prosecutor to consider:
 - (i) Providing further evidence or conducting further investigation with respect to a particular charge; or
 - (ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62 **Place of trial**

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63 **Trial in the presence of the accused**

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64 **Functions and powers of the Trial Chamber**

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - (b) Determine the language or languages to be used at trial; and
 - (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
 - (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - (c) Provide for the protection of confidential information;

- (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
 - (e) Provide for the protection of the accused, witnesses and victims; and
 - (f) Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.
- (b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:
- (a) Rule on the admissibility or relevance of evidence; and
 - (b) Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65

Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
- (a) The accused understands the nature and consequences of the admission of guilt;
 - (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
 - (c) The admission of guilt is supported by the facts of the case that are contained in:
 - (i) The charges brought by the Prosecutor and admitted by the accused;
 - (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order

that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
 - (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66

Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
 - (c) To be tried without undue delay;
 - (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
- (h) To make an unsworn oral or written statement in his or her defence; and
- (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68 Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69 Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70 Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- (b) Presenting evidence that the party knows is false or forged;
- (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

- (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
 - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
- (b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71

Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72

Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national

security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

- (a) Modification or clarification of the request;
- (b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
- (c) Obtaining the information or evidence from a different source or in a different form; or
- (d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

- (a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - (i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
 - (ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
 - (iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
- (b) In all other circumstances:
 - (i) Order disclosure; or
 - (ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76 Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77 Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78 Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of
penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction
or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

- (i) Procedural error,
- (ii) Error of fact, or
- (iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

- (i) Procedural error,
- (ii) Error of fact,
- (iii) Error of law, or

- (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.
- 2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
- (b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;
- (c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).
- 3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
- (b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;
- (c) In case of an acquittal, the accused shall be released immediately, subject to the following:
 - (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
 - (ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.
- 4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82

Appeal against other decisions

- 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
 - (a) A decision with respect to jurisdiction or admissibility;
 - (b) A decision granting or denying release of the person being investigated or prosecuted;
 - (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
 - (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
- 2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
- 3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

- (a) New evidence has been discovered that:
 - (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
- (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
- (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- (a) Reconvene the original Trial Chamber;
- (b) Constitute a new Trial Chamber; or
- (c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85

Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86

General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87

Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working

languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88

Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89

Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the

requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90 Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:
 - (a) The respective dates of the requests;
 - (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - (c) The possibility of subsequent surrender between the Court and the requesting State.
7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
 - (a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
 - (b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91

Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A copy of the warrant of arrest; and
 - (c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or

arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
 - (a) A copy of any warrant of arrest for that person;
 - (b) A copy of the judgement of conviction;
 - (c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and
 - (d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.
4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92 Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
 - (a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - (b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
 - (c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and
 - (d) A statement that a request for surrender of the person sought will follow.
3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

- (a) The identification and whereabouts of persons or the location of items;
- (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
- (c) The questioning of any person being investigated or prosecuted;
- (d) The service of documents, including judicial documents;
- (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
- (f) The temporary transfer of persons as provided in paragraph 7;
- (g) The examination of places or sites, including the exhumation and examination of grave sites;
- (h) The execution of searches and seizures;
- (i) The provision of records and documents, including official records and documents;
- (j) The protection of victims and witnesses and the preservation of evidence;
- (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
- (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

- (i) The person freely gives his or her informed consent to the transfer; and
- (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

- a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
- b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

- a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
- b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect
of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.
2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in
respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of
assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).
2. The request shall, as applicable, contain or be supported by the following:
 - (a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - (b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - (c) A concise statement of the essential facts underlying the request;
 - (d) The reasons for and details of any procedure or requirement to be followed;
 - (e) Such information as may be required under the law of the requested State in order to execute the request; and
 - (f) Any other information relevant in order for the assistance sought to be provided.
3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

- (a) Insufficient information to execute the request;
- (b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- (c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity
and consent to surrender

- 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
- 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

- 1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
- 2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
- 3. Replies from the requested State shall be transmitted in their original language and form.
- 4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination

without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

- (a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
 - (b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.
5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100

Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:
- (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
 - (b) Costs of translation, interpretation and transcription;
 - (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
 - (d) Costs of any expert opinion or report requested by the Court;
 - (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
 - (f) Following consultations, any extraordinary costs that may result from the execution of a request.
2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101

Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

- (a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.
- (b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of
sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.
2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
 - (a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
 - (b) The application of widely accepted international treaty standards governing the treatment of prisoners;
 - (c) The views of the sentenced person;
 - (d) The nationality of the sentenced person;
 - (e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104

Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105

Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.
3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107

Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or

surrender of the person for purposes of trial or enforcement of a sentence.

Article 108

Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109

Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110

Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - (a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - (b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111

Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:
 - (a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
 - (b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113 **Financial Regulations**

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114 **Payment of expenses**

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115 **Funds of the Court and of the Assembly of States Parties**

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116

Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117

Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118

Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119

Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120

Reservations

No reservations may be made to this Statute.

Article 121

Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122

Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.
2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123

Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124 Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125 Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126 Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127 Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the

date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.

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