

**IS A U.N. INTERNATIONAL CRIMINAL COURT IN
THE U.S. NATIONAL INTEREST?**

HEARING
BEFORE THE
SUBCOMMITTEE ON INTERNATIONAL OPERATIONS
OF THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE
ONE HUNDRED FIFTH CONGRESS
SECOND SESSION

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THURSDAY, JULY 23, 1998

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL OPERATIONS,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 10:08 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Rod Grams, chairman of the subcommittee, presiding.

Present: Senators Helms, Grams, Ashcroft, Feinstein, and Biden.

Senator GRAMS. I apologize for being late, but I would like to call this hearing of the International Operations Subcommittee on the creation of the international court into session. I do have an opening statement; and I would like to defer to my colleague from California, Senator Feinstein, and then we would hear from our panel this morning. Thank you very much.

Well, Ambassador Scheffer, I want to thank you for making the effort to come before this committee so soon after the completion of the U.N. conference in Rome. I understand that you probably have not had time to fully recover from what was by all accounts a grueling round of negotiations on the creation of the International Criminal Court.

However, given this court claims universal jurisdiction—in other words, the right to prosecute United States citizens even though the U.S. is not a party to the treaty—it is important for Congress and the American people to become apprised of the details regarding the court sooner rather than later.

Now, while I am relieved that the administration voted against the treaty in Rome, I am convinced that it is not in itself sufficient to safeguard our Nation's interests. The United States must aggressively oppose this court each step of the way, because the treaty establishing an international criminal court is not just bad, but I believe it is also dangerous.

The proposed ICC is not a part of the international system. It sits alone and above the system, and that is by design. At present international law regarding peace and security is largely whatever the Security Council says that it is. With the creation of the International Criminal Court, that will no longer be the case.

This is a great victory for the critics of the Security Council that have finally achieved their goal of diluting the power of the permanent five with the realization that their bids to increase the number of permanent members were destined to ultimately fail. They found a way to circumvent the authority of the Security Council al-

together; and ironically, by undermining the role of the Security Council, this court could have the effect of destabilizing the international arena instead of securing it.

Supporters of this court can proclaim that it will act as a deterrent against the commission of war crimes and other atrocities, but the evidence I believe points to the contrary. Saddam Hussein and the next Pol Pot will not be deterred by the indictments of the International Criminal Court any more than Bosnian Serb strongmen have been deterred by their indictments by the Yugoslav War Crimes Tribunal when they undertook their massacre.

The fact remains, the most effective deterrent is the threat of military action; and this court is undermining the ability of the United States to do that very thing. The ICC may issue a series of indictments, but unless these war criminals are defeated and they are stripped of their power, they will never be brought to justice.

It is ironic that the same countries which look to the United States to be the global enforcer have now created a court which inhibits our ability to project force. By claiming universal jurisdiction, this treaty will force us to reconsider the deployment of our troops around the world, even though we are not a party to the treaty. At the very least, we will have to renegotiate our status of force arrangements.

In some circumstances, as our Secretary of Defense reportedly noted, we may decide that the best policy is to withdraw our troops; and when the international community comes to us requesting that American soldiers participate in a peacekeeping mission, we will have to factor into our calculations the threat of our soldiers being turned over to the ICC.

A Dutch delegate offered faint praise of this international criminal court stating—and I quote—“I won’t say we gave birth to a monster, but the baby has some defects.” Well, I respectfully disagree, the International Criminal Court is a monster.

First, the ICC will have the final determination over whether it has jurisdiction over the case. Under a system of complementarity, the ICC can override the decision of a nation’s judicial system and it can pursue a case if it decides that a State is unwilling or unable to do so. In other words, if an ICC prosecutor wanted to investigate and charge the President of the United States for a bombing raid like the one President Reagan conducted in Libya, our only way to prevent the case from going forward would be to have our own Justice Department investigate the President. If the U.S. Government then declined to prosecute, it would still be up to the judgment of the ICC whether to prosecute and pursue the case.

A decision by the International Criminal Court to prosecute Americans for military action would not be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984, the World Court ordered the U.S. to respect Nicaragua’s borders and to halt the mining of its harbors by the CIA. In 1986, the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. Needless to say, we ignored both of those rulings.

Second, the International Criminal Court 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.

Third, the judges will not be confined to those from democratic countries with rule of law. The judges will be elected by a super majority of the state parties. Given that, the group of 77 developing countries in the U.N. General Assembly, which routinely vote against the United States and which is really more like 160 countries, could represent such a majority. This is not much of a screen.

As for eligibility to service, the U.S. proposal to require judges to have both criminal trial and international law experience was rejected as too high of a bar to meet. Of course, the ICC judges must possess all of the qualifications required in their respective states for appointment to the highest judicial offices, and I wonder what that means in Sudan or in Iran.

Finally, it turns the functioning of the Security Council on its head and, I think, sets a very bad precedent. The Security Council must act affirmatively to stop a prosecutor from taking up a case. This means that the U.S. loses its veto, and it would need to convince a majority of members to vote with us to stop the International Criminal Court from proceeding.

Supporters of this treaty are banking on the fact that the United States will allow this court to flourish and gain legitimacy over time. We must not allow that to happen. Even if it is weak at its inception, the Court's scope and its power can and will grow. This court will be an international institution without checks or balances, accountable to no state or institution for its actions, and there will be no way to appeal its decisions except through the Court itself.

Whatever lines are drawn in Rome can be erased or redrawn at some future date by a majority of state parties, and as the head of the Swiss delegation pointed out, the rules of the Court will be developed over time by the Court itself through custom and precedent.

Now, we must affirm that the United States will not cede its sovereignty to an institution which claims to have the power to override the United States legal system and to pass judgment on our foreign policy actions. We must refuse to allow our soldiers and Government officials to be exposed to trial for promoting the national security interests of the United States and deny the international court's self-declared right to investigate, prosecute, convict, and punish U.S. citizens for supposed crimes committed on American soil which is arguably unconstitutional.

The only fail-safe way to ensure these results is to make sure that this treaty never is ratified by the 60 nations necessary for it to go into force. Should this court come into existence, we must have a firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its rulings, and absolutely no referral of cases by the Security Council.

I think we can all agree that the current U.N. and *ad hoc* tribunal system is imperfect. It is certainly inefficient. The need to set up an administrative, investigative, and judicial structure in each

case creates a number of bureaucratic hurdles and significant delays in getting these tribunals up and operating.

Many supporters of an international criminal court point to these failings as evidence that a permanent court is needed. However, this treaty does not create a permanent architecture to support the current tribunal system. It creates an independent international body with unprecedented power, super national power, and I for one am not willing to trade the sovereignty of this country for gains in efficiency, no matter how noble the cause.

Mr. Ambassador, the U.S. lost the big battles over universal jurisdiction, the self-initiating prosecutor, a Security Council screen, the crime of aggression, and state consent. I hope that now the administration will actively oppose this court to make sure that it shares the same fate as the League of Nations and collapses without U.S. support for this court truly I believe is the monster and it is the monster that we need to slay.

I want to thank you.

Senator Feinstein.

Senator FEINSTEIN. I would like to begin by thanking you, Mr. Chairman, for conducting this hearing so quickly after the vote in Rome last week.

Frankly, I am of two minds regarding the hearing and the International Criminal Court that emerged from the Rome conference.

On one hand, I truly believe the President is correct when he said that nations all around the world who value freedom and tolerance should establish a permanent international court to prosecute, with the support of the United Nations Security Council, serious violations of humanitarian law. And, as we approach the 21st century, I think we have got to make it really clear that individuals who participate in serious crimes against humanity cannot act with impunity. I had hoped we learned this lesson in World War II, and too many times in this century, even since World War II, we have witnessed the terror of genocide, of mass rape, and of ethnic cleansing. With the explicit labeling and recognition of war crimes and crimes against humanity, including significantly such acts as rape and sexual slavery, the establishment of an international criminal court would send a strong message to those contemplating committing such crimes and, I believe, could play an instrumental role in making sure that the sordid chapter of human history in which such acts are employed is brought to a close.

On the other hand, I share the concerns which ultimately led the United States to determine that it could not support the draft statute that emerged in Rome. And I think the chairman of this subcommittee has rather forcefully made those points. None of us would like to see a court that frivolously prosecutes Americans or which acts with politics, not justice, as its motivating force. I think the question is, to what degree is a member of the armed forces that might be deployed abroad really subject to this kind of politics, if one chooses to play it, by giving the prosecutor some kind of untrammled authority?

But it seems to me that the bottom line of the Rome conference is that the United States is still left facing what Ambassador Scheffer, in a speech this past September, termed "a gap in inter-

national criminal justice." This gap exists because of the lack of an international criminal court. This gap, in my mind, should be filled.

There can be little doubt that the problem of filling this gap is a complex one, and that it is extremely difficult to arrive at an effective and a nonpolitical solution. The effort by Ambassador Scheffer and others in Rome is testament to these difficulties, but I truly believe that the victims of the atrocities and the war crimes of this century demand our continued effort.

Thus, although some may see the result of Rome as an end to the International Criminal Court, I would like to think that we remain still at a crossroads, and that if the other members of the international community go forward with the endeavor, the United States might still seek amendments and might one day be able to join them. I have been one that has been very concerned, particularly with the former Yugoslavia, in writing letters to the President, in writing letters to the Secretary-General of the United Nations, that the war criminals, the Karadzics and the Mladics of the world, must be brought to justice. So, it is with some irony that I now find myself questioning some of the strictures laid down in Rome with respect to the development of this court.

It seems to me that reasonable people ought to be able to agree on a set of definitions and on a protocol and a procedure that in effect would take the political maneuverings out of the designation of war criminal and set certain specific beginning causes with which we all agree as the kind of opening to really test the value of an international criminal court. Apparently that is not going to happen.

So, I view our present predicament with some amount of dismay. To many in the world, whether we like it or not, this country sometimes acts wrongly and we think we are always right, and I share that belief. But if you are talking about an international criminal court, we have to take those things where we can agree and move them forward onto the agenda and into the domain of the development of this court.

So, I look with great interest to see what Ambassador Scheffer has to say today and then be able to ask some questions. I thank you, Mr. Chairman.

Senator GRAMS. Thank you, Senator. We have also been joined by Senator Helms. Senator?

Senator HELMS. Thank you very much, Mr. Chairman, for putting up with me this morning. I try not to make long speeches, but this one is one that I think deserves a lot of discussion and a lot of contemplation. I thank you for calling this hearing, the subject of which is exceedingly significant, and I hope I may be forgiven by those who feel that I am talking too long.

Now, I do not agree with the able and charming Senator from California. We do not agree always, but I respect her always.

It is no secret that the United States walked away from this treaty negotiated in Rome to establish a permanent United Nations international criminal court. That was certainly the right thing for you to do. I appreciate your having done it.

I am aware that the administration was eager to sign that treaty, so the very fact that you, Mr. Ambassador, declined to do so

speaks volumes about how unwise this treaty adopted in Rome really is.

Since the signing ceremony, several governments have made clear their belief that the United States will eventually succumb to international pressure and join the Court.

Now, let me be clear, at least from one Senator's position, the Rome treaty is irreparably flawed. The statute purports to give this international court jurisdiction over American citizens even if the United States refuses to sign or ratify the treaty. It empowers this court to sit in judgment of the United States foreign policy. It creates an independent prosecutor accountable to no government or institution for his actions, and it represents a massive dilution of the United Nations Security Council's powers and of United States veto power within that Security Council. In short, this treaty represents a very real threat to our military personnel and to our citizens and certainly to our national interests.

Mr. Ambassador, I commend you for voting no on this fatally flawed treaty, but I also must be clear, rejecting this treaty is not enough. The United States must fight this treaty. Canadian Foreign Minister Lord Ashworthy asked you a pretty good question in Rome. He said—and I quote—"The question is whether the United States treats the Court with benign neglect or whether they"—the United States—"are aggressively opposed." He is right about that.

Now, what galls me is that we sent American personnel overseas twice in this century, along with expenditure of billions of dollars, to save the bacon of countries who voted against us in this regard. And I damned well resent that, and they better get used to the notion that there are several of us in the Senate who feel the same way.

But we must, Mr. Ambassador, I think be aggressively opposed to this court, and let me cite just a few examples why I say that.

The treaty includes in one of its "core crimes" something called the crime of aggression. The countries negotiating the treaty in Rome were unable to reach agreement on just what constitutes a crime of aggression. Well, I think I can anticipate what will constitute a crime of aggression in the eyes of this court. It will be a crime of aggression when the United States of America takes any military action to defend the national interest of the American people unless the United States first seeks and receives the permission of the United Nations. And I say baloney to that.

So, what this court proposes to do is this. It will sit in judgment of the national security policy of the United States. Now, just imagine what would have happened if this court had been in place during the U.S. invasion of Panama or the U.S. invasion of Grenada or the United States bombing of Tripoli. In none of those cases, did the United States seek permission from the United Nations to defend our interest. So long as there is breath in me, the United States will never—and I repeat never, never—allow its national security decisions to be judged by any international criminal court.

Now, we all know the history of how in the 1980's the World Court attempted to declare U.S. support for the Nicaraguan contras to be a violation of international law. The Reagan administration simply ignored the World Court because the World Court had no jurisdiction and no authority in this matter.

Well, this court declared that the American people are under its jurisdiction no matter what the U.S. Government says or does about it. So, you see the delegates in Rome included a form of universal jurisdiction in the Court's statute. This means that even if the United States never signs the treaty and even if the United States refuses to ratify it, the countries participating in this court will regard American soldiers and citizens to be within the jurisdiction of this international criminal court. And again, I say baloney. That, Mr. Chairman, is nonsense in short. It is an outrage that will have grave consequences for our bilateral relations with every one of the countries that signs and ratifies this treaty, and they better understand this at the outset.

I understand that Germany was the intellectual author of this universal jurisdiction provision. Mr. Chairman, we have thousands of American soldiers stationed in Germany right now. Will the German Government now consider those American forces under the jurisdiction of the International Criminal Court?

Now, I support keeping forces in Germany but not if Germany insists on exposing them to the jurisdiction of the ICC. The administration will now have to renegotiate our status of forces agreements with Germany and other signatory states, and we must make clear to these governments that their refusal to do so will force us to reconsider our ability to station forces on their territory, participate in peacekeeping operations, and meet our Article 5 commitments under the NATO charter. We will have no choice about that.

Because this court has such wide-ranging implications for the United States and the American people, I shall seek assurances from the Secretary of State on the following points.

One, Article 13(b) permits a case to be referred to this court by the Security Council. The United States must never vote in favor of such a referral, Mr. Ambassador.

The United States will not provide any assistance whatsoever to the Court or to any other international organization in support of the Court either in funding or in-kind contributions or other legal assistance.

The United States shall not extradite any individual to the Court or directly or indirectly refer a case to the Court.

The United States shall include in all of its bilateral extradition treaties a provision that prohibits a treaty partner from extraditing U.S. citizens to this court.

The United States shall renegotiate all of its status of forces agreements to include a provision that prohibits a treaty partner from extraditing U.S. soldiers to this court and will not station American forces in any country that refuses to accept such a prohibition.

The United States shall not permit a U.S. soldier to participate in any NATO, United Nations, or other international peacekeeping mission until the United States has reached agreement with all of our NATO allies and the United Nations that no United States soldier will be subject to the jurisdiction of this court.

Mr. Chairman, I have been accused by advocates of this court of engaging in 18th century thinking. One of the smart columnists who knows it all said that the other day. Well, I find this to be a

compliment. It was 18th century thinking that gave us our Constitution. It was 18th century thinking that gave us the fundamental protections of our Bill of Rights. And I will gladly stand with James Madison and the rest of our Founding Fathers over that collection of ne'er do wells in Rome any day of the week.

If Madison and the other Founding Fathers were here today, I believe that they would support the assertion that any treaty which undermines those constitutional procedures and protections, as this one clearly does, will be dead on arrival when it reaches the Foreign Relations Committee. Let us close the casket right now, Mr. Ambassador.

Thank you, Mr. Chairman.

Senator GRAMS. Thank you very much, Senator Helms. Senator Ashcroft?

Senator ASHCROFT. Thank you, Mr. Chairman. I want to associate myself, to the extent that I am eligible to do so, with the chairman of the full committee. I thought that was an outstanding presentation.

I want to thank you, Mr. Chairman, for holding this hearing. The International Criminal Court in my judgment represents a clear and continuing threat to the national interests of the United States despite our decision not to participate.

I might add that I am very pleased that the administration has made the wise decision not to participate, but I think it is important to consider carefully what the chairman of the full committee has just reiterated, that some complicit cooperation in the operation of a court in which we did not fully participate in forming could be as damaging as full participation. Therefore, our need to be vigilant in this respect is continuing. I was pleased that the United States voted against the passage of this global criminal court.

However, I do remain concerned that the danger posed by this court has not passed. The administration has already come under criticism for its rejection of the Court and there will be considerable pressure from proponents of the Court for the administration to reconsider its opposition. Even more disturbing is the possibility that the Court would assert jurisdiction over American soldiers despite America's refusal to join the Court. The Court's claim of universal jurisdiction smacks of arrogance and creates deep concerns about how the United States will interact with this court and how the Court's existence could cloud decisions about when to deploy American soldiers.

The administration should just say no to any efforts to get the United States to reconsider or to signal any degree of compliance, formal or informal, with the Court.

As a member of the Senate Foreign Relations Committee and as Chairman of the Subcommittee on the Constitution, Federalism and Property Rights, I find the International Criminal Court profoundly troubling. If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats.

No aspect of the Court is more troubling, however, than the fact that it has been framed without any apparent respect for—and indeed in direct contravention of—the United States Constitution.

First and foremost, I remain concerned by the possibility that Americans could be dragged before this court and denied the protection of the Bill of Rights. Even more fundamentally, I am concerned that the administration participated in these negotiations without making any effort to insist that the proposed international criminal court incorporate and honor the Bill of Rights. Even if one concedes that such a court might be needed, which I emphatically do not, we should certainly insist on respect for the Bill of Rights.

The proposed court negotiated in Rome neither reflects nor guarantees the protections of the Bill of Rights. The administration was right to reject the Court and must remain steadfast in its refusal to join a court that stands as a rejection of America's constitutional values.

Had the administration indicated a desire to join this court, I had already signaled that I would have held hearings in the Constitution Subcommittee to examine the constitutional issues raised by the International Criminal Court in more detail. In light of the administration's current position, these hearings might prove to be unnecessary. I am speaking of hearings in the Judiciary Committee's Subcommittee on the Constitution which I have the privilege of chairing.

However, if there is any indication that the administration may reconsider its position, I stand ready to hold hearings in the Judiciary Committee.

I have a longer statement. It might be hard for you to believe, but I do, and I would like to submit it for the record.

Senator GRAMS. Without objection.

Senator ASHCROFT. And if I have time, I would like to have the opportunity to direct some questions to the Ambassador.

[The prepared statement of Senator Ashcroft follows:]

PREPARED STATEMENT OF SENATOR ASHCROFT

Mr. Chairman, I want to thank you for holding this hearing. The International Criminal Court represents a clear and continuing threat to the national interest of the United States, despite our decision not to participate. I was pleased that the United States voted against final passage of this global criminal court. However, I remain concerned that the danger posed by this Court has not passed.

The Administration has already come under criticism for its rejection of the Court, and there will be considerable pressure from proponents of the Court to reconsider the Administration's opposition. Even more disturbing is the possibility that the Court would assert jurisdiction over American soldiers, despite the American refusal to join the Court. The Court's claim to universal jurisdiction smacks of arrogance and creates deep concerns about how the United States will interact with this Court and how the Court's existence could cloud decisions about when to deploy American soldiers. The Administration should "just say no" to any efforts to get the United States to reconsider or to signal any degree of compliance—formal or informal—with the Court.

As both a Member of the Senate Foreign Relations Committee and as Chairman of the Subcommittee on the Constitution, Federalism and Property Rights, I find the International Criminal Court profoundly troubling. If there is one critical component of sovereignty it is the authority to define crimes and punishments. This Court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats.

There are other aspects of this Court that are equally troubling. As examples, the authorization of international independent prosecutors, the expense of such a permanent court, and the lack of any clear limits on the Court's jurisdiction are all

alarming. But no aspect of this Court is more troubling than the fact that it has been framed without any apparent respect for—indeed, in direct contravention of—the United States Constitution.

As Chairman of the Constitution Subcommittee, I have a number of particular concerns about the Court. First and foremost, I remain concerned by the possibility that Americans could be dragged before this Court and denied the protections of the Bill of Rights.

Even more fundamentally, I am concerned that the Administration participated in these negotiations without making any effort to insist that the proposed International Criminal Court incorporate and honor the Bill of Rights. Even if one concedes that we need an International Criminal Court—which I emphatically do not—we should certainly insist on respect for the Bill of Rights as the price of American admission.

America's ideals and values are ascendant in the post-Cold War world. America's position as world leader is, in no small part, a product of a Constitution that is the envy of the world. The Administration should be justly proud of that Constitution and should have insisted that those principles form the cornerstone for any International Criminal Court. That unfortunately was not the official position of this Administration.

In the United States, there is a right to a jury of your peers. In the United States, there is a privilege against self-incrimination. In the United States, we have eliminated the prospect of criminal liability for ill-defined common law crimes. In the United States, the Constitution limits the authority of prosecutors. None of these protections will be guaranteed for defendants brought before this international star chamber.

The proposed Court negotiated in Rome neither reflects nor guarantees the protections of the Bill of Rights. The Administration was right to reject the Court and must remain steadfast in its refusal to join a court that stands as a rejection of American constitutional values.

Had the Administration indicated a desire to join this Court, I would have held hearings in the Constitution Subcommittee to examine the constitutional issues raised by this Court in more detail. In light of the Administration's current position, those hearings may prove unnecessary. I do, however, have a few questions for Ambassador Scheffer today about where the Administration plans to go from here, and if there is an any indication that the Administration may reconsider its position, I stand ready to hold hearings.

The United States can never lessen its commitment to ensuring that this Court does not pose a threat to the constitutional rights of American citizens. We must never trade away American sovereignty and the Bill of Rights so that international bureaucrats can sit in judgment of the United States military and our criminal justice system.

In Monday's *New York Times*, there is an opinion piece in which Anthony Lewis chastises the United States for missing a historic opportunity by failing to vote in favor of the International Criminal Court. The author states that the vote to form the International Criminal Court "will be seen as a turn in the road of history." That is perhaps the only point in the piece with which I agree. The approval of this Court was indeed "a turn in the road of history." By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government. I, for one, am heartened to see that the United States took the right turn on the road of history, and I will work hard to ensure that there is no backtracking.

Senator GRAMS. Thank you very much.

Ambassador, we want to welcome you. I know you just returned to the States from Rome earlier this week and have put in some long days. We appreciate your being here this morning and we look forward to your statement. Go ahead, sir.

STATEMENT OF HON. DAVID J. SCHEFFER, AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES; ACCOMPANIED BY MARY ELLEN WARLOW, U.S. DEPARTMENT OF JUSTICE

Ambassador SCHEFFER. Thank you, Mr. Chairman and Mr. Chairman and Senator Feinstein and Senator Ashcroft. Thank you for the opportunity to discuss with the committee the developments in Rome this summer relating to the establishment of a permanent

international criminal court. As you know, I had the pleasure of being joined by a number of committee staffers during the Rome conference, and I am sure they brought back to you their own perspectives on the negotiations.

Mr. Chairman, no one can survey the events of this decade without profound concern about worldwide respect for internationally recognized human rights. We live in a world where entire populations can still be terrorized and slaughtered by nationalistic butchers and undisciplined armies. We have witnessed this in Iraq, in the Balkans, and in Central Africa. Internal conflicts dominate the landscape of armed struggle, and impunity too often shields the perpetrators of the most heinous crimes against their own people and others. As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice.

That is why, since early 1995, U.S. negotiators labored through many *ad hoc* and preparatory committee sessions at the United Nations in an effort to craft an acceptable statute for a permanent international criminal court using as a foundation the draft statute prepared by the International Law Commission in 1994. Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation. But we always knew how complex the exercise was, the risks that would have to be overcome, and the patience that we and others would have to demonstrate to get the document right. We were, after all, confronted with the task of fusing the diverse criminal law systems of nations and the laws of war into one functioning courtroom in which we and others had confidence criminal justice would be rendered fairly and effectively. We also were drafting a treaty-based court in which sovereign governments would agree to be bound by its jurisdiction in accordance with the terms of its statute. How so many governments would agree with precision on the content of those provisions would prove to be a daunting challenge. When some other governments wanted to rush to conclude this monumental task, even as early as the end of 1995, the United States pressed successfully for a more methodical and considered procedure for the drafting and examination of texts.

The United States delegation arrived in Rome on June 13th with critical objectives to accomplish in the final text of the statute. Our delegation included highly talented and experienced lawyers and other officials from the Departments of State and Justice, the Office of the Secretary of Defense, the Joint Chiefs of Staff, the U.S. mission to the United Nations, and from the private sector. America can be proud of the tireless work and major contributions that these individuals made to the negotiations.

Among the objectives we achieved in the statute of the Court were the following:

- an improved regime of complementarity, meaning deferral to national jurisdictions, that provides significant protection, although not as much as we had sought;
- a role preserved for the U.N. Security Council, including the affirmation of the Security Council's power to intervene to halt the Court's work;
- sovereign protection of national security information that might be sought by the Court;
- broad recognition of national judicial procedures as a predicate for cooperation with the Court;
- coverage of internal conflicts, which comprise the vast majority of armed conflicts today;
- important due process protections for defendants and suspects;
- viable definitions of war crimes and crimes against humanity, including the incorporation in the statute of elements of offenses (We are not entirely satisfied with how the elements have been incorporated in the treaty, but at least they will be a required part of the Court's work. We also were not willing to accept the wording proposed for war crimes covering the transfer of population into occupied territory);
- some progress on recognition of gender issues;
- acceptable provisions based on command responsibility and superior orders;
- rigorous qualifications for judges;
- acceptance of the basic principle of state party funding;
- an Assembly of States Parties to oversee the management of the Court;
- reasonable amendment procedures; and
- a sufficient number of ratifying states before the treaty can enter into force, namely 60 governments have to ratify the treaty.

The U.S. delegation also sought to achieve other objectives in Rome that in our view are critical. I regret to report that certain of these objectives were not achieved and therefore we could not support the draft that emerged on July 17th.

First, while we successfully defeated initiatives to empower the Court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections. In particular, the treaty specifies that, as a precondition to the jurisdiction of the Court over a crime, either the state of territory where the crime was committed or the state of nationality of the perpetrator of the crime must be a party to the treaty or have granted its voluntary consent to the jurisdiction of the Court. We sought an amendment to the text that would have required both of these countries to be party to the 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. We asked for a vote on our proposal, but a motion to take no action was overwhelmingly carried by the vote of participating governments in the conference.

We are left with consequences that do not serve the cause of international justice. 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. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.

Mr. Chairman, the U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies. But serious risks remain because of the document's provisions on jurisdiction.

Our position is clear. 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 Security Council action under the U.N. Charter. Otherwise, the ratification procedure would be meaningless for governments. In fact, under such a theory, two governments could join together to create a criminal court and purport to extend its jurisdiction over everyone everywhere in the world. There will necessarily be cases where the international court cannot and should not have jurisdiction unless the Security Council decides otherwise. The United States has long supported the right of the Security Council to refer situations to the Court with mandatory effect, meaning that any rogue state could not deny the Court's jurisdiction under any circumstances. We believe this is the only way under international law and the U.N. Charter to impose the Court's jurisdiction on a non-party state. In fact, the treaty reaffirms this Security Council referral power. Again, the governments that collectively adopt this treaty accept that this power would be available to assert jurisdiction over rogue states.

Second, as a matter of policy, the United States took the position in these negotiations that states should have the opportunity to assess the effectiveness and impartiality of the Court before considering whether to accept its jurisdiction. At the same time, we recognize the ideal of broad ICC jurisdiction. Thus, we were prepared to accept a treaty regime in which any state party would need to accept the automatic jurisdiction of the Court over the crime of genocide, as had been recommended by the International Law Commission in 1994. We sought to facilitate U.S. participation in the treaty by proposing a 10-year transitional period following entry into force of the treaty and during which any state party could opt out of the Court's jurisdiction over crimes against humanity and war crimes. We were prepared to accept an arrangement whereby at the end of the 10-year period, there would be three options: to accept the automatic jurisdiction of the Court over all of the core crimes, to

cease to be a party, or to seek an amendment to the treaty extending its opt-out protection. We believe such transition period is important for our Government to evaluate the performance of the Court and to attract a broad range of governments to join the treaty in its early years. While we achieved the agreement of the permanent members of the Security Council for this arrangement, as well as appropriate protection for non-party states, other governments were not prepared to accept our proposal. In the end, an opt-out provision for 7 years for war crimes only was adopted.

Unfortunately, because of the extraordinary way the Court's jurisdiction was framed at the last moment, 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 jurisdiction.

Further, under the amendment procedures, States Parties to the treaty can avoid jurisdiction over acts committed by their nationals or on their territory for any new or amended crimes. This is protection we successfully sought. But as the jurisdiction provision is now framed, it purports to extend jurisdiction over non-party states for the same new or amended crimes.

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 a 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 decisionmaking, and confusion.

In addition, we are disappointed with the treatment of the crime of aggression. We and others had long argued that such a crime had not been defined under customary international law for purposes of individual criminal responsibility. We also insisted, as did the International Law Commission in 1994, that there had to be a direct linkage between a prior Security Council decision that a State had committed aggression and the conduct of an individual of that State. The statute of the Court now includes a crime of aggression, but leaves it to be defined by a subsequent amendment to be adopted 7 years after entry into force of the treaty. There is no guarantee that the vital linkage with a prior decision by the Security Council will be required by the definition that emerges, if in fact a broadly acceptable definition can be achieved. We will do all we can to ensure that such linkage survives.

We also joined with many other countries during the years of negotiation to oppose the inclusion of crimes of terrorism and drug crimes in the jurisdiction of the Court on the grounds that this could undermine more effective national efforts. We had largely prevailed with this point of view only to discover on the last day of the conference that the Bureau's final text suddenly stipulated, in an annexed resolution that would be adopted by the conference, that crimes of terrorism and drug crimes should be included within the jurisdiction of the Court, subject only to the question of defining the relevant crimes at a review conference in the future. This last minute insertion in the text greatly concerned us and we op-

posed the resolution with a public explanation. We said that while we had an open mind about future consideration of crimes of terrorism and drug crimes, we did not believe that including them will assist in the fight against these two evil crimes. To the contrary, conferring jurisdiction on the Court could undermine essential national and transnational efforts, and actually hamper the effective fight against these crimes. The problem, we said, was not prosecution, but rather investigation. These crimes require an ongoing law enforcement effort against criminal organizations and patterns of crime with police and intelligence resources. The Court will not be equipped effectively to investigate and prosecute these types of crimes.

Finally, we were confronted on July 17th with a provision stipulating that no reservations to the treaty would be allowed. We had long argued against such a prohibition and many countries had joined us in that concern. We believe that at a minimum there were certain provisions of the treaty, particularly in the field of state cooperation with the Court, where domestic constitutional requirements and national judicial procedures might require a reasonable opportunity for reservations that did not defeat the intent or purpose of the treaty.

Mr. Chairman, the administration hopes that in the years ahead other governments will recognize the benefits of potential American participation in the Rome treaty and correct the flawed provisions in the treaty.

In the meantime, the challenge of international justice remains. The United States will continue as a leader in supporting the common duty of all law-abiding governments to bring to justice those who commit heinous crimes in our own time and in the future. The hard reality is that the international court will have no jurisdiction over crimes committed prior to its actual operation. So more *ad hoc* judicial mechanisms will need to be considered. We trust our friends and allies will show as much resolve to pursue the challenges of today as they have to create the future international court.

Thank you, Mr. Chairman.

Senator GRAMS. Thank you very much, Mr. Scheffer, for your statement and for your work, and again thank you very much for appearing before this committee this morning.

We have just been joined by Senator Biden. Would the Senator want to make an opening statement before we go to questions?

Senator BIDEN. No, thank you.

Senator GRAMS. Thank you.

I think we will just hold the questioning to 5-minute rounds so we can get across the board to everybody in a short period of time.

But I would just like to start off by asking a few questions, Mr. Scheffer. As we have talked about this morning, there are a lot of bad provisions in this treaty, and in some of your closing remarks you called them flawed. I was wondering, which ones made it impossible for the United States to vote to approve this treaty? In your opinion what were some of the major flaws?

Ambassador SCHEFFER. Well, the major flaws were definitely, shall I call it, the *de facto* universal jurisdiction which emerged from the treaty which would expose the nationals operating, par-

ticularly in official actions for governments which are not party to the treaty—would expose those individuals to the jurisdiction of the treaty. That was a flaw that we simply could not accept.

A further flaw was what would be the initial exposure of a State to the jurisdiction of the Court if it became a State Party to the Court. We deeply believed that there needed to be a transitional period that was reasonable and that could facilitate our own interests in the Court, as well as the interests of other major countries that have large militaries and are deploying those militaries in peacekeeping operations around the world. We did not achieve the totality of what would have been needed for us to seriously consider that.

Furthermore, the independent prosecutor, which is now incorporated in the statute, was of deep, deep concern to us. We spent much of the second week of the conference arguing against this proposal. We circulated a detailed paper in four languages to dispute the merits of this proposal, and we actually had a fair number of countries supporting us in this.

In the end that proposal, when combined with these two others, were the most serious issues; but I must say that there were other issues in the statute that would have caused us to have to come back to Washington with the document for a very serious review of it before considering signing it, because there were pockets of issues throughout the statute which, particularly the way it was handled the final day, were thrown in and done so with such swiftness that the best we could have done was simply come back to Washington with the document and ask everyone to examine it.

Senator GRAMS. I think there are many that believe this is an effort that goes around the Security Council, in other words, mutes our veto power and authority. Would you clarify the relationship of the Security Council to this court?

Ambassador SCHEFFER. Yes. The Security Council has primary responsibility under the U.N. Charter for international peace and security and no subsequent treaty can change that reality. It has primary responsibility. We argued for many years that that primary responsibility requires that if there is a matter that is brought to the Court that is within the jurisdiction of the Security Council under the U.N. Charter, the Security Council should have a prior review of whether or not that matter should be linked into a judicial process, particularly when the Security Council itself is seeking to address that matter of international peace and security. That position did not attract any significant support for many years, but we continued to pursue it.

What we discovered in Rome by the third week was the absolute critical requirement that we at least preserve in the statute itself a recognition by the Court and the judges of the Court, so that there is none of this judicial interpretation in later years, that the Security Council has an unfettered right and power under the U.N. Charter to halt the Court's work if it deems that is necessary. We at least had to preserve that in the treaty. We were not able to preserve our longstanding position on the right of the Security Council review of matters that come before the Court. We simply had no votes for it other than a handful. But at least we had to preserve

the right of intervention by the Security Council in the statute and we were able to achieve that.

I think in the future what needs to be seriously considered is a recognition by all governments that the Security Council will need to do what it needs to do under the U.N. Charter. It will have to exercise the powers that it has under the U.N. Charter, and we may not know yet what the totality of those powers are in connection with this court. We may have to experience this if the treaty in fact enters into force. But I want to leave no mistake here that the U.S. Government and this administration fully understand and have advocated the full sweep of powers that the Security Council has under the U.N. Charter.

Senator GRAMS. Thank you very much.

Senator FEINSTEIN.

Senator FEINSTEIN. Thank you, Mr. Chairman.

I wanted to go to your second area of major problems, the exposure issue, if I could, for a minute. You raise the issue that a United States soldier, for example, as part of a peacekeeping mission, might do something which could lead to charges being filed against him or her. As I understand it, the bar is set fairly high regarding the Court's ability to indict or try someone for war crimes. For crimes against humanity, for example, Article 7 of the treaty calls for either widespread or systematic activity and that the activity be pursuant to state policy. Does this rule out the danger that a random incident, even one with genuine harm, could be prosecuted?

Or, if the concern is over a possible war crime charge because of civilian casualties resulting from a United States operation, Article 8, section b, subparagraph iv specifies that the offending nation would need to intentionally launch an attack with the knowledge that it would cause incidental civilian damage and that the use of force has to be clearly excessive to the military goal.

So, under what circumstances do you see a United States soldier, for example, or a United States policy subject to prosecution under this statute?

Ambassador SCHEFFER. Thank you, Senator Feinstein. That is a very relevant question. It is one that occupied us hourly and daily for years.

I must say that I think one achievement that we can be very proud of in this statute—I think there are many actually, but the provisions on crimes against humanity and war crimes were scrubbed and negotiated with tireless effort by U.S. negotiators, including in Rome. If I can just signal my gratitude to the lawyers not only from the State Department, but from the Joint Chiefs of Staff and the Office of the Secretary of Defense, who labored extremely hard to get this right.

What you have just pointed to is what we worked hard to achieve, which is, if I may put it bluntly, a magnitude test for the triggering of charges of crimes against humanity or war crimes such that this court should not be dealing with isolated commissions of crimes. It should be dealing with a high level of criminal activity on a widespread massive scale. That is what this court should be dealing with. While we have great confidence that the U.S. armed forces are not in the business of committing these types

of crimes—that is not what they are trained to do; that is not what we ask them to do—nonetheless, we know from hard experience that because of our global deployments, because of the responsibilities that we take on overseas, there will inevitably be referrals to this court that seek to bring us to the bar of justice of this court simply because we have deployed our military and used it.

Now, we would hope that in response to any such referral, we could easily defeat it because it has not met that test that you just pointed out in either crimes against humanity or war crimes and that it could be easily defeated on that ground alone, or that we could easily show that, under the complementarity principle. We will look into this matter. We will investigate it. We will determine whether or not there is a basis for prosecution of these crimes, and that will be the end of it, that the Court will recognize the legitimacy of our legal system and the decision even not to prosecute of our legal system.

The problem is that it is not a guarantee, obviously, that frivolous and politically motivated charges will nonetheless be brought against us; and we have to be extremely careful that, first of all, we have some time period in which we can witness how this court operates, whether it operates in a politically motivated way, but second that we have enough safeguards in the treaty to prevent any unjustified and unwarranted prosecution of Americans before the Court.

Senator FEINSTEIN. I have a followup question, but I will wait for the next round. Thank you very much.

Senator GRAMS. Thank you, Senator.

Senator Helms.

Senator HELMS. George Washington is often quoted as warning for future generations to beware of entangling alliances. There is only one problem with that. He did not say it. Thomas Jefferson did. But in any case, whoever said it—

Senator BIDEN. I am willing to forgive him. Are you not?

Senator HELMS. Pardon?

Senator BIDEN. I said I am willing to forgive him, having done something like that myself. [Laughter.]

Senator HELMS. Let the record show that Joe Biden and I agree on something.

Seriously, the trouble is about this business, you cannot pin down all of the details of what you would do in theoretical cases. I do not know how you would negotiate a thing like that, but I am flat-footed in my opposition to it.

Let me get to another subject. Bill Cohen, former Senator, now the distinguished Secretary of Defense, is said to have met with key U.S. allies—and I do not know who those would be under the circumstances—in which Secretary Cohen indicated that a treaty containing universal jurisdiction would require the United States to reconsider the presence of U.S. troops in those countries.

My question is, did that conversation or meeting take place?

Ambassador SCHEFFER. Well, Mr. Chairman, I will have to let Secretary Cohen and his spokesmen answer that directly to you. I think I can answer it generally though.

We certainly did talk with other governments about this treaty. That was our job.

Senator HELMS. And about that aspect of it.

Ambassador SCHEFFER. I can only say that it would be logical to assume that the consequences of our future posture in other countries is not only on our mind, but needs to be on their minds as well.

Now, I was not party to any particular conversation that Secretary Cohen had, so I do not know precisely what he said.

Senator HELMS. Well, were you party to any conversations that you had with our allies on that subject?

Ambassador SCHEFFER. Yes. In Rome I did speak with other allies, and I raised this issue—

Senator HELMS. About that subject.

Ambassador SCHEFFER. Yes. I raised this issue with them.

Senator HELMS. What was their reaction?

Ambassador SCHEFFER. Well, I think their reaction was one of concern. I hope that it was one of profound concern, and I discussed this issue for the express purpose of hoping that these delegates would communicate with their capitals about the concerns that we are expressing.

Senator HELMS. It is my understanding that Germany—correct me if I am wrong—currently will not extradite its nationals to the United States or any other country with which it has a bilateral extradition treaty due to statutory and constitutional prohibitions. Is that correct?

Ambassador SCHEFFER. I do not know if that is correct with respect to Germany. I would have to get back to you. Is that correct? Yes.

Senator HELMS. She says it is correct?

Ambassador SCHEFFER. Yes. That is my Justice Department lawyer. She says it is correct.

Senator HELMS. I have to ask my folks too.

In fact—and I believe the lady will confirm this—neither do the following OECD member countries: Austria, Belgium, Brazil, Bulgaria, Denmark, Finland, France, Greece, Hungary, Iceland, Luxembourg, Mexico, Norway, Switzerland, and Turkey. Is that not correct?

Ambassador SCHEFFER. Is it not correct that they would not extradite their citizens to our country? Is that the question?

Senator HELMS. That is my question. My understanding.

Ambassador SCHEFFER. That is a long list.

We may have to get back to you, Mr. Chairman. We will get back to you with an answer to that.

Senator HELMS. Let us assume that just even one of them is correct. I think you will find that every one is correct. How would any other country carry out its obligations under the treaty given these constitutional impediments?

Ambassador SCHEFFER. Well, a very good question. There are provisions in this treaty that would require governments to change their national laws in order to comply with the provisions of this treaty, particularly with respect to the surrender or transfer of individuals on their territory to the treaty. There would have to be changes in certain national laws to facilitate that and the implementing legislation.

Senator HELMS. You bet.

Ambassador SCHEFFER. So, those countries do have to confront that. I suspect that at least some of those countries have to deal with that particular issue in the future.

Senator HELMS. My time is just about up, but I want to commend you for your work over there and your testimony here this morning. You did not try to color it in any way. You laid out the facts, and I appreciate that.

Thank you, Mr. Chairman.

Ambassador SCHEFFER. Thank you.

Senator GRAMS. Thank you very much.

Senator Biden.

Senator BIDEN. Thank you, Mr. Chairman.

It may surprise you. Senator Helms and I agree on a lot more than just George Washington and Thomas Jefferson.

Senator HELMS. Well, of course we do.

Senator BIDEN. But one of the things we agree on actually is the approach you have taken to this treaty. First of all, you did a great job. Second, you reached the right conclusion for our country.

Third, I would try to put it in perspective. There are roughly 10 signatures. No one has ratified, and you have got to get 60 countries ratifying for it to take effect. So, hopefully between here and there, there will be some major changes. The reason I mention that is all of the questions are speculative and the answers are going to have to be speculative because this treaty is not in force yet and it is a long way from being in force.

So, I want to explore with you one issue that was raised by the chairman of the full committee, and that is the purported *de facto* universal jurisdiction. Article 12 of the Court statute creates the possibility that non-parties will be subject to the jurisdiction of the Court. Now, that raises serious concern about the U.S. forces deployed overseas in countries which are parties to the Court. U.S. forces overseas could face prosecution by the Court even though we are not a signatory.

I realize that has been raised already, but it seems to me that if this treaty goes into effect we may have to review the status of forces agreements now in place to ensure that adequate protections are in place. It seems to me—let me just ask the question rather than tell you what I think.

Is the administration, to the best of your knowledge, planning to undertake such a review prior to this treaty gaining 60 countries ratifying and it coming into force?

Ambassador SCHEFFER. Thank you, Senator Biden, very much.

We have already started to have discussions about that within the administration. We have simply not reached any policy decisions. We are still catching our breath after a long 5 weeks.

But we have already started discussions about the fate of the status of forces agreements. We have started looking at them. We have looked at provisions within the statute itself that may guide us toward encouraging other states to help us amend these agreements so that they do not find themselves in an unacceptable bind because they need to recognize themselves that they need to address this issue directly, their own status of forces agreements with us.

Senator BIDEN. In my experience spanning more than 2 decades on this committee, nothing gets the attention of our friends like discussing the status of forces agreements we have with them. There is a facetious ring to what I just said, but I mean it sincerely. It seems to me that I need not tell you, as talented as you are, how we should go about impacting on the final outcome of this treaty, but I respectfully suggest that if at the highest levels there were the beginning of discussions about status of forces agreements with our allies, most of whom did not go along with us in the way we viewed the treaty, that we may very well get them to focus on aspects of the treaty I suspect they have not really fully focused on—their governments. You know how to do your job better than I know how you should do your job, but I suspect that may be a useful thing.

Ambassador SCHEFFER. Senator, if I may point your attention and the committee's attention to Article 98, section 2 of the statute, I think that is one provision we will be focusing on in terms of your question.

Senator BIDEN. Why do you not tell me what that is since I do not have it in front of me?

Ambassador SCHEFFER. It deals with cooperation with respect to waiver of immunity and consent to surrender, and it is a very important provision that I think we will need to be pointing out to other governments, particularly as it relates to our status of forces agreements.

Senator BIDEN. That says, "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." Is that what you are referring to?

Ambassador SCHEFFER. Yes, although you may have a text there which was preceding the final text. There are a few word changes, but that is essentially the text, yes.

Senator BIDEN. Well, I would also note and, Mr. Chairman, I will conclude by saying in the absence of the chairman of the full committee, I say nonetheless for the record, this is something he feels very strongly about. This is a treaty that is a long way from becoming law, and we are holding hearings on it. We have time for it, but we do not have time to have hearings on the Comprehensive Test Ban Treaty. We do not have time to have hearings on things that are really current. I would hope my Republican friends would focus on about 12 treaties that require urgent attention up or down for us and we not spend a lot more time on something that I predict to you is not going to come to fruition anyway, and if it does, it is a long way off.

But I thank you for your hard work and your staff. You did a great job according to my staff and Senator Helms' staff who spent time over there observing. So, thank you.

Ambassador SCHEFFER. Thank you, Senator.

Senator GRAMS. Thank you very much. But it is never too early to begin.

Senator BIDEN. That is true. That is why we should be doing the Comprehensive Test Ban Treaty right now.

Senator GRAMS. Thank you, Senator.

Ambassador, we talked a little bit just a while ago about the relationship of the Security Council to this Court. I would like to followup on that question and ask, will this administration support Security Council referrals to the ICC if the treaty has not been ratified by the United States?

Ambassador SCHEFFER. I do not know, Senator. We have not had a policy decision on that. It is somewhat premature at this stage. We know that this Court is many years in the distant future, if at all. We do need to have discussions within the administration about exactly what our approach will be in the coming years. I can assure you that that is a key checklist item for that discussion.

Senator GRAMS. It is always costs that are important as well. The treaty calls for funding by the parties to the treaty and also by the U.N. Now, is there any way that funding could be provided to the ICC by the United Nations aside from when cases are referred by the Security Council?

Ambassador SCHEFFER. As the committee staff who were there know, this was a very tortuously negotiated provision. We had basically the entire world confronting us on this issue. I should not say the entire, but there were large numbers of countries that wanted this court to be funded strictly by the United Nations, out of the U.N. budget. We had to point to them time and time again that that did not make sense, that you cannot ask governments which are not party to this treaty to, nonetheless, pay for it through the U.N. budget. We were very clear with them that we did not think the U.S. Congress would facilitate this at all.

So, we went through several stages of negotiation and there was one stage which suggested that the initial funding of the Court, i.e., for the first 2 or 3 years of the Court's operation, at least that should be U.N. funding. And we said, no, that is not correct either because once again, you will have many countries which are not party to this treaty and yet you are asking the U.N. to pay for it through their assessments to the United Nations budget. We defeated that.

The language which resulted in the document—and what number is the article now, if someone can remind me? Here it is. Article 115. They renumbered all the articles on us the last day, so you can imagine those of us who lived with certain article numbers for many months have had to reeducate ourselves.

Article 115 is crafted in such a way that it does provide the possibility for funds provided for the United Nations, but only if the General Assembly has so determined that the United Nations wishes to make that contribution to the Court. Of course, we have the opportunity to weigh in within that context in New York.

But we also worded this so that the focus is on U.N. contributions for Security Council referrals to the Court, since the Security Council would have made the decision. But it is not wording that perfectly satisfies how we would have preferred this result. We had sought assessed contributions by States Parties—period. But this was the language that was finally achieved in the negotiations.

Senator GRAMS. You are right. There are many in Congress who would not approve of that type of funding.

This treaty authorizes the Court's prosecutors, as we have talked about here a little bit already this morning, to initiate cases; and that is something that the U.S. is aggressively opposed to. Are the safeguards contained in the treaty over the prosecutor adequate to prevent what we would call politicizing of the prosecution?

Ambassador SCHEFFER. Well, I think the arguments we made for 5 weeks stand today. We had great concern. We continue to have great concern over the potential politicalization of the prosecutor. Now, this is an argument that at times we found others had difficulty grasping; so let me, if I may, for one minute explain this.

The prosecutor undoubtedly is going to have to become not only the receiver of an enormous amount of information in this capacity, he will have to decide and he will have to make judgments as to what he pursues and what he does not pursue for investigative purposes. In the end, those kinds of judgments by the prosecutor will inevitably be political judgments because he is going to have to say no to a lot of complaints, a lot of individuals, a lot of organizations that believe very strongly that crimes have been committed, but he is going to have to say no to them. When he says no to them and yes to others and he is deluged with these, he may find that he ends up making some political decisions. Even if he has to go to the Pretrial Chamber and get the approval of at least two of the three judges in the Pretrial Chamber, in the end you have three individuals making that decision.

We have always argued that this court, first of all, should deal only with the referral of large scale commission of these crimes and that it will be inevitable that when you have a large scale commission of crimes, I think we have a fairly high degree of confidence that at least one state party or the Security Council will deem it meritorious to refer that situation to the Court.

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.

Senator GRAMS. Thank you. I have a followup, but I will wait until my next round of questioning.

Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Mr. Ambassador, after listening carefully to your testimony and reading it, it would appear to me that the treaty is effectively dead as far as the United States is concerned unless major changes are made to it. Would you agree with that?

Ambassador SCHEFFER. Well, I would say that we are not prepared to go forward with this treaty in its current form. We are simply not prepared to do so.

Senator FEINSTEIN. I would interpret that to say, really, that as far as the United States is concerned, it is effectively dead.

I wanted to ask you a question also about some of the initial press stories that came out after the Rome decision which held that one of the countries that might be affected by this statute was

Israel, and that Israel really might run afoul of it because of the occupied territories clause included in Article 8(2)(b)(viii). Can you explain that clause, the precedent for it in international law, and give us your understanding of whether Israel would or would not face potential jeopardy before the Court?

Ambassador SCHEFFER. Yes, Senator, I would be glad to.

This was a provision in the treaty which we spent an enormous amount of our time on. We consulted very closely with the Government of Israel consistently about this provision. We talked with many other countries about it. It is a provision which was very popular with certain groups of countries to include in this treaty.

We had opposed it from the very beginning in discussions that began two years ago because we did not feel that there was customary international law yet that attached this kind of activity to individuals for criminal responsibility. Rather in the Geneva Convention, it is a State responsibility issue, i.e., transferring your population into an occupied territory is an issue that relates to State responsibility. We felt that given its very, very political context and the fact that there are actually many governments in the world that one might look to with respect to this kind of activity, that we needed to keep it at the level of State responsibility and not seek to bring it into the area of individual responsibility or culpability, criminal culpability.

Now, we argued that for a long time, but none of our European colleagues and other countries around the world accepted this argument. It was strongly advocated for inclusion in the statute.

Senator FEINSTEIN. Let me just understand that.

Ambassador SCHEFFER. Yes.

Senator FEINSTEIN. Are you effectively saying, yes, Israel could run afoul of the Court under the present structure as proposed?

Ambassador SCHEFFER. Well, first, I think it is because of this issue, along with other issues, that Israel joined us in voting against this treaty.

Senator FEINSTEIN. So, may I interpret your answer as being yes?

Ambassador SCHEFFER. Well, again I always want to turn to the Government of Israel to answer that question for its own position, but—

Senator FEINSTEIN. Well, I am asking you for your interpretation.

Ambassador SCHEFFER [continuing]. My interpretation is that Israel would stand at risk with this provision in terms of exposure to this court.

Now, we had many discussions on this, including with our good friends from Israel, and there was an insertion into the statute that went beyond even the Geneva Protocol I of 1977 which does identify as a grave breach of the protocol the transfer by the occupying power of parts of its own civilian population into the territory it occupies. That is identified as a grave breach in the 1977 Geneva Protocol I, and Israel was very involved in those negotiations in 1977.

What we found unacceptable at the end was the insertion of three words into the statute that appears no where in the Geneva protocol. The statute now reads: "The transfer, directly or indi-

rectly, by the occupying power of parts of its own civilian population into the territory it occupies.” What does directly or indirectly, and where does that come from? That we could not accept and neither could Israel accept those three words. I must say that if Israel had brought this issue up for a vote directly on Friday evening of last week, we were going to intervene, speak against the provision, and vote against it, but Israel chose not to.

Senator FEINSTEIN. May I just make one other statement along this line? To me then it is rather clear that this provision, directly or indirectly, strikes directly at Israel and the West Bank. What surprises me about it is, this was agreed to by our European allies?

Ambassador SCHEFFER. Yes.

Senator FEINSTEIN. I find that quite remarkable.

Let me ask one final question. What chances do you give to whether the statute can be ratified by 60 nations?

Ambassador SCHEFFER. Well, there were more than 60 governments that comprised the group called the “like-minded group” in these negotiations that were very strong advocates of the Court. So, I do not know what will come of the actions of those 60-plus countries who had very strong affirmative views about this court, but they certainly know that they have got a group of 60, or more than 60 actually in the end, that were in the right frame of mind for ratification.

Senator FEINSTEIN. So that we know the real world in which we are playing, on a scale of 1 to 10, are you saying you would rank at 10 the chances that this will be ratified?

Ambassador SCHEFFER. Well, I think it is very close to 10 for ultimate entry into force. I think the real question is how many years it will take. Remember that the requirement in each government will be what needs to be adopted domestically in order to conform their national criminal codes and other provisions to the requirements of cooperation of this statute and also the war crimes definitions, because one thing that I think every government will want to be able to demonstrate is that under the principle of complementarity in this statute, they have the capability to investigate and prosecute these crimes domestically under their domestic law. That will require some changes in domestic law for them to be able to demonstrate that capability. So, this will be a long process.

Senator FEINSTEIN. Thank you, Mr. Chairman. One other question?

Senator GRAMS. Sure, go ahead.

Senator FEINSTEIN. Just one question. I wanted to ask you quickly about the Pretrial Chamber process and what specific rights a State or individual would have to appeal a decision of the Court to prosecute a given case. If a frivolous charge were to be leveled against, say, a United States citizen and the prosecutor, say, for whatever reason determines an investigation was warranted, are there options that a third party would have to bring exculpatory information before the Court at that stage to close down the investigation or does that just proceed?

Ambassador SCHEFFER. If I may, I would like to ask my colleague who negotiated that provision to answer it for you, if I may.

Senator FEINSTEIN. I would be happy to.

Ambassador SCHEFFER. It is Molly Warlow from the Department of justice. Molly, could you possibly address that question?

Ms. WARLOW. There are various provisions that would be at issue. First, as a general matter, there is a general provision that the prosecutor is not strictly speaking an adversarial position. He has a responsibility to also look into exculpatory information which is a provision that we put in.

However, one of our main objectives was to set the stage very early on for a State to be able to challenge the competence of the Court, particularly with respect to the admissibility of the case, which means the Court is without jurisdiction if the national authorities are themselves pursuing the case. Under the provision that we worked very hard to achieve, the state has standing simply by notifying the prosecutor of their own interest in prosecuting and investigating to achieve a deferral of the case.

At that point, the burden lies with the prosecutor to go forward and seek a ruling from the Pretrial Chamber which has then the burden of showing that the national proceedings are, either the system is in collapse, or that the national proceedings are a sham.

So, one of our main objectives was to have a very early opportunity to present these issues and the right to intercede does not depend on whether you are a State Party or not.

Senator FEINSTEIN. Do you feel that that is adequate?

Ms. WARLOW. It is extremely useful. There is an opportunity to appeal it, but of course one of our main themes was the concern that overall complementarity in and of itself may not be sufficient to meet our interests. It certainly is a much better regime than we had going in Rome. We fought off an effort at the last minute to remove that provision, much to our surprise. And at other stages there can be challenges to jurisdiction as well. So, generally states can act on behalf of their nationals to proceed in these matters.

Senator FEINSTEIN. Thank you very much. I would like to just say thank you to you, Ambassador. I think you certainly acted in the best interests of our Nation at this stage, and I appreciate it very much.

Ambassador SCHEFFER. Thank you, Senator Feinstein.

Senator GRAMS. Mr. Ambassador, just a couple of quick questions following up and clarifying. We talked about politicizing a prosecution, some of the decisions that might have to be made by the Council. In what areas is the prosecutor given sole discretion in a case?

Ambassador SCHEFFER. In bringing the case or—

Senator GRAMS. Bringing the case or furthering the prosecution or the investigation itself.

Ambassador SCHEFFER [continuing]. Well, certainly in triggering the mechanism of the Court to launch widespread investigations of a situation, he is given, well, near complete independence to do that as long as he can persuade two judges in the Pretrial Chamber to agree with him. So, he has to demonstrate to the judges that there is a premise here for investigation, that this rises to the level of jurisdiction of this court, and if the judges agree with him, then he can launch into those investigative activities.

Now, once he is launched, whether by his own accord or by referral by the Security Council or by a State Party to the treaty, he

does have a wide range of provisions in the statute that check him along the way. The Pretrial Chamber itself has numerous opportunities to examine the course of his work and to influence the course of his investigative work. This is something that is very common to the civil law governments that we were dealing with and they felt comfortable with it and we actually saw some merit in it for purposes of an international court.

But in addition to that, we have a lot of provisions on cooperation with States, part 9 of the statute, which do provide him and the Court with a guide path for how to make requests for cooperation with States. That is a very detailed set of provisions, but it certainly is the case that the prosecutor cannot simply walk into other countries and start investigating. He has to work in a cooperative manner with other countries. He has to fulfill documentary requirements, and he has to work with other governments in order to achieve his investigative objectives. So, it is not a completely independent prosecutor with access throughout the world.

And we worked very, very hard on these provisions so that national judicial procedures would have to be recognized by the prosecutor in the pursuit of his work. I think where we felt that we would have preferred more progress in the statute is that not only national judicial procedures, but in some cases national law itself, including constitutional law, needed to be recognized by the prosecutor. But I think that the phrase "national judicial procedures" which is peppered throughout the cooperation provisions we hope will provide for an adequate, shall we say, cooperative check on the prosecutor's ability to investigate on foreign territory. We want him to be able to do so. If the Court is an adequate functioning court, he needs to do his job, but he needs to do it with full respect for national judicial procedures and the constitutional requirements of other countries.

Senator GRAMS. So, acting on a complaint or a charge or through a Security Council directive, but he could also initiate himself such an investigation.

Ambassador SCHEFFER. Yes, and that we opposed of course in Rome, the latter.

Senator GRAMS. One final question then just to sum this up. Do you believe that the Constitution permits the U.S. Government to delegate its authority to prosecute Americans for crimes committed on U.S. soil to the International Criminal Court?

Ambassador SCHEFFER. Well, I believe that is one of the issues that we wanted to bring back to Washington, and it is also one of the reasons why we were so insistent on pressing for a reservations clause in this treaty because we knew that that issue ultimately had to be resolved in discussions back here in Washington as to our ability to address that very specific issue, the crime being committed on U.S. territory by a U.S. citizen. It is not unprecedented. In the past crimes committed by U.S. citizens on U.S. territory have in fact been prosecuted elsewhere in the world with our consent; but we wanted to bring that issue back, and we wanted a reservations option in the treaty so that there would be ample opportunity for the United States to meet its constitutional requirements in reviewing this treaty.

Senator GRAMS. But you said with our consent, that this would not happen without our consent or it has happened in the past.

Ambassador SCHEFFER. Yes, I would have to provide that to you, Senator, but I am told that there are examples in the past where U.S. nationals who have committed crimes on U.S. territory have in fact been prosecuted overseas.

Senator GRAMS. You will furnish that.

Ambassador SCHEFFER. Yes, I will furnish that to you, Senator.

Senator GRAMS. Well, Ambassador, I want to thank you very much for taking your time to be here this morning and for your answers. I also just have a note that Senator Ashcroft, who had to leave, would also like to submit some written questions to you, sir. So, I am going to leave the record open until the close of business today, and we would appreciate a prompt response to those questions if possible. Thank you very much, Mr. Ambassador, and thanks you for your time.

I would like to now call our second panel for the hearing this morning, and they are the Honorable John Bolton, former Assistant Secretary of State for International Organization Affairs, now Senior Vice President of American Enterprise Institute in Washington, D.C.; also Mr. Lee Casey, an attorney at Hunton & Williams, in Washington, D.C.; and also Mr. Michael P. Scharf, Professor of Law and Director, Center for International Law and Policy, New England School of Law, in Boston, Massachusetts.

Gentlemen, welcome. Thank you very much for also joining us this morning. If you have opening statements, the committee would now entertain those, and we could start from left to right. Mr. Bolton, if you would.

STATEMENT OF HON. JOHN BOLTON, FORMER ASSISTANT SECRETARY OF STATE FOR INTERNATIONAL ORGANIZATION AFFAIRS; SENIOR VICE PRESIDENT, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, D.C.

Mr. BOLTON. Thank you very much, Mr. Chairman. I have a prepared statement which I would ask to be incorporated in the record.

It is a pleasure to testify today on the somewhat misnamed International Criminal Court. In fact, what the Rome conference has actually done is create not only a court, but also a powerful and unaccountable piece of an executive branch: the prosecutor.

Unfortunately, support for the ICC concept is based largely on emotional appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and running contrary to sound principles of international crisis resolution. Moreover, for some, faith in the ICC rests largely on an unstated agenda of creating ever more comprehensive international structures to bind nation states in general and one nation state in particular. Regrettably, the Clinton administration's naive support for the ICC has left the U.S. in a worse position internationally than if we had simply declared our principled opposition in the first place.

Many people have been led astray by analogizing the ICC to the Nuremberg trials and the mistaken notion that the ICC traces its intellectual lineage directly to those tribunals. However, examining what actually happened at Nuremberg easily shows these conten-

tions to be wrong, and we can learn important lessons why the ICC, as presently conceived, can never perform effectively in the real world.

Nuremberg occurred after complete and unambiguous military victories by allies who shared juridical and political norms and a common vision for reconstructing the defeated Axis powers as democracies. The trials were intended as part of an overall process, at the conclusion of which the defeated states would acknowledge that the trials were prerequisites for their readmission to civilized circles. They were not just political score settling or continuing the war by other means. Moreover, the Nuremberg trials were effectively and honorably conducted. Just stating these circumstances shows how different was Nuremberg from so many contemporary circumstances, where not only is the military result ambiguous, but so is the political, and where war crimes trials are seen simply as extensions of the military and political struggle under judicial cover.

ICC supporters also support that Nuremberg was only an after-the-fact event that would not deter others from committing future crimes against humanity. They believe simply that if you abhor genocide, war crimes, and crimes against humanity, you should support the ICC. This logic is flatly wrong for three compelling reasons.

First, all available historical evidence demonstrates that the Court and the prosecutor will not achieve their central goal, the deterrence of heinous crimes, because they do not and should not have sufficient authority in the real world. Beneath the optimistic rhetoric of the ICC's proponents, there is not a shred of evidence to support their deterrence theories. Instead, it is simply a near religious article of faith.

It is incredibly striking, therefore, that faith is about all they have to support their argument. Rarely has so sweeping a proposal for restructuring international life had so little empirical evidence to support it. One ICC advocate said in Rome that "the certainty of punishment can be a powerful deterrent." I think that statement is probably correct, but unfortunately it has little or nothing to do with the ICC.

In many respects the ICC's advocates fundamentally confuse the appropriate roles of political and economic power, diplomatic efforts, military force, and legal procedures. No one disputes that the barbarous actions under discussion are unacceptable to civilized peoples. The real issue is how and when to deal with these acts, and that is not simply or even primarily a legal exercise. The ICC's advocates make a fundamental error by trying to transform matters of power and force into matters of law. Misunderstanding the appropriate roles of force, diplomacy, and power in the world is not just bad analysis, but bad and potentially dangerous policy for the United States.

Recent history is unfortunately rife with cases where strong military force or the threat of force failed to deter aggression or gross abuses of human rights. Why we should believe that bewigged judges in the Hague will prevent what cold steel has failed to prevent remains entirely unexplained.

Even viewed in the light most favorable to the ICC, this debate is almost solely about predictions. Without more, predictions alone are insufficient to support radical change in the international order.

Needless to say, I do not view the argument in the most favorable light. Existing empirical evidence in the military sphere argues convincingly that a weak and distant legal body will have no deterrent effect on the hard men like Pol Pot and Saddam Hussein most likely to commit crimes against humanity. Holding out the prospect of ICC deterrence to those who are already weak and vulnerable is simply fanciful.

Second, the ICC's advocates mistakenly believe that the international search for justice is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within States, and the reconciliation of hostile neighbors. In the real world, as opposed to theory, justice and reconciliation may be consistent, or they may not be. Our recent experience in situations as diverse as Bosnia, Rwanda, South Africa, Cambodia, and Iraq argue in favor of a case-by-case approach rather than the artificially imposed uniformity of the ICC. And I have laid out in my prepared testimony at some length the specifics of these cases and why they demonstrate from reality today why the Court is not appropriate.

Third, tangible American interests are at risk. I believe that the ICC's most likely future is that it will be weak and ineffective and eventually ignored, because naively conceived and executed. There is, of course, another possibility, that the Court and the prosecutor, either as established now or as potentially enhanced, will be strong and effective. In that case, the U.S. may face a much more serious danger to our interests, if not immediately, then in the long run.

Let there be no mistake. Our main concern from the U.S. perspective is not that the prosecutor will indict the occasional U.S. soldier who violates our own values and laws and his or her military training and doctrine by allegedly committing a war crime. Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor and that is the real problem of universal jurisdiction.

I have demonstrated I think in my testimony the crisis of legitimacy we face now with the International Court of Justice and the U.N. Commission on Human Rights which are held in low esteem, not just in the United States, but around the world.

I have also dealt with the overwhelming repudiation by the Rome conference of the American position supporting even a minimal role for the Security Council. Implicit weakening of the Security Council is a fundamental new problem created by the ICC, an important reason alone why the ICC should be rejected. The Council now risks both having the ICC interfering in its ongoing work and even more confusion among the appropriate roles of law, politics, and power in settling international disputes.

The ICC has its own problems of legitimacy. Its components do not fit into a coherent international structure that clearly delineates how laws are made, adjudicated, and enforced, subject to pop-

ular accountability, and structured to protect liberty. Just being out there in the international system is unacceptable and indeed almost irrational unless one understands the hidden agenda of many NGO's supporting the ICC.

There is real vagueness over the ICC's substantive jurisdiction, although one thing is emphatically clear: This is not a court of limited jurisdiction. We should take a systems approach to the ICC, judging not only what we see before us now, but look forward to what might be added in the long run. Only if we are willing to travel the entire path shall we take the first step, and I can testify to that from my own years in the vineyards of U.N. matters.

I have laid out in my prepared testimony question after question after question of the vagueness of the statute. I will just touch on one.

The statute's definition of genocide could not be accepted by the U.S. Senate in its present form unless the Senate were to reverse the 1986 reservations and understandings that attached to the Genocide Convention.

Consider second the Israeli problem, which has been discussed here, concerning its conduct in the West Bank and Gaza. This is a perfect example of politicizing this supposedly independent legal institution right from its inception and a clear marker of future problems.

I cannot predict whether the first case will be brought against the United States or Israel. I suspect it will be a race to the Court-house door.

Apart from these problems with existing provisions and the vague and uncertain development of customary international law, consider all of the other crimes on the waiting list: aggression, terrorism, embargoes, courtesy of Cuba; drug trafficking, and so on. This is the unstated agenda of the NGO's, as Mr. Crawford's statement, which I quote in my prepared testimony, demonstrates. The Court's range is enormous.

Let me just quote one provision of the statute. This is one of the few provisions that is, unfortunately, clear, Article 119. I am quoting. "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court." That is pretty straightforward and pretty frightening.

The troubling substantive problems are overshadowed by the governance structures of the Court and the prosecutor. One of the executive branch's strongest powers is the law enforcement power. In the United States we accept this enormous power because we separate it from the adjudicative power and because we render it politically accountable through Presidential elections and congressional oversight. There has been a lot of talk about how all of our European allies supported this court. Europeans may feel comfortable with the ICC structure, no political accountability and no separation of powers, but that is a major reason why they are Europeans and we are not.

What to do next is obviously the critical question. Whether the ICC survives and flourishes depends in large measure on the United States. We should not allow this sentimentality masquerading as policy to achieve indirectly what was rejected in Rome. We should oppose any suggestion that we cooperate, help

fund, or generally support the work of the prosecutor. We should isolate and ignore the ICC.

Specifically, I propose for the United States policy—I have got a title for it. I think it is one the Clinton administration will understand toward the ICC. I call it the Three Noes: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute.

This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective. The ICC is fundamentally a bad idea. It cannot be improved by technical fixes as the years pass, and in fact it is more likely than not to worsen. We have alternative approaches and methods consistent with American national interests, as I have previously outlined, and we should follow them.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Bolton appears in the appendix on page 45.]

Senator GRAMS. Mr. Bolton, thank you very much for your comments and testimony. Mr. Casey, your statement please.

**STATEMENT OF LEE A. CASEY, ATTORNEY, HUNTON &
WILLIAMS, WASHINGTON, D.C.**

Mr. CASEY. Yes, sir. Thank you. I also have a written statement that I ask to be submitted for the record.

Senator GRAMS. Without objection, it will be entered as read.

Mr. CASEY. Thank you.

One of the oldest principles of American government is that Americans accused of criminal offenses within the judicial power of the United States must be tried in their own courts with all of the guarantees mandated in the Bill of Rights. This principle was first articulated when the Founders of our Republic declared its independence and catalogued the outrages that they believed justified revolution and war. They noted three of particular interest to us here today where, in the Declaration of Independence, they accused the King and Parliament of subjecting us to a jurisdiction foreign to our constitution and unacknowledged by our laws, depriving us in many cases of the benefits of trial by jury, and of transporting us beyond the seas to be tried for pretended offenses. After the revolution, the Founders ensured that Americans would never again be transported beyond the seas for trial by requiring in the Constitution that all crimes be tried by jury in the State where the said crime shall have been committed. This guarantee was stated not once but twice in the Constitution in Article II, section 2 and in the sixth article of amendment.

American participation in the ICC treaty would have violated this fundamental principle. Ambassador David Scheffer and his colleagues and the American delegation to the Rome conference can be justly proud of the fact that when the extreme demands and intransigence of the supporters of a permanent international criminal court became evident, they kept faith with the Founders of our Republic and with the American people, refusing to sign a treaty that would again have subjected Americans to a foreign jurisdiction able to transport them beyond the seas to be prosecuted without the benefits of trial by jury.

Ambassador Scheffer and his delegation, as well as the Americans in the nongovernmental community who traveled to Rome to oppose creation of a permanent international criminal court with the power to prosecute Americans, deserve the grateful thanks of the American people. These individuals worked hard on our behalf in Rome and suffered the petulant and childish attempts of ICC supporters to smear their efforts and to discredit the position of the United States. The extremity of their demands may be judged by the results they achieved, for it takes a rare talent indeed to drive the United States and Israel onto the same ground as China and Libya.

The Senate and the whole American people should support the administration in its firm objection of the ICC treaty and particularly in its unequivocal denial that the ICC has any lawful power over Americans either at home or abroad. The ICC's claim to jurisdiction over the nationals of any state that has not joined this treaty are entirely unsupported in the accepted rules of international law. There is in fact no precedent in international law or practice for the exercise of jurisdiction by such a court over the nationals of a State that has not acceded to the treaty creating the Court itself.

In attempting to subject Americans to the jurisdiction of the ICC, the ICC states are in fact attempting to act as an international legislature, a power they do not have and a power that is fundamentally at odds with the guarantee of the sovereign equality of States memorialized in the United Nations Charter. This attempt to subject Americans to the authority of a court the United States has not accepted nothing less than a concerted challenge to American sovereignty, the right of the American people to govern themselves. If the ICC may call American and military officials to account for their actions on behalf of the United States in a criminal court, then those individuals are no longer ultimately accountable to us, the people of the United States, but to the prosecutor and judges of the ICC. As Alexis de Tocqueville wrote in the last century, "He who punishes the criminal is the real master of society."

This action, led in large part by like-minded States whose own rights of self-government have been preserved and guaranteed by American blood and treasure and which have sheltered in the lee of American power these 50 years past brings to mind the words of British Prime Minister Lord Palmerston when asked to name Britain's permanent friends in a world where it was the sole global power. "England," he replied, "has no permanent friends, only permanent interests."

The extravagant and illegal claims of the ICC states to exercise jurisdiction over the United States and her citizens and the actions of our allies in supporting these claims might lead many Americans to support a withdrawal from our global responsibilities. We must resist this temptation and heed Palmerston's counsel. However faithless our friends, we too have permanent worldwide interests; and these interests dictate that that the United States remain engaged on the world stage. We cannot allow the foolish actions of our allies to achieve what the Soviet Union in all of its expanse and power never could: to drive the United States back into isolation on the North American continent.

However, it now has become imperative for the United States to make clear to the ICC and the States who have signed this treaty that it will not honor any claims to authority over American citizens, that it considers such pretensions to be unfounded in law, and that any attempt to assert such power will be vigorously resisted and ultimately frustrated with all of the United States' considerable resources.

Thank you.

[The prepared statement of Mr. Casey appears in the appendix on page 61.]

Senator GRAMS. Mr. Casey, thank you very much.

Mr. Scharf.

**STATEMENT OF MICHAEL P. SCHARF, PROFESSOR OF LAW,
AND DIRECTOR, CENTER FOR INTERNATIONAL LAW AND
POLICY, NEW ENGLAND SCHOOL OF LAW, BOSTON, MASSA-
CHUSETTS**

Mr. SCHARF. Thank you, Mr. Chairman. Since I am the baby face on this panel, let me begin my remarks by telling you a little bit about my background so that you will not assume that these are the remarks of naive advocacy for an international criminal court.

Before the creation of Ambassador Scheffer's role, Ambassador-at-Large for War Crimes Issues, that job at the State Department was the responsibility of a young lawyer from 1989 to 1993. That lawyer was myself. Since leaving the State Department in 1993, I have been the author of the three major books on the Yugoslavia Tribunal, the Rwanda Tribunal, and then there is my Pulitzer Prize nominated *Balkan Justice*.

So, I speak not as a naive advocate, but I give you I think a different view than you have gotten today. I am going to be the lone discordant voice in this anti-international criminal court chorus.

In the 1950's, people were worried about who lost China. I think in 10 years, people are going to look back at this event and say, who lost the International Criminal Court? I think as Senator Helms' views today indicated, this issue is going to be much broader than our participation in the Court. It may be the beginning of a whole new round of U.S. isolationism.

We need to begin, of course, with the case for a permanent international criminal court. This body voted several times in favor in principle for such a court in recognition of the fact that in the last 100 years, during this decade, 170 million people have been killed by crimes of genocide, crimes against humanity, and war crimes, according to Professor Rummel's *Death by Government*.

We live in a golden age of impunity in which a person stands a better chance of being prosecuted for killing 1 person than for killing 100,000 or a million people. And the failure to prosecute, to bring these people to justice encourages future dictators, future genocidal maniacs. Remember Hitler's famous words on the eve of the invasion of Poland in 1939 when his generals were squeamish about what he was asking him to do. He said, do not worry. "After all, who today remembers the fate of the Armenians?" And what he was saying was that the Armenians were slaughtered, a million of them, in the world's first genocide and there was no prosecution. The Turks were given amnesty in the Treaty of Lausanne; and be-

cause of that, Hitler could tell his followers, do not worry, we will get away with this too. There will be no international prosecutions.

After Nuremberg, there was a hope that there would be a permanent Nuremberg, that people like Hitler everywhere around the world would be prosecuted in an international criminal court; but because of the Cold War, this was not to be. The failure to prosecute Pol Pot, Idi Amin, Saddam Hussein have only encouraged acts like Karadzic and Milosevic. There is no proof that an international court is an effective deterrent, but not having an international criminal court is definitely an encouragement.

Now we have seen two *ad hoc* tribunals that have become successful to everybody's great surprise, including my own, with the Yugoslavia Tribunal now having 31 of the indictees in custody out of 61 and the Rwanda Tribunal doing even better with 25 indictees out of 35 in custody, including all of the major genocidal leaders. These international criminal courts can work. They can have a deterrent value.

Unfortunately, the hope that the Security Council would continue to create such courts was dashed when the Security Council experienced what David Scheffer calls tribunal fatigue. In other words, creating new courts for every situation, appointing new prosecutors, electing new judges, creating new courtrooms is so expensive, so politically exhausting that the Security Council could not do it. That is why the world turned to the idea of a permanent international criminal court and that is why a permanent international criminal court as a concept is still worth pursuing.

So, what went wrong in Rome?

First of all, we have to remember that in Rome there was a tension between the United States, which wanted a Security Council controlled court, and the rest of the world, virtually every other country, which wanted a court that no country's individuals could be immune from.

In Rome they created a two-track system. One track was Security Council referral, and this was always the more important, the more significant of the two tracks because the Security Council could obligate every country in the world to comply. The Security Council could enforce the obligation with economic embargoes, with the freezing of assets which were so effective in the Haiti situation, and even with authorizing the use of force like with the NATO troops in Bosnia. So, the Security Council controlled track always was the real international criminal court for all intents and purposes.

The other court, the court which requires the independent prosecutor or complaints by States, requires compliance of countries in good faith, and there are many reasons why countries are not always going to comply unless you have some enforcement built in. So, no one ever thought that was going to be the important part of the Court.

Nonetheless, the United States insisted on protections from that part, from that second track, and the United States got just about everything it insisted on. We saw the laundry list on page 2 of David Scheffer's testimony today.

First, the United States got something known as complementarity with teeth. That means that not only can the

Court in principle not prosecute when a domestic court is investigating or prosecuting, but specifically the Court for 6 months must defer prosecution and investigation if any State says it is investigating and a State can appeal that.

Second, as Senator Feinstein suggested, the limit of war crimes to serious and the addition of plan or policy to the definition of war crimes means that no U.S. soldier in a U.N. peacekeeping force can be prosecuted for these war crimes. That is not a real issue.

Third, the safeguard against an independent prosecutor, what some U.S. officials have referred to as the international Ken Starr problem, is in Article 15 which requires the approval of a three-judge pretrial panel before the independent prosecutor can launch an investigation and this too is subject to an appeal before the whole tribunal.

And fourth, as David Scheffer said, the Security Council can vote to postpone the investigation or a prosecution for up to 12 months, renewable if the Security Council thinks it is in the world's interest to do so.

These protections were sufficient for the other major powers, specifically the United Kingdom, France, and Russia. The deal-breaker for the United States we have heard is the U.S. insistence that the State of nationality must consent to the Court's jurisdiction. Well, the reason that was the deal-breaker is because every situation around the world where this court would be effective would not apply. Because, think about it: Is Yugoslavia going to consent to Milosevic's trial? Will Iraq consent to Saddam Hussein? Would Cambodia have consented to Pol Pot? So, no wonder the other countries of the world felt that that was not a reasonable demand.

And where does that leave us now?

You have to understand that there is enormous world support for this international criminal court. I think the other members of the panel have tried to downplay this. David Scheffer was, I think, honest when he tells you that there are more than 60 countries that are already ready to ratify it. I have to tell you honestly that this thing is going to happen very quickly. There are already 20 countries that have signed and the pace is so fast that it is like the Rights of the Child Convention. That is the fastest convention that was ever ratified coming out of the U.N.

As a non-party, as a country that did not sign and will not go along with it, the U.S. does not have to cooperate with the tribunal. That is true. But we have heard today that the U.S. is not immune from the tribunal. U.S. soldiers who commit crimes abroad, U.S. officials who commit crimes abroad who are visiting a foreign country could be apprehended, and there could be indictments even though the U.S. has not signed.

Now, by not signing on, the U.S. cannot participate in the preparatory conference which is going to draft the rules of procedure and the definition of crimes. That will be further elaborated. The U.S. cannot participate in the selection of the prosecutor to make sure that the prosecutor is not someone who is subject to politicization. The U.S. cannot nominate judges or vote for judges or determine funding. The U.S. has pulled itself out of the process just at the time when the U.S. ought to continue to be engaged.

Because of the adverse fallout, the U.S. probably will not be able to employ the Security Council track of the tribunal which was, in the United States view, the whole reason why such an *ad hoc* tribunal on a permanent basis was worthwhile.

In the final analysis, I think the U.S. may have lost more than it preserved by voting against the International Criminal Court, and I think it is very telling which other countries joined the U.S. there were at least 7 countries that voted against and there were 120 that voted in favor. Those countries are not countries that I want our country keeping company with. They are Iran, Iraq, Libya, China, and Yemen, and only Israel was the only ally of the United States, for its own reasons, that voted no.

Now, there are other issues that I am happy to address during the question and answer. I see my time is up, but I would like to say that there is another side to some of the questions that have been raised. The constitutionality of the Court, the protections of the Bill of Rights, the applications of citizens of a non-Party State, and the issue that Senator Feinstein raised about the occupying powers all have another side; and I am happy either to talk about that today or to submit further written answers to those questions.

Thank you.

[The prepared statement of Mr. Scharf appears in the appendix on page 69.]

Senator GRAMS. Thank you very much, Mr. Scharf, for your statement.

I was hoping that I would be considered the baby face of the hearing.

Or Senator Feinstein.

I would like to for courtesy defer Senator Feinstein to begin this round of questions.

Senator.

Senator FEINSTEIN. Well, thank you very much.

I think this has been a very interesting discussion, and I really hope that people sitting in the audience have gotten as much out of it as I have. You really see how something with good intent becomes subject to an enormous problem.

Let me begin, if I might, with Mr. Scharf because I think you had a difficult role here. You were really sort of the only note of positiveness about this court in all these hours.

I do not understand really why you feel there is an incentive for the United States to continue in this situation; because what is clear is that the die is really cast, and unless you have a much more developed link to the Security Council, it seems to me that nothing else you do really makes any difference if you are going to have that independent prosecutor. I mean, we have learned about independent prosecutors, at least I have, in this country, and I do not think they are always such a good idea, to be honest with you. So, could you comment on that question?

Mr. SCHARF. Yes, certainly.

Even though the United States is now the lone super power, the greatest economic and military power in the world, we are not alone in the world, and what other countries do does make a difference, contrary to what some people might wish or hope. The other countries in the world made it clear early on that there was

going to be an international criminal court. There will be such a court and the U.S. will have to deal with that. Early on the United States correctly decided to engage, to make a major effort to try to turn this court into something that we could live with. And David Scheffer should be applauded; because, really, the United States bullied its way into getting the U.S. stamp on almost every single provision in the International Criminal Court statute. It is really a U.S. statute with just a couple of exceptions, a couple of things that we did not get.

But what I am saying is that we are going to have a court anyway. It could be a negative influence on the United States if we do not engage, if we do not continue to be part of the process. If we do continue to be part of the process, either through trying to get new amendments, to get further protections, or living with the protections that we did get—and I think they have been downplayed today. I think the successes of the U.S. delegation were enormous and the rest of the countries in the world were surprised at the last minute that the U.S. could not accept those because when you go into a negotiation, no one thinks they are going to get everything, and the U.S. got about 95 percent. It was enough for France. It was enough for the United Kingdom. It was enough for Russia. Perhaps we could revisit this and decide that with some modifications, this is enough for us, but I think the alternative is going to be a disaster.

Senator FEINSTEIN. Thank you. Well, finish that. A disaster in what respect?

Mr. SCHARF. In that we will not be participating. If we are worried about a politicized court by not being involved in the process of creating its rules of procedure and electing its judges and appointing its prosecutor, we are going to get just what we fear. But in the Yugoslavia context where we were engaged, the president of the Yugoslavia Tribunal is a U.S. Federal Court former judge. The prosecutor of the Yugoslavia Tribunal is our friend and ally Canada. We have a court that we are very comfortable with and we can live with because we have engaged in that court. Why should we disengage in this court?

Senator FEINSTEIN. Well, you have heard comments on both sides of the aisle here today that now the United States should begin to reexamine its force structure and commitment to other nations.

Mr. SCHARF. I have heard the beginnings of an isolationist movement today, and it frankly scares me. If you follow what Senator Helms is suggesting, the Court is still going to be a reality. Not every one of those 60 countries is going to be bullied by the United States. And we are going to end up disengaging our military forces from NATO, from the United Nations peacekeeping? I mean, this would not be in our best interests just over the International Criminal Court.

What you also have to understand is the day of the vote on this court there was 15 minutes of cheering. When 120 countries voted in favor, there was a strong, strong belief that this Court was in the world's best interest. And this Court is going to happen.

Senator FEINSTEIN. Could we ask the other two witnesses to comment on this?

Mr. BOLTON. Yes, I would appreciate the opportunity.

It is fanciful to say that the United States' abstaining from dealing with the Court will result in a disaster for this country. The result will be that the Court will have no legitimacy, that the Europeans in their frequently and unfortunately cynical fashion will make sure that it really does not affect them, and most of the world will pay it lip service and ignore it.

The only way to get the attention of the rest of the world after the spectacle in Rome that Mr. Scharf just described—then I want to come back to the 15 minutes of cheering—the only way to restore respect is to say, you made that court, you live with it.

Now, I was stunned when I read in the newspapers about the cheering after the take-no-action motion on the U.S. amendment to have non-States Party defendants not subject to jurisdiction. It recalled to me nothing so much as two votes in the General Assembly of the United Nations from what I had thought were the old days, the bad old days, and I am thinking of two, one in 1971 and one in 1975.

The one in 1975 was when the General Assembly adopted the resolution equating Zionism with racism, a resolution which I am proud to say in the Bush administration we got the General Assembly to repeal. But in 1975 there was sustained cheering in the General Assembly after Zionism was declared to be racism, and Senator Moynihan, then Ambassador, went to the podium and said the United States will never abide by this resolution. We will never accept it. We will never adhere to it, which was a statement of high principle, which we adhered to until we got it repealed. So, that is one answer.

The second was the 1971 vote in the General Assembly when, contrary to the U.N. Charter, the representatives of Taiwan were expelled and the Peoples Republic of China were inserted, and at that point that was the event that led then Ambassador Bush, after he left the United Nations, to write as the title of his book on his experiences, *The Light that Failed*.

Now, I had hoped that with the end of the Cold War, the majority in the General Assembly had gotten over those kinds of silliness; but I must say I interpreted that sustained applause in Rome to be a thumb in the eye of the United States. They enjoyed every minute of it, and it would be humiliating for the United States now to go back to that majority who care about this court and say, gee, please let us talk to you about it some more. We should isolate it and ignore it.

Senator GRAMS. Mr. Casey.

Mr. CASEY. Senator, if I might add on one point. Mr. Scharf suggests that unless we participate in the Court, we are effectively going to be stuck with it and not be a player. The fact is that this Court's assertions of authority over Americans is illegal. We have talked a lot today about universal jurisdiction, and everyone always used the term loosely. In fact, this Court does not have universal jurisdiction. That is a concept of customary international law that allows States to assert jurisdiction over individuals who have committed certain very narrowly defined crimes, piracy, the slave trade, perhaps war crimes, perhaps genocide, much more narrowly defined than in the statute.

In fact, this Court's assertion of jurisdiction over the citizens of countries who have not become a member to the treaty is entirely unprecedented. This Court is entirely a matter of treaty. It is a creature of this treaty. Unless we join the treaty, it cannot exercise jurisdiction over the United States or its citizens.

Senator FEINSTEIN. Thank you very much. It is a very interesting discussion. Thank you all very much.

Senator GRAMS. Mr. Scharf, I would just like to begin questioning with you on this one subject. You have used I think some very obvious examples of prosecution for war crimes, genocide, *et cetera* with names like Hitler, Pol Pot, *et cetera*. But what about the real possibility of real abuse by this Court seeping in the politicizing of prosecution? That is what I think most people are concerned about. If the Court would define and remain focused on just those type of atrocities, I do not think most would have concerns, but when you open this up to politicizing the decisions by one or three or the review by the same on those decisions, I think that is what has the concern of abuse of this Court.

Mr. SCHARF. Well, I think the statute of the Court has five levels of protections built into it to try to prevent the Court from being politicized. Every country in the world was worried, not just the United States, about a body that might be politicized and one day would turn on that country. Therefore, there was support for our protections.

Let us look at a case study. Let us say the United States does something very controversial. It decides to invade another country. The rest of the world does not think that that was in self-defense and decides to indict our Secretary of Defense or even our President. What would happen under that scenario?

Well, what would happen is at the first level, the United States would say this is not part of the Court's jurisdiction because this is not a serious war crime, and if the prosecutor does his or her job, they will decide, no, this is not what the Court was about. This is not a serious war crime. This is not of the level of genocide. This is a peacekeeping effort. This is something that is appropriate. But we cannot trust the prosecutor to do his job. You do not know.

So, then the prosecutor has to go to the three-judge panel, and you hope that two of those judges will see the light. But if they do not, then you have to go to the full panel of all of the judges. During this time period, the United States can stop it in other ways. If we do our own investigation like a Lieutenant Calley, what if our Secretary of Defense was doing a rogue operation? We could investigate and we could decide to prosecute, in which case it turns off the Court, or we could decide that there is no grounds for prosecution, but that we made that decision in good faith, which also turns off the Court and that decision is appealable.

Finally, we can go to our friends on the Security Council and say, look, you do not want your leaders to be brought before the Court. Join us in voting to turn off the Court. The five permanent members are very likely to join us, and if we can get four out of the other nine members to do so, then the Security Council can stop.

These are all protections to prevent just that kind of scenario from coming about.

Senator GRAMS. Mr. Bolton, Mr. Scharf had said earlier in his statement that the U.S. would not be immune from this court. That has some concern I think for many. Article 27 of the Rome treaty requires that the Court apply equally to all persons without any distinction based on official capacity. In your opening statement, you stated that the main concern of the U.S. should be that the President, cabinet officials, and other senior leaders responsible for defense, for foreign policy decisions would be the potential targets of an independent prosecutor.

So, my question to you, and again echoing “not immune,” do you believe the existence of this court would have a chilling effect on the decision made by our U.S. senior officials from the President, cabinet members, *et cetera*, kind of always like looking over their shoulder?

Mr. BOLTON. Well, let me say first I agree with Mr. Casey’s assessment, that because the United States is not going to be a party to the statute of Rome, that nothing they do—nothing—has any jurisdiction over us. There is simply no basis for it at all and we can and should ignore it.

But in the event that we either joined at some point or that a subsequent administration or this administration does not share that analysis, I think these vague, ambiguous, and expansive provisions could well have a chilling effect on top decisionmakers, and I can guarantee you that the lawyers in the State Department and the Pentagon are going to be reading it very carefully all the time.

If I might read one section of this on—or two sections, individual criminal responsibility. It says in Article 25, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person “orders, solicits, or induces the commission of such a crime.” Orders, solicits, or induces. That is what military chains of command do.

You have cited Article 27. I think everybody should read that as well, especially in the Senate, because it also says expressly that members of a government or parliament or elected representative are not immune either. So, if you were to declare war, when aggression finally gets defined at some point down the road and it is determined to be an act of aggression and therefore a criminal element, conceivably Members of Congress who voted to declare war could be liable as well.

I just want to say again one other thing, Senator, I think you mentioned in your opening statement and others have commented on. Article 120 says, “No reservations may be made to this Statute.” I think very clearly the people who wrote that in were worried about the Senate quite frankly which writes reservations to almost every international convention that the United States agrees to, not the least of which was the Genocide Convention that I mentioned before. The fact that they would try to strip you of your ability to write reservations and understandings in the U.S. accession to this law, I find very, very troubling.

I think if you have to read the long-term precedential value of Rome, it is that we have some very tough sledding ahead and that we need strong diplomacy from the President to prevent this thing from getting even worse than it was in Rome.

Senator GRAMS. Senator Feinstein.

Senator FEINSTEIN. No. I think that completes it. Again, I think, Mr. Chairman, it is a very interesting hearing and there is a lot of food for thought. Thank you three gentlemen very much.

Senator GRAMS. I have just a couple of quick ones.

Senator FEINSTEIN. You will have to excuse me.

Senator GRAMS. Mr. Casey, Ambassador Scheffer remarked that there were examples of Americans committing crimes on U.S. soils who were prosecuted abroad. He said he is going to give us some information on that. What I was wondering, could you think of any such examples?

Mr. CASEY. Well, I would be very interested to see what they submit. The only way that Americans can be prosecuted abroad for what they do in the United States is if what they have done is to intentionally attempt to bring about a criminal effect overseas, and therefore the overseas nation may be able to exercise extraterritorial jurisdiction and ask for their extradition.

There is only one case I can think of where this actually happened, and it is a case involving an individual in Connecticut—the cite is actually in my written statement—who solicited and planned the murder of someone. I think it was in Montreal, and the Canadian authorities, of course, asked for his extradition and the individual was indeed extradited. Again, there that individual purposefully set out to bring about an illegal effect in another country. So, under the rules of jurisdiction, it was appropriate and constitutional to send them overseas.

One thing to keep in mind is under the ICC treaty, this would reach crimes committed in the United States by Americans against Americans.

In addition, it should also be kept in mind that the most likely means by which the Court will attempt to reach our high officials, our leaders is through a theory of command responsibility. Well, under a theory of command responsibility, you do not need any intent to bring about illegal effect overseas. All that has to happen is that American troops overseas commit a crime. If you are in the chain of command, you are on the hook.

Senator GRAMS. Mr. Scharf.

Mr. SCHARF. Can I just address that issue as well?

Senator GRAMS. Sure.

Mr. SCHARF. I think there is another side to it.

First of all, I would ask you to try to get a copy of the National Judicial Conference report that was prepared in 1992 on the Permanent International Criminal Court because they addressed the constitutionality of the Court. They addressed this issue, and citing the case of *Ex parte Quirin*, which is a U.S. Supreme Court case, they found that this argument which had been raised and made was not consistent with today's precedent, existing precedent, before the Supreme Court. Yes, in fact, there is no constitutional bar for the United States to participate in an international tribunal and even to send its citizens to the tribunal. And in *Ex parte Quirin*, there were several Yugoslavs who were actually of U.S. citizenship that were sent to an international tribunal.

Senator GRAMS. Just a couple of brief questions and I know I will let you go.

But, Mr. Scharf, I will start with you again. There are many who wonder why we want to replace the current courts dealing with war crimes, genocide, *et cetera*, even though they might be inefficient, exhaust a lot of people politically at the U.N. putting these together, but why do we need to replace them with an ICC? There were a number of war crimes committed when the Yugoslav Tribunal had already issued indictments against perpetrators. So, what makes you think that the ICC indictments would have any different effect or would be a stronger deterrent to what we currently have?

Mr. SCHARF. Well, that is because when the Yugoslavia Tribunal was established, most people in the world, including the Bosnian Serbs, thought it was a joke. They thought it was just the major powers trying to paper over their failure to intervene to stop the atrocities.

It was not until after the Srebrenica massacre that the Yugoslavia Tribunal began to apprehend individuals and to bring those people to justice. Now you have got major generals, you have got major leaders, and you have even got Karadzic, who is increasingly likely to be apprehended. And now it is a completely different situation. People are now taking that seriously, and when a tribunal is taken seriously, when it becomes effective, then it becomes a deterrent, and that is the difference between now and before.

Now, I think the *ad hoc* tribunal approach was the best possible approach. I had wished that the Security Council would continue to create *ad hoc* tribunals for all the other situations. Unfortunately, the other countries in the world felt that it would be better to have a permanent institution. Once that decision was made, the United States lost its ability to use the Security Council through the *ad hoc* approach. Now, as Senator Feinstein said, we are left with a tremendous gap if we do not join in the permanent international criminal court and at least try to revise that into something that we can live with.

Senator GRAMS. Mr. Casey, I think many believe this treaty was supposed to codify international law, not create new international law.

Mr. CASEY. Yes.

Senator GRAMS. Are there any areas where you think the treaty really overstepped those bounds?

Mr. CASEY. Yes, Mr. Chairman, many areas. The definitions of crimes against humanity and of genocide, of aggression, which is yet to be defined, and of war crimes themselves all are far broader than that recognized in customary international law.

To take an example, under the crimes against humanity definition, there is a provision that would make it criminal to impose essentially humiliating conditions on people based on their ethnicity. Again, that is unprecedented in international law and it is subject to basically any kind of meaning and application the Court might wish to put on it.

Another example, and in fact a good example, in the definition of genocide, there is also essentially a mental distress element added in that the United States rejected when it ratified that treaty, and that in fact is not contained in the statutory definition of genocide that the Congress enacted to carry it out.

So, there are really many areas where the definitional section is far broader than international law currently is.

Senator GRAMS. Just one final question, Mr. Bolton. I would like to just wrap it up. Two things really. I noted that you had made a statement that the Clinton administration in their naive support—I do not know if that was referring to getting involved at all in the negotiations in Rome or what it meant, but maybe you can explain that.

But also, as I mentioned in my opening statement, I believe that this court I think makes an end run around the Security Council. When we talk about not being involved, I do not think we would have a very strong voice as we have had in some of the tribunals in getting some people that we trust or are comfortable with on these courts, but when you leave it open to 160 or 185 countries to be able to choose who would sit on these courts and how we would respect those. Could you just quickly address those?

Mr. BOLTON. Certainly, Mr. Chairman. When the administration came in, as you may recall, it declared its foreign policy to be something that they labeled assertive multilateralism. Now, I for one never understood what assertive multilateralism was, but I did take an element of it to be more reliance on getting Security Council authorization for elements of U.S. foreign policy. Almost from the beginning, just a month after the inauguration, the administration sought Security Council creation of the first war crimes tribunal. They saw it quite clearly at the time as an *ad hoc* first step toward the creation of a permanent international criminal court.

So, this path of international negotiation that has gone on almost for six years now is something that they concede right from the beginning. Ambassador Scheffer has written numerous times on the subject, both before and after he took office. He said, while he was in office in 1996—I am quoting from an article of his in Foreign Policy—“The ultimate weapon of international judicial intervention would be a permanent international criminal court.” And he goes on to say, “In the civilized world’s box of foreign policy tools, this will be a shiny, new hammer to swing in the years ahead.” I think what happened is the administration let the genie out of the bottle and the genie took the hammer and broke their nose.

Senator GRAMS. With that, I want to thank you very much.

I appreciate you gentlemen being here, and I think we will probably be hearing more from you in the future because I expect that this is going to be a controversial debate and we would draw on your expertise and your comments in the future. So, I want to thank you very much for your time.

Mr. CASEY. Thank you, Mr. Chairman.

Mr. SCHARF. Thank you.

Mr. BOLTON. Thank you.

[A statement submitted by The Lawyers Committee for Human Rights appears in the appendix.]

Senator GRAMS. The hearing is completed.

[Whereupon, at 12:37 p.m., the subcommittee was adjourned.]

APPENDIX

Additional Questions Submitted for the Record by the Committee to Ambassador David J. Scheffer

Questions Submitted by Senator Ashcroft

Clarification of the Administration's Position on the Court

Question. Does the Administration have any current plans to try to modify the agreement reached in Rome to enable American participation?

Answer. Of course we would welcome modification of the agreement to make it acceptable to the United States. At this stage, however, it would be premature to attempt to assess whether and to what extent modification of the treaty might be feasible.

Question. Does the Administration have any plans to cooperate—informally or formally—with the Court during the ratification phase or after that phase should the requisite number of countries agree to participate?

Answer. The Administration has no plans to cooperate with the Court at this stage. We do not anticipate that this question will arise until the treaty enters into force and such a Court is created or, at least, until some future time if and when entry into force is foreseeable.

Question. What will our posture be with allies who are considering whether to sign on to the treaty?

Answer. As I stated in my testimony, the Administration opposes the treaty in its current form. While much of the treaty is very good, we strongly oppose certain critical elements. We are of course particularly concerned about those elements which could affect U.S. nationals who are conducting legitimate activities overseas. Our overall posture with allies beyond these aspects is under active consideration at this time.

Possible Trial of Americans

Question. Assuming the Court is approved by the requisite number of countries, would it be possible for the Court to assert jurisdiction over American soldiers?

Answer. The text of the treaty provides that the Court could have jurisdiction over an alleged crime occurring in a given country if that country is a party to the Statute or has accepted the exercise of jurisdiction by the Court with respect to the crime in question by declaration. In such a case, therefore, the Court might seek to assert jurisdiction over American soldiers, assuming the other requirements were met.

(In view of our overall position as noted, the answers to this and the following questions are based on the premise that the United States itself has not joined the treaty. The question of Security Council referral of a matter will also not be considered, as the United States would have to agree to any such referral.)

Question. Again, assuming the Court is approved by the requisite number of countries, would it be possible for the Court to assert jurisdiction over American soldiers for acts committed on American soil?

Answer. The Statute requires the consent of either the State on the territory of which the conduct in question occurred or the State of which the person being investigated or prosecuted is a national. Accordingly, if the territorial State is the United States, the Court could claim to assert jurisdiction only if the soldier, although in the U.S. armed services, was of a foreign nationality and the foreign government in question had joined the Statute or accepted the court's jurisdiction by declaration.

Question. Can you envision circumstances in which the Administration would ever consent to the voluntary transfer of an American citizen to the jurisdiction of the Court for actions committed on American soil?

Answer. If the citizen in question for some reason affirmatively wished to be tried by the Court, a question of possible “voluntary” transfer could be presented. We do not envision circumstances under which a U.S. citizen would be transferred against that person’s will to the jurisdiction of the Court for actions committed on American soil.

United States Reaction to Assertion of Jurisdiction over Americans

Question. Has the Administration considered how it would react to a situation in which the court asserted jurisdiction over an American citizen?

Answer. The Administration opposes the “extraordinary” jurisdiction provisions of the treaty which purport to confer jurisdiction over official U.S. actions or actions within the United States without the consent of the United States. Accordingly, the United States would not accept such an assertion of jurisdiction, which violates a fundamental principle of international law.

Question. Would the Administration ever consider conducting its own investigation of an incident over which the International Court had asserted jurisdiction to satisfy the concept of complementary and to avoid an open conflict with the Court?

Answer. The United States condemns genocide, crimes against humanity, and war crimes as a matter of strong and long-standing national policy wholly unrelated to this or any other international court. Accordingly, in the event that a non-frivolous allegation were made that such a crime had been committed by an American soldier or within the jurisdiction of the United States, we would expect that the appropriate United States authorities would investigate such an incident as a matter of course. The question of what the Administration might do in the case of a frivolous claim, if the Court came into existence and if the Court were to give credence to such a claim, is too remote and speculative at this time. As a matter of general principle, we would expect any United States Administration to take such actions as it thought best in order to protect the interests of the United States and its citizens.

Question. In a situation in which the Court asserted jurisdiction over an American citizen, would the Administration plan to appear before the Court to contest jurisdiction or would it simply refuse to recognize the Court’s asserted jurisdiction?

Answer. For similar reasons, this is too remote and speculative a question at this stage. The same basic principles noted in response to the prior two questions would appear relevant here as well.

Constitutional Concerns with the Trial of Americans

Question. If the Court were to assert jurisdiction over an American soldier for actions taken on American soil, how could the trial of that individual be reconciled with the requirement of Article III, section 2 of the Constitution that “[t]he trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed”?

Answer. For reasons noted above, this specific scenario seems particularly unlikely. Given the jurisdictional provisions of the Statute, there would seem to be greater opportunities for the Court to seek to assert jurisdiction in relation to actions occurring outside the territory of a non-party State than in relation to actions occurring within its territory. In general, however, we note that in very rare instances persons within the United States have been extradited to foreign countries in connection with crimes occurring abroad, where the particular actions of the individuals in question were performed within the United States. For example, in *Austin v. Healey*, 5 F.3d 598 (2d Cir. 1993), a U.S. citizen was extradited to the United Kingdom for conspiring from New York to commit a murder in the UK. For its part, in the case of transnational crimes such as drug trafficking, the United States has regularly sought the extradition of persons from various countries for actions which may have largely been performed in those countries, for example in leading and directing major drug cartels.

Question. In such a trial, how could the other constitutional rights of criminal defendants be guaranteed?

Answer. As noted in response to the previous question, we do not believe that U.S. Constitutional rights necessarily apply to trials by foreign authorities outside the United States. This is well settled in extradition practice. In general, however, we note that the United States, along with other countries, worked vigorously to see that the ICC Statute incorporated adequate due process protections for defendants.

This is not an aspect of the treaty that we consider to be seriously deficient or flawed.

Question. What about a situation in which the Court asserts jurisdiction over an American soldier for actions taken abroad? Should such a soldier have the same protections that would be guaranteed to him by the Constitution if his actions were taken on United States soil? Should he enjoy the same protections applicable to him in a court martial proceeding?

Answer. The Administration believes strongly that U.S. soldiers should be tried by U.S. authorities and not by the Court. The Court is supposed to assert jurisdiction only in the event of a fundamental break-down in national institutions, such that the national authorities do not investigate and prosecute the commission of these crimes. Since the United States does and will continue to investigate and, where there are grounds to do so, prosecute such crimes, intervention by such a Court would not be warranted.

Enforced Pregnancy Issues

Question. As you know, the language in the treaty concerning enforced pregnancy was of great concern to many individuals. At the beginning of the process in Rome, this term was undefined, which led to the concern that it might be used to try to attack national policies concerning pregnancy and abortion. Fortunately, the negotiations in Rome produced a narrow definition of this term so that it expressly does not apply to national policies on pregnancy. What role did the United States play in the negotiations over this term? Did the United States take a formal position in favor of any particular definition of that term?

Answer. The United States was consistently supportive of finding a definitional solution that could be adopted with the agreement of all concerned, as was ultimately the case. The United States was of the view that the definition of crimes within the Statute should in all cases be clear, precise, and strictly limited to acts which were recognized as criminal under customary international law. Questions of individual rights or social policies, whatever their merits or demerits, were wholly outside the proper scope of the Statute. The United States could have envisioned a definition within the main text of the Statute that was somewhat simpler than that ultimately adopted, which focused on the unlawful detention of a woman forcibly made pregnant. At the same time, however, the U.S. view was that this definition and all others should be further elaborated in an Annex specifying the "Elements of Crimes" which could in general help to ensure that all crimes within the jurisdiction of the Court were understood to be limited to well-established crimes.

Prepared Statements of Hearing Witnesses

Prepared Statement of John R. Bolton

I. INTRODUCTION AND SUMMARY

Mr. Chairman and members of the Subcommittee, I want to thank you for the opportunity to testify before you today on the somewhat-misnamed “International Criminal Court” (the “ICC,” or “the Court”). In fact, what delegates to the recently concluded conference in Rome have done is created not only a Court, but also a powerful and unaccountable piece of an “executive” branch: the Prosecutor.

Unfortunately, international support for an ICC of some kind is based largely on emotional (and sometimes irrational) appeals to an abstract ideal of an international judicial system, unsupported by any meaningful evidence, and, frequently running contrary to sound principles of international crisis resolution. Moreover, for some, faith in the ICC is motivated largely by a publicly-muted or unstated agenda of creating evermore-comprehensive international organizations to bind nation states in general, and one nation state in particular. Regrettably, the Administration’s own naive support for the concept of an ICC has now left the United States in a far weaker position internationally than if we had simply declared our principled opposition to the very concept in the first place.

The basic logic of the Statute of Rome’s proponents is that if you abhor genocide, war crimes, and crimes against humanity, you should support the ICC. This logic is flatly wrong, for three compelling reasons:

First, all available historical evidence demonstrates that the Court and the Prosecutor will not achieve their central goal—the deterrence of heinous crimes—because they do not (and should not) have sufficient authority in the real world. Beneath the optimistic rhetoric of ICC’s proponents, there is not a shred of evidence to support the deterrence theories of the Court’s advocates. Moreover, their attempted analogy to the deterrence of domestic law-enforcement systems is naive, unfounded and disingenuous.

Second, the roles envisioned for the Court and the Prosecutor fatally confuse the appropriate roles of law and politico-military power in international affairs, to the detriment of the ICC’s own goals, and to the national interests of the United States should the ICC, contrary to every likelihood, actually prove effective. There are, in any event, important and very viable alternatives to an ICC in international problem solving that should not be abandoned.

Third, the larger objectives of many ICC supporters run contrary to American interests in accountable, constitution-based government, and should be regarded as incompatible with the fundamental attributes of our political system, our foreign policy interests, and, over the long term, our national independence.

Our main concern here, from the American perspective, is not that the Prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Our main concern should be for the President, the Cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the real potential targets of the politically unaccountable Prosecutor created in Rome.

The millenarian rhetoric of the ICC’s supporters will not withstand scrutiny, and the United States should be quite content that it will not be a State Party to the Rome Statute of the International Criminal Court. The ICC is a fundamentally bad idea, which cannot be improved by technical fixes as the years go by. Indeed, if the range of proposals suggested in Rome, but not included in the final Statute, is any indication, the Statute will only get worse, not better.

In this testimony, I will expand on the reasons why the ICC is a flawed, naive and potentially dangerous institution, and also recommend a policy approach for the United States for the years ahead, on the assumption that the ICC now actually gets off the ground. That policy should essentially be to isolate and ignore the Court and its Prosecutor by not providing any U.S. support—political or financial—for the exercise of their treaty authority. The United States should seek to preserve the relative role of the UN Security Council in the system of international organizations, and now permit the Court and the Prosecutor to erode its position. Moreover, the U.S. can and should seek approaches and mechanisms outside of and alternative to the ICC to advance American interests in dispute resolutions around the world.

II. THE “NUREMBERG ANALOGY” MISREADS AND MISAPPLIES HISTORY

A substantial part of the emotional appeal of an ICC is the mistaken notion that it traces its intellectual lineage directly back to the Nuremberg (and Tokyo) war crimes trials after World War II.¹ ICC supporters argue that its trials of alleged war criminals will perform the same functions as the Nuremberg tribunals, and are therefore justified.

However, by examining, even briefly, what actually happened at Nuremberg, not only are these contentions easily shown to be wrong, but also we can learn important lessons why the ICC as presently conceived can never perform effectively in the real world. The successes achieved by Nuremberg must be understood in its context, which understanding will in turn show why the ICC is almost certain to fail.

First, the Nuremberg trials were conducted in the aftermath of a war that resulted in the complete military and political victory of the winners, and the unconditional surrender of the losers. Unlike our more recent experiences, there was no ambiguity in the result of World War II. In politico-military terms, the enemy forces had been routed or destroyed in battle after battle, on land, at sea and in the air, and there was absolutely no question—in their minds or in ours—about the extent of their military defeat. Their existing governmental systems had been shattered essentially beyond repair, and their prior political leaderships were disgraced. The economic systems of the enemy states had been shattered, and they faced an extended military occupation by forces from the victorious powers.

Moreover, in legal terms, preparations for war crimes trials enjoyed certain enormously important advantages. Essentially all of the prospective defendants were in the custody of the victorious powers (other, of course, than those who had died in the closing days of the War). There was no question of trials in absentia. Additionally, because of the visible and massive presence of Allied forces, victims of the crimes and other potential witnesses were free from intimidation and the fear of retribution for their testimony, or from the possibility of conspiracies to suborn perjury or otherwise frustrate the tribunals' efforts. Finally, large quantities of physical and documentary evidence (whether helpful to the prosecution or the defense) were in the possession of the victors, or were easily obtainable. Accordingly, there was little or no risk of destruction or tampering of such evidence while investigative and pre-trial efforts were underway.

Second, and more broadly, the principal managers of Nuremberg, the British and the Americans, almost completely shared political and juridical norms, both in the immediate aftermath of the War, and in their long-term vision for the futures of the defeated enemy states. Because of their shared legal traditions, the Allies were quickly able to agree on the appropriate legal standards and procedures to be applied. The tribunals' jurisdictional mandates themselves were selective and limited, and the prosecutorial and judicial authorities had the highest integrity and professional abilities. All of the prosecutions and the adjudications were controlled exclusively by officials of the victorious military coalitions.

Most significantly, the trials were not narrowly conceived to be exercises in “settling scores.” The Allies had an agreed-upon vision of what the post-Occupation governments of the defeated states would be, and the war-crimes trials were a key element of the necessary transformation to a new society. This transformation was implemented through numerous channels—not just the war crimes trials—including everything from the complete rewriting of the constitutions of the defeated nations to programs of “denazification” at all levels of society. The victorious Allies desired, and these factors (particularly the extended military occupation) encouraged the endorsement by the vanquished of the legitimacy of the Nuremberg process and its results. Indeed, in Germany, once restored to full sovereignty, national institutions continued to prosecute alleged war criminals. Thus, the Allies were successful in their efforts to internalize among the defeated populations the recognition and acquiescence of their prior governments' and leaders' culpability, and thereby prevented the fostering of a post-Versailles “sellout” mythology.

Simply restating this history, even in summary fashion, demonstrates the unique confluence of circumstances that permitted the successful prosecution of war crimes at Nuremberg to contribute to the political and social transformations of the societies of the defeated states, and to their reconciliation with their former adversaries. While no one of the factors mentioned could confidently be said to be completely sufficient for future successful war crimes prosecutions, we can predict with some degree of confidence that several of them might be necessary. Perhaps most important

¹These courts were known formally as the “International Military Tribunal” (“IMT”) at Nuremberg and the “International Military Tribunal for the Far East” (“IMTFE”).

was the unambiguous military relationship between winners and losers, post-World War II, and the high degree of shared values among the key winners.

III. THE DETERRENCE ARGUMENT HAS NO EMPIRICAL FOUNDATION

Careful analysis of the Nuremberg experience (rather than simply its rhetorical deployment for emotional purposes) is usually precluded by the assertion of ICC proponents that Nuremberg was an inadequate post-facto response. They argue instead for the deterrent value of having an on-the-shelf Court and Prosecutor, contending that the absence of a permanent ICC is the real problem. So central is the deterrence argument to ICC advocates that it has become a near-religious article of faith among them.

It is incredibly striking, therefore, that faith is about all they have to support their argument. Rarely, if ever, has so sweeping a proposal for restructuring international life had so little empirical evidence to support it. Instead, the assertion that deterrence will follow inevitably from the risen Court is simply made without a shred of supporting evidence. Merely as one example, Mr. William Pace told the Rome Conference that: “[i]f we succeed it means the establishment of a court which will prevent the slaughter, rape murder of millions of people during the next century.”² Mr. Benjamin B. Ferencz was closer to being accurate when he said “[t]he certainty of punishment can be a powerful deterrent.”³ But his assertion about the ICC comes no closer to making punishment a certainty than any other wishful thinking.

In many respects, the ICC’s advocates fundamentally confuse the appropriate roles of political (and often economic) power, diplomatic efforts, military force and legal procedures. No one seriously disputes that the barbarous actions and heinous crimes about which ICC supporters correctly complain are acceptable to civilized peoples. The real issue is how and when to deal with these acts, and this is not simply an exercise in taxonomy, characterizing this as a legal problem, and that as political problem, and the other as a military problem. The ICC’s advocates make a fundamental error in trying to transform matters of power and force into matters of law.⁴ Misunderstanding the appropriate roles of force, diplomacy and power in the world is not just bad analysis, but bad and potentially dangerous policy for the United States.

Recent history is unfortunately filled with cases where even strong military force or the threat of force has failed to deter aggression or the commission of gross abuses of human rights. Why we should believe that bewigged judges in the Hague will prevent what cold steel has failed to prevent remains entirely unexplained.

There are, of course, cases where ICC proponents argue that the “world community” has failed to pay adequate attention, or failed to intervene in a sufficiently timely fashion to prevent genocide or other crimes against humanity. The new Court and Prosecutor, it is said, will now guarantee against similar failures in the future. But this is surely fanciful. Deterrence ultimately depends on perceived effectiveness, and, as discussed more fully below, the ICC is most unlikely to be that. In those cases where, in particular, the West was unwilling to intervene militarily before, as in Rwanda, to prevent the possibility of crimes against humanity as they are happening, why will a potential perpetrator feel deterred by the mere possibility of distant legal action?

Moreover, even if administratively competent by its own standards, the ICC’s authority is likely to be far too attenuated to make the slightest bit of difference either to the potential perpetrators of crimes against humanity or to the outside world. For example, the knowledge of the “world community” will certainly be far more complete and up-to-the-minute than the ICC, and its political decision to intervene will have to crystallize far more quickly than the Prosecutor can prosecute. Thus, absent other factors tending to support international intervention, the ICC is not going to alter that balance, as all will plainly see in short order after the Court and Prosecutor begin operations.

²Statement of William Pace to the Rome Conference, June 15, 1998. (This statement, like others quoted in this testimony, can be found at <http://www.un.org/icc>.)

³Statement of Benjamin B. Ferencz of the Pace Peace Center, June 16, 1998. Mr. Ferencz also told the Rome Conference that “[o]utmoded traditions of State sovereignty must not derail the forward movement.”

⁴Mr. Pace’s statement, once again, provides an excellent example of the near-theological fervor of this conviction. He asked the Rome Conference: “Will we replace the centuries-old rule of impunity with the rule of just law? . . . Will the ICC be the formal war-related victim of the Twentieth Century, or a major advance in replacing the rule of force with the rule of law in the Twenty-first Century?”

Even viewed in the light most favorable to the ICC's advocates, this debate is solely about predictions. Without more, predictions alone (and blind faith is really a better description of what ICC advocates are pursuing) are insufficient to support radical changes in the international order.

Needless to say, of course, I do not view the argument in this light. I believe that the empirical evidence that does exist in the military sphere argues strongly that a weak and distant legal body will have no deterrent effect on the hard men like Saddam Hussein or Pol Pot most likely to commit crimes against humanity. Holding out the prospect of ICC deterrence to those who truly are already weak and vulnerable is nothing but a cruel joke.

IV. POST-CONFLICT JUSTICE AND RECONCILIATION MAY—OR MAY NOT—BE CONSISTENT

THERE ARE ALTERNATIVES TO THE ICC

It is by no means clear that the international search for "justice" is everywhere and always consistent with the attainable political resolution of serious political and military disputes, whether between or within states. It may be, or it may not be. Indeed, human conflict over time teaches that, unfortunately for moralists and legal theoreticians, there is more likely than not to be a series of tradeoffs among inconsistent objectives that mere mortal policy makers will have to undertake. This is a painful and unpleasant realization to face, confronting us as it does with the irritating facts of human complexity, contradictions, and imperfections. Some elect to ignore these troubling intrusions of reality, but those judging the merits of the ICC do not have (or should not follow) that option.

As described above, Nuremberg seems to have accommodated acceptably both the search for justice and the transformation and reconciliation of the defeated enemy states with the victors. Others may as well, but, as demonstrated above in the examples of Bosnia and Rwanda, others may not. Thus, what experience we have accumulated argues in favor of a case-by-case approach rather than the artificially imposed uniformity of the ICC.

One ongoing experiment that is worth following closely is South Africa's Truth and Reconciliation Commission. In the aftermath of the evil, destructive, and frequently deadly, system of apartheid, the new government faced the difficult tasks of shifting political power from a white minority to a black majority, establishing and legitimizing truly democratic governmental institutions, and dealing with earlier crimes and wrongs. One option certainly would have been widespread prosecutions against those who perpetrated widespread human rights abuses under the guise of enforcing apartheid. The new government felt that while so doing might have produced feelings of vindicated (if long-denied) justice among some segments of the population, it might have produced also corresponding feelings of persecution and unfairness among those targeted for prosecutions.

Instead, the new government decided to follow a different model, establishing the Truth and Reconciliation Commission as a way of dealing with the unlawful acts of the prior government. Under the Commission's charter those who may have committed human rights abuses, both from the apartheid government and the anti-apartheid movement, have the opportunity to come before the Commission and confess their past misdeeds. Assuming they confess truthfully and fully, the Commission can in effect pardon them from prosecution.⁵ This approach is intended to make public more of the truth of the apartheid regime in the most credible fashion, to elicit thereby admissions of guilt, and then to permit society to move ahead without the continued opening of old wounds that trials, appeals and endless recriminations might bring.

I do not argue that the South African approach should be followed everywhere, or even necessarily that it is the correct solution for South Africa. Indeed, since the process is ongoing, it would only be prudent not to draw overlarge conclusions from the existing body of work of the Truth and Reconciliation Commission. But it is certainly not too early to conclude that the approach now being followed by South Africa is radically different from that contemplated by the proposed ICC, which seeks vindication, punishment, and retribution as its goals, as is the case for most criminal law-enforcement institutions.

It may well be that, under some circumstances, neither exact retribution nor the whole truth is the desired outcome of the parties to a dispute. In many former Communist countries, for example, citizens are today wrestling with the question of how

⁵This condition is obviously both important and controversial, and deserves more extended discussion than is possible within the scope of this testimony.

to handle the involvement of its citizens in secret police activities of the prior regimes. So extensive was the informing, spying and compromising in some societies that a tacit decision has been made that the complete opening of secret police and Communist Party files once promised will either not be made or will be made with exquisite slowness over a long period of time. In effect, these societies have chosen a kind of "amnesia," at least for some time into the future, because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire simply to move ahead into whatever the future holds.

One need not agree with these decisions to have at least some respect for the complexity of the moral and political problems they must face. Only those most completely certain of their own moral standing, or most confident in their ability to judge the conduct of others in difficult circumstances, however, can reject the amnesia alternative out of hand. Once again, our experience should counsel for a prudent approach that does not invariably insist on international adjudication to an alternative that the parties to a dispute might themselves ultimately agree upon. Indeed, with an ICC "on the shelf," one can predict that one or more disputants might well try to invoke the ICC's jurisdiction at an opportune moment, and thus—ironically—make more complicated the ultimate settlement of a dispute.

A further alternative, of course, is for the parties to a dispute themselves to try their own alleged war criminals. The ICC's proponents usually only ignore or overlook this possibility, either because it is inconvenient to their objectives, or because it utilizes national judicial systems and agreements among (or within) nation states to implement effectively. Here, one important contemporary example is Cambodia. Although the Khmer Rouge genocide is frequently offered as an example of why the ICC is needed, its proponents never address the question of why the Cambodians and Cambodian judicial institutions should not try and adjudicate allegations of war crimes by Cambodians against each other. (The implications of this option in the context of Bosnia are discussed below.)

Cambodia is again split by intense political disputes so divisive that the UN General Assembly decided last September to leave the Cambodia seat vacant rather than decide between the competing factions. As before, these factions seek to internationalize their dispute, each obviously hoping that external political intervention will tip the domestic political scales in its favor. The earlier international effort in Cambodia fell apart when it lost touch with actually trying to bring the Cambodian factions into genuine agreement, instead of solely agreeing to the words on a piece of diplomatic paper. By so doing, among other things, they inevitably prolonged the disputes among Cambodians.

Contributing to that prolongation is that idea that an international war crimes tribunal is needed. Instead, Cambodians should consider judging their own criminals themselves. There is a strong argument that to obtain the full cathartic benefit of war crimes trials, a nation must be willing to take on the responsibility of judging its own (as Germany, and some others, did to an extent after Nuremberg). To create an international tribunal for the task implies immaturity on the part of Cambodians and paternalism on the part of the international community. Repeated interventions by global powers are no substitute for the Cambodians coming to terms with themselves, as some of their leaders have clearly recognized. Indeed, the *Far Eastern Economic Review* recently editorialized that "It would appear that continued foreign paternalism only delays Cambodians over their own affairs. Pol Pot's death teaches us that the weakest imperialism is also the most dangerous."⁶

It may well be that nations, entirely on their own, will not have the entire wherewithal to mount successful war crimes prosecutions, and that international assistance and support for national law-enforcement efforts will be necessary. In such cases, the best source for such assistance, at least in the first instance, is almost surely regional organizations rather than the United Nations or another global body. (Indeed, in the example of Cambodia, the ASEAN countries are perfectly suited for exactly this role.) The central point, under any analysis, however, is certainly that a permanent ICC may actually hinder or prevent the comprehensive resolution of internal or international problems, thus proving yet again the importance of utilizing the readily available alternatives.

V. RECENT CRISES DEMONSTRATE THAT CASE-BY-CASE TREATMENT IS THE PROPER APPROACH TO ALLEGED INTERNATIONAL CRIMES

Proponents of the Court and Prosecutor assert that the recent histories with the two ad hoc war crimes tribunals established by the Security Council, for Bosnia and

⁶"Pol Pot: Death be not proud," *Far Eastern Economic Review*, April 30, 1998, page 78, column 2.

Rwanda, demonstrate why a permanent ICC is necessary. They further assert that circumstances where ad hoc tribunals were not created, such as Cambodia, also support creating an ICC. The actual evidence turns out to prove precisely the contrary point, namely that our current knowledge demonstrates why it is wildly premature to extrapolate from the limited, and highly unsatisfactory experience with ad hoc tribunals to a standing Court and Prosecutor.

In *Bosnia*, the ad hoc war crimes court was established long before the Dayton Agreement. In fact, it serves thereby as example of how a decision to detach war crimes from the underlying political reality advances neither the goal of a political resolution to the its particular crisis nor the goal of punishment for war criminals. Even today, functioning in the context of Dayton, the tribunal is not, and probably cannot achieve its declared objectives. Moreover, if it could, it is by no means clear that such a "success" would complement or advance the political goals of a free, coherent and independent Bosnia, not to mention reconciliation among the Bosnian factions.

Unlike Nuremberg, in Bosnia, there are no clear winners and no clear losers. Indeed, in many respects the war in Bosnia is no more over than it is in other parts of the former Yugoslavia, such as Kosovo. Thus, the future status of the warring parties, their respective politico-military postures, and their levels of political support are afar from clear. Their prior leaderships, or persons closely associated with them, are still in power, and likely to remain so for the foreseeable future. Within Bosnia itself, there is every reason to believe that ethnic separation and de facto partition is a result more likely than national reconciliation, given the long histories among the factions. Moreover, there is quite clearly no consensus among then intervening powers, with the Russian Federation taking a very different, and far more protective view of Serbian interests than that taken by any Western European power or the United States.

Significantly, there is no agreement, either among the Bosnian factions nor among the external intervening powers about how the war crimes tribunals fit into the overall political disagreement and its potential resolution. Indeed, Bosnia is virtually a case study of how the insistence on making legal process a higher priority than the basic political resolution can adversely affect both the legal and political sides of the equation. Merely as one example, it is far from clear that war crimes trials will result in the expiation of war-time hostilities. Press reporting over the years since the Yugoslav tribunal was created seems to show almost without contradiction that Serbs regard the tribunal as hopelessly biased against them, thus helping to reaffirm the long-standing Serbian view that they are not understood or appreciated by Western Europe. Croats are outraged that some of their fellows have been indicted at all, because of the implicit equating of them as war criminals along with the Serbs, and the Bosnian Moslems see the whole process as inadequately vindicating their claims of oppression at the hands of both Serbs and Croats.

In short, and very much unlike Nuremberg, much of the Yugoslav war crimes process seem to be about score settling rather than a more disinterested search for justice that will contribute to political reconciliation. There may well be legitimate disagreement with the perspective that score settling is in fact what is happening in Yugoslavia, but this is a case where it only takes one to tango. If one side—most likely the Serbs—believe that they are being unfairly treated, and hold this view strongly, then the "search for justice" will have harmed the cause of Bosnian national reconciliation. All outside observers might disagree with this assessment, but the outside observers do not live in Bosnia. While the Yugoslav war-crimes process is still obviously incomplete, its progress to date is not encouraging.

This assessment, moreover, does not even address the tribunal's continuing inability to bring prominent defendants into custody, to obtain and compel testimony from material witnesses, to prevent the destruction and tampering of documentary and physical evidence, or even to reach what is quite likely multiple ongoing conspiracies to obstruct justice. Moreover, this failure is continuing contemporaneously with the presence of thousands of heavily-armed foreign forces, including those of the United States, on Bosnian territory. Governments of the troop-contributing countries, for various reasons, have, to date at least, not been willing to undertake the likely-necessary sustained military operations that would be necessary to provide support for the Yugoslav tribunal that might make it at least somewhat more effective.⁷

One may certainly complain about this lack of resolve, as many proponents of the ICC do, including those within the Clinton Administration. But those more skeptical

⁷After the Dayton Agreement, it was not until June 10, 1997, that the first IFOR military action to apprehend indicted war criminals took place. See Richard Holbrooke, *To End a War*, Random House (1998), at p. 190.

of the ICC are also entitled to ask: "If not in Bosnia, where?" If the political will, say, to risk the lives of troops to apprehend alleged war criminals in Bosnia does not exist, where will it suddenly spring to life on behalf of the nascent ICC? These are questions it would be particularly important to address to those European and other governments in Rome's group of so-called "like minded nations" that pushed so ardently for the creation of the ICC.

Moreover, the option of the Bosnians themselves trying their own war criminals of whatever stripe, mentioned as a possibility above, is not even seriously discussed. One reason, of course, is that, at the time of Dayton, the ongoing Hague tribunal was already a fact of life that some parties did not want to have modified. More troubling, and less welcome for public discussion, is the fact that Dayton did not really accomplish much more than a *de facto* partition of Bosnia. Bluntly stated, if Bosnian Serbs, Croats and Moslems had really reached a true meeting of the minds at Dayton, they would have agreed on how to resolve the question of war crimes allegations. That they did not is a straightforward admission that Dayton simply papered over, and almost certainly only temporarily, the underlying causes of past and future conflicts. Thus, the Hague tribunal has not only not contributed to a comprehensive solution in Bosnia, but may well be a factor inhibiting such a result. An ICC with jurisdiction over former Yugoslavia would only inhibit it further.

The experience of the *Rwanda* war crimes tribunal is even more discouraging. There, widespread corruption and mismanagement in that tribunal's affairs have led many simply to hope that it expires quietly before doing more damage. At least as equally troubling, however, is the clear impression many have that score settling among Hutus and Tutsis is the principle focus of the Rwanda tribunal. In fact, one estimate of potential defendants in war crimes prosecutions was once put at 60,000, which leads one to ask whether the tribunal is not simply war by other means, at least in the view of some.

In addition to the cases of Bosnia and Rwanda where war crimes tribunals are not only troubled, but which actually undercut the argument for creating an ICC, there is at least one example where the *non*-existence of a tribunal likewise demonstrates the risks of a permanent Court and Prosecutor: *Iraq*. Iraq's August, 1990 invasion of Kuwait unquestionably qualifies as an unjustifiable act of aggression, and there is little debate, at least in the West, that the Iraqis committed any number of acts which would be illegal under the Statue of Rome, as now written. Yet, by conscious decision, neither the United States nor any other power, including Kuwait, has seriously sought to create a war crimes tribunal for crimes in the Persian Gulf War.

Iraq thus illustrates the case where valid prudential considerations dictate against the automatic launching of war crimes investigations and trial, at least for the foreseeable future. The reasons are clear: this is a case to abjure war crimes prosecutions because the appropriate circumstances are not yet present. Unlike Nuremberg, the victorious coalition in the Persian Gulf never had as its goal the unconditional surrender of Saddam Hussein and his removal from power.⁸ Accordingly, the coalition did not destroy the existing government of Iraq, its forces never occupied Iraqi territory any longer than was necessary to accomplish their military mission of ousting Iraq from Kuwait, and they had no plans whatever to transform Iraqi society from a dictatorship to a democracy. Thus, war crimes trials from the coalition's military perspective formed no part of its long-range strategy.⁹

It is nonetheless certainly true that Kuwait and its citizens, and many others, suffered enormous losses because of the Iraqi invasion, and, as the victims still feel entitled to vindication and restitution or damages where possible. But war crimes prosecutions have been foregone even in their cases, and for good reasons. Most importantly, for the present at least, the key defendants, from Saddam on down are not in custody, nor is potentially dispositive documentary and physical evidence which is still in the hands of the Iraqi government and military. Prosecuting the alleged war criminals in absentia is therefore the only possibility, and this approach raises enormous potential risks. Specifically, in absentia prosecutions could give rise to "Versailles syndrome" feelings of injustice and persecution by the West, both among the Iraqi population in particular and generally throughout the Arab world.

⁸ Whether this should have been the goal, of course, is the subject of an ongoing debate, but it is not decisively important for present purposes.

⁹ At one point in the immediate aftermath of the Persian Gulf War, the Bush Administration believed that the threat of war-crimes indictment and prosecution would be more likely to spur anti-Saddam activity, especially within the Iraqi military, than proceeding with trials in absentia. To date, of course, such activity has clearly been insufficient because Saddam remains in power. Whether at a point of future confrontation with Iraq a revival of the threat might have some impact remains to be seen.

Whether this “Versailles” reaction would have been fair and accurate is not, of course, particularly helpful, since this is another case where it only takes one to tango.¹⁰

These concededly brief sketches of three pertinent case studies make it clear, at a minimum, that the questions whether, how, and under what circumstances, to initiate war crimes prosecutions are far from being susceptible to uniform, one-size-fits-all decision-making. Our contemporary experience therefore counsels strongly against locking in a permanent Court and Prosecutor in the absence of more compelling experience and circumstances.

VI. THE MANDATE AND STRUCTURE OF THE ICC ARE LIKELY TO BE CONTRARY TO AMERICAN INTERESTS

I believe that the foregoing analysis demonstrates that the most likely outcome for the new ICC is that it will be weak and ineffective, and eventually ignored, because it is naively conceived and executed.

There is, of course, another possibility: that the Court and the Prosecutor (either as currently established by the Statute of Rome, or as potentially enhanced to take account of the preceding point) will be strong and effective. In that case, the United States may face a much more serious problem, because then they may very likely be dangerous to American interests, if not imminently, certainly in long-range precedential terms.

This seeming paradox stems from the nature of the authority sought to be transferred to the ICC by the Statute of Rome. This would be a transfer that, at least according to some, simultaneously purports to (1) create authority outside of (and arguably superior to) the U.S. Constitution; and (2) inhibit the full constitutional autonomy of all three branches of the U.S. government, and, indeed, of all states party to the Statute. Advocates of the ICC do not often publicly assert that these transfers are central to their stated goals, but in fact they must be for the Court and Prosecutor to be completely effective. While the Statute of Rome appears indistinguishable from other international treaties such as those creating NATO and the WTO, it is in fact quite different. And it is precisely for these reasons that, strong or weak in its actual operations, the ICC has unacceptable consequences for the United States. It is, in fact, a stealth approach to eroding constitutionalism.

A. *The Problem of Legitimacy*

First, we must begin with the existing universe of international organizations dealing with human rights and legal norms, or at least those within the UN system, and assess their efficacy and legitimacy from the American perspective. Their record is not encouraging. To the contrary, assessing the record of analogous United Nations institutions, we find considerable evidence for concern about the operations of a new one such as the ICC. Moreover, here, right at the outset of the inquiry, we come upon the first anomaly. With virtually no debate in Rome, and with the full endorsement of the Clinton Administration, supporters of an ICC have created it by treaty as an organization *outside of the United Nations system*.¹¹

This result was far from inevitable. The United Nations Charter establishes the International Court of Justice (“ICJ”) as one of the six principal organs of the UN system, but the Charter clearly contemplates the possibility of additional judicial bodies.¹² Nonetheless, the ICC’s proponents rejected that option. In response to a press inquiry in Rome, UN Secretary General Kofi Annan offered this explanation:

“I think in a way an attempt to set up an independent international criminal court that is not seen as a UN organ is also an attempt to reinforce and enhance the independence of the Court. Often when organizations

¹⁰Article 63.1. of the Statute of Rome provides that “[t]he accused shall be present during the trial.” While such a provision prevents *in absentia* trials, it does not prevent indictments from being issued against alleged perpetrators when they are not in custody, and even when there is no likelihood that they will or even can be brought into custody in the future. Thus, the risk of the ICC fostering a “Versailles syndrome” remains strong.

¹¹Article 2 of the Rome Statute provides that “[t]he 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.” This very language, of course, demonstrates that the ICC does not *presently* stand in any relation to the UN. From the context of other language in the Statute (such as the provisions concerning financing in Part 12), and from numerous comments made by ICC supporters during several years of negotiation, it is plain that the “relationship” contemplated is nothing like the relationship of the ICJ or the specialized agencies or the IAEA to the main UN.

¹²Article 92 provides that the ICJ will be “the *principal* judicial organ of the United Nations” (emphasis added), thus implying the permissibility that *lesser* judicial entities might be created subsequently.

(even though the ICI is quite removed) are attached to the General Assembly we have heard the accusations that it is either politicized or is likely to be politicized. . . . [I]f one wants a court to operate independently and have its own rules of procedure without interference from political institutions and governments, . . . I think setting it up as an independent court, a stand alone court, . . . should reinforce a sense of independence and lack of politicization, and I think it is a plus rather than a negative.”¹³

Whatever the reasons why the recently concluded Rome conference decided not to establish the ICC as a UN body, that conscious choice by the delegations, and by the States which become party to the Statute of Rome, will have significant consequences for the governance of the ICC as well. Most notably for present purposes, separating the ICC from the UN should mean unambiguously that the ICC must be self-financing through contributions from States party to the Statute, not from the UN membership at large. The expenses of the ICJ, by contrast, are borne by the United Nations, as the UN Charter and the ICJ Statute expressly provide.¹⁴ Accordingly, no one can seriously argue that the United States has any financial responsibility whatsoever for the future operations of the Court and Prosecutor, whether through mandatory assessments or voluntary contributions.¹⁵

More fundamentally, separating the ICC from the ICJ at least tacitly acknowledges that the ICJ has failed to garner the kind of legitimacy that the ICJ's founders had hoped for in 1945. In some respects, this is more than ironic, because much of what was said about the ICJ in 1945 anticipates what the ICC's supporters have recently said about it. The drafting committee of the San Francisco Conference responsible for the ICJ reported that it:

“ . . . ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. . . . It is confidently anticipated that the jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectation that its exercise of this jurisdiction will commend a general support. . . . In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.”¹⁶

These touching sentiments were not borne out in practice for the ICJ, which has been largely ineffective when invoked, and more often ignored in significant international disputes. Indeed, the United States withdrew from the mandatory jurisdiction of the ICJ, and it has lower public legitimacy in the United States than even the rest of the UN system.

Among the several reasons why the ICJ is held in such low repute, and what is candidly admitted at least privately in international circles, is the highly politicized nature of its decisions. Although ICJ judges are supposed to function independently of their national government, their election by the UN General Assembly is a highly politicized matter, involving horse trading among and within the UN's regional and other political groupings. Once elected, the judges are expected to vote, and typically do vote, along highly predictable national lines (except in the most innocuous of cases). Thus, the ICJ's failure to generate widespread international respect and le-

¹³Quoted from the transcript of the Secretary General's press conference at the opening of the Rome Conference, June 15, 1998

¹⁴Article 33 of the ICJ Statute provides that: “The expenses of this Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.” Article 17(1) of the UN Charter provides in complementary fashion that: “The General Assembly shall consider and approve the budget of the Organization.”

¹⁵The back door to American financing for the ICC, even if the United States never ratifies the Statute of Rome, is already written into Article 115. It provides that the United Nations shall make available funds “in particular in relation to the expenses incurred due to referrals by the Security Council.” If the Yugoslavia and Rwanda Tribunals are consolidated into the ICC, right from the outset they will constitute the bulk of the ICC's work, and therefore the bulk of its funding requirements. Accordingly, the United States would not save any money by transferring these tribunals away from the jurisdiction of the Security Council.

Note also Article 115's use of the phrase “in particular.” These words imply that while UN funding for referred cases is automatic, the Statute also contemplates other situations where the UN may provide funding. Since the United States is assessed twenty-five percent of the regular UN budget, every case in which the UN contributes to the ICC from that budget, the US will be paying a major share.

¹⁶Quoted in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, Oxford University Press (1984), at pp. 980–81.

gitimacy on “civil” matters may well be the most powerful explanation why the ICC’s supporters chose to establish their new institutions outside the UN system.¹⁷

Another contributing factor in making the ICC independent of the UN was quite likely the massive failure to achieve legitimacy of the UN’s principal human rights body, the UN Human Rights Commission (“UNHRC” or “the Commission”). Despite unrelenting, bipartisan American efforts over the years to make the Commission successful, we are routinely treated with the spectacle of a human rights watchdog that includes among its membership nations like Cuba, Iraq and Iran. Impotent on the full range of issues, from the massacre in Tienanmen Square to ethnic cleansing in the former Yugoslavia, the UNHRC is a classic UN operation: considerable talk and paper, but, unfortunately, very little of value produced.

In recent years, where the Commission has been active and productive, it has been unaccountably focused on finding fault with the United States. This year, for example, three UNHRC rapporteurs will have visited us, to investigate our record on “religious persecution,” violence against women, and the death penalty. The UN report on America’s use of the death penalty has already been issued, and provides clear evidence both of how the UNHRC now operates, and on what we may expect analogously from the ICC. Notably, the rapporteur’s actual mandate only covered “extrajudicial, summary or arbitrary executions,” but he interpreted this to mean all applications of the death penalty in America.

He effectively admitted his unstated agenda when he said that “information concerning the extension of the scope and the reintroduction of death penalty statutes in several states” partly prompted his visit. Incredibly, he recommends that our government should “include a human rights component in training programs for members of the judiciary,” and that our police should receive “training on international standards on law enforcement and human rights.” Where did these recommendations come from? At least in part, they came from the rapporteur’s belief that the United Nations had already found the US to be retrograde on the death penalty: “The United Nations has gradually shifted from the position of a neutral observer . . . to a position favouring the eventual abolition of the death penalty.”¹⁸

Many in America would be surprised to find that the UN had a position on the death penalty at all, let alone one so profoundly different from that so emphatically, and so democratically, expressed here. But the UN High Commissioner for Human Rights would undoubtedly greet this American attitude with scorn, a failure by the United States to “recognize the need to rise above narrow definitions of national self interest.”

B. The Elimination of the Security Council Role in ICC Affairs

Although few Americans would be surprised by the implicit acknowledgement of problems with UN legitimacy by ICC supporters, most would be stunned to learn of the overwhelming repudiation of the Security Council by delegates to the Rome Conference. Almost alone among significant UN governing bodies, the Security Council does enjoy a significant level of legitimacy among American policy makers. And yet it was precisely the Security Council—where the Clinton Administration has focussed so much of its efforts over the past six years—where the Administration found the greatest resistance to its position.

In fact, one could analyze what happened in Rome to be—for the Administration—the completely unintended consequences of its own basic policies, starting literally from the Administration’s first days in office. Security Council Resolution 808, which created an international criminal tribunal for Yugoslavia, was adopted on February 22, 1993, just slightly over a month after the Inauguration. The Rwanda tribunal followed thereafter, created by Security Council Resolution 935 in July,

¹⁷ Because the Statute of the ICJ “forms an integral part of the [UN] Charter,” under Article 92, amending the Statute would have triggered the full panoply of requirements for amending the Charter itself. Pursuant to Article 108 of the Charter, such a process would require: (1) a two-thirds vote of the General Assembly; and (2) having the amendment “ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all of the Permanent Members of the Security Council.”

Thus, under the Charter amendment procedure, Permanent Member, such as the United States, could have effectively vetoed any changes. There is no doubt that the desire to avoid the U.S. (and possibly other Permanent Member) veto was a powerful, though publicly unspoken, incentive for ICC supporters to create an entirely new organization.

¹⁸ It should, therefore, come as no surprise that the Statute of Rome makes no provision for the death penalty for any offense, including genocide.

Indeed, and most ironically, Mary Robinson, the UN High Commissioner for Human Rights, said in her opening remarks to the Rome Conference on June 15: “I would look for the Court to include provision for efforts to rehabilitate those it convicts.” High Commissioner Robinson does not elaborate on her vision about how to rehabilitate those convicted of genocide, war crimes or crimes against humanity.

1994. The Administration clearly intended, and stated frequently, that these individual tribunals were not only justifiable on their own merits. They were also intended as building blocks in the foundation of what became the ICC, and, indeed, for an even larger agenda. Over two years ago, David J. Scheffer wrote:

“The ultimate weapon of international judicial intervention would be a permanent international criminal court (ICC). . . .

The ad hoc war crimes tribunals and the proposal for a permanent international criminal court are significant steps toward creating the capacity for international judicial intervention. In the civilized world’s box of foreign policy tools, this will be a shiny new hammer to swing in the years ahead.” (emphasis added)¹⁹

By overwhelmingly repudiating the Administration’s position, which had itself been modified and weakened during the negotiations, the Rome Conference has substantially minimized, if not effectively eliminated, the Security Council from any role in its affairs.²⁰ Since the Council is charged by Article 24 of the UN Charter with “primary responsibility for the maintenance of international peace and security,” it is more than passing strange that the Council and the ICC are now to operate virtually independent of one another. Strange, that is, only if one is unfamiliar with the agenda of many governments and Non-Governmental Organizations (“NGOs”) supporting the ICC, whose agenda has for years included a downgrading of the Security Council, and especially the weakening of the importance of the veto power of the Council’s five Permanent Members.

This implicit weakening of the Security Council is a fundamental new problem now created by the ICC, and an important reason why the ICC should be rejected. The Council now risks both having the ICC interfering in its ongoing work, and the confusion, discussed above, between the appropriate roles of law, politics and power in settling international disputes.

C. The ICC’s Own Problems of Legitimacy

But it is not just the ICC’s detrimental impact on the Security Council, or its troubling intellectual antecedents in the ICJ and the UNHRC that should concern us, important though they may be. The Court and the Prosecutor themselves have problems of legitimacy, which not only will not remedy the problems of the existing UN institutions, but which will simply reduce further their already diminished standing. The Clinton Administration has never seriously addressed these issues because it has been such a vociferous advocate of “a” Court that it likely does not take these issues seriously. I believe that there is substantial opinion to the contrary outside of the Administration, and that should warrant extensive debate in Congress *now* about how to treat the ICC when it actually comes into existence within the next few years.

The ICC’s principal difficulty is that its components do not fit into a coherent “constitutional” structure that clearly delineates how laws are made, adjudicated and enforced, subject to popular accountability and structured to protect liberty. Instead, the Court and the Prosecutor are simply “out there” in the international system, ready to start functioning when the Statute of Rome comes into effect. Consistent with American standards of constitutional order, this approach is unacceptable.

¹⁹David J. Scheffer, “International Judicial Intervention,” *Foreign Policy* (Spring, 1996) 34, at 48–51.

²⁰The limited renaming role for the Security Council in the ICC is found in Article 16 of the Statute of Rome, which provides that:

“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.”

This provision, of course, totally reverses the appropriate functioning of the Security Council. It seriously undercuts the role of the five Permanent Members of the Council, and radically dilutes their veto power. This was precisely the objective of the ICC’s proponents.

Under Article 16 of the Statute, the Prosecutor is free to investigate, indict and try before the Court completely at will, unless and until the Security Council acts. But in requiring and affirmative vote of the Council to *stop* the Prosecutor and the Court, the Statute slants the balance of authority from the Council to the ICC. Moreover, a veto by a Permanent Member of such a restraining Council resolution leaves the ICC completely unsupervised.

For the United States, faced with the possibility of an overzealous or politically motivated Prosecutor, the protection afforded by our veto has been eliminated. In effect, the UN Charter has been implicitly amended without being approved pursuant to Chapter XVIII of the UN Charter. In particular, this drastic erosion of the U.S. position will not be subject to Senate review.

It would also seem entirely irrational unless we understand the true motives of many of the ICC's proponents, as discussed more fully below.

1. Substantive Problems

The first key problem of legitimacy for the ICC for Americans is that there is insufficient clarity or agreement over the substantive jurisdiction of the Court and the Prosecutor. This is—most emphatically—*not* a Court of limited jurisdiction.

Even for genocide, the oldest codified among the three crimes specified in the Statute of Rome, as approved, there is hardly complete clarity in what it means. Although vague statutory terms can sometimes be clarified by judicial interpretation, even for the crime of genocide as enacted into positive U.S. law, there has been virtually no judicial elaboration. Moreover, the Senate could not even accept the Statute of Rome's definition of genocide, unless it was prepared to *reverse* the position it took just a few years ago in giving approval to the Genocide Convention of 1948.

When the Senate approved the Genocide Convention on February 19, 1986, it attached two reservations, five understandings and one declaration. One reservation, for example, requires the specific consent of the United States before any dispute involving the U.S. can be submitted to the International Court of Justice. One of the understandings limits the definition of "mental harm" in the Convention to "permanent impairment of mental faculties through drugs, torture or similar techniques." Another understanding provides that the Convention should not be understood to function automatically as an extradition treaty. Two other understandings are of especial importance here. One was intended to protect American servicemen and women, and provides that:

"... acts in the course of armed conflicts committed without the specific intent [required by the Convention] are not sufficient to constitute genocide as defined by this Convention."

The other, even more directly pertinent here, provides that:

"... with regard to the reference to an international penal tribunal in article VI of the Convention, *the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.*" (emphasis added)²¹

By contrast, Article 120 of the Statute of Rome provides explicitly and without any exceptions that "No reservations may be made to this Statute." Thus, confronted with a definition of "genocide" in the Statute of Rome that does not take into account the Senate's existing reservations, understandings and declaration, the Senate would not have the adoption of attaching them to any possible ratification of the Statute. In effect, to accept the Statute, the Senate would have to reverse the position it took as recently as 1986. Moreover, Senators should take careful note of the reservation quoted above in the "penal tribunal" that we can now clearly identify as the ICC, which requires Senate approval of any "participation" in that body.

For the other two broadly defined crimes (war crimes and crimes against humanity), the vagueness is even greater, as is the accompanying risk that an activist Court and Prosecutor can broaden the Statute's language in an essentially unchallengeable fashion. It is precisely the risk to potential defendants that has led our Supreme Court to invalidate criminal statutes which fail to give adequate notice of exactly what they prohibit under the "void for vagueness" doctrine. Unfortunately for the unwary, "void for vagueness" is a peculiarly American invention.

Much of the media attention to the American negotiating position on the ICC concentrated on the risks perceived by the Pentagon to American peacekeepers stationed around the world. As real as those risks may be, however, no one should operate under the illusion that our basic concern should be only with a handful of peacekeepers.

Our real concern should be for the President and his top advisers. For example, consider some of the following provisions of the Statute of Rome. The definition of "war crimes" includes, for example:

"intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; [and]
"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 environ-

²¹ See American Society of International Law, 28 *International Legal Materials* 754 (Number 3, May, 1989), at p. 782.

ment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; . . .”²²

A fair reading of these provisions leaves one unable to answer with confidence the question whether the United States was guilty of war crimes for its aerial bombing campaigns over Germany and Japan in World War II. Indeed, if anything, a straightforward reading of the language probably indicates that the Court would find the U.S. guilty. *A fortiori*, these provisions seem to imply that the U.S. would have been guilty of a war crime for dropping atomic bombs on Hiroshima and Nagasaki.²³

Even apart from these incredibly important general questions, consider further some of the elements of the offenses just quoted.

- What is to constitute “knowledge” that an attack “will cause incidental loss of life or injury to civilians”? Second-guessing long after the fog of battle lifts is an arm-chair exercise well suited for academics and theorists, but ill-suited to military or political decision makers whose failure to make the right command decisions can endanger their own forces.
- What is to constitute “long-term and severe damage to the natural environment,” surely a new crime to most militaries in the world? While we might agree that the oil fires set by Iraq as it was being forced out of Kuwait would meet this test, what else would? Is sustained bombardment enough? Is the use of all nuclear weapons now a war crime? Would the Iraqis have a defense that they were justified by exigent military circumstances?
- What is to constitute the “clearly excessive” damage required by the last phrase in subparagraph (b)? What are the standards, and how are they to be agreed upon?

There are similar problems in numerous other provisions as well. Subparagraph (k), for example, forbids “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.” A law professor could spend weeks taking his class through hypotheticals trying to figure out what that provision might mean.

Moreover, as we are all very much aware, simply the fact of launching massive criminal investigations can have an enormous political impact. Although subsequent indictments and later convictions are unquestionably more serious still, a zealous independent Prosecutor can have a dramatic impact simply by calling witnesses and gathering documents, without ever bringing formal charges.

Perhaps the most intriguing is the prohibition in subparagraph (p) against “committing outrages upon personal dignity, in particular humiliating and degrading treatment.” Were the problems with the Statute of Rome not so gravely serious, one could imagine this provision as the subject of endless efforts at humor.

Worse even than the vague and elastic provisions in the Statute is what is included only by general reference. Thus, for example, the definition of crimes against humanity, after listing several elements, includes the catch-all phrase “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” How will this phrase be interpreted, and will there be any way to countermand the Court if its interpretation is unacceptable? Who will advise the President that he is unambiguously safe from the retroactive imposition of criminal liability if he guesses wrong on an “inhumane acts”? Is even the defensive use of a nuclear weapon an “inhumane act”?

Perhaps worst of all is that we are nowhere near the end of the list of prospective “crimes” that can be added to this Statute. Many were suggested at Rome, and commanded support from many participating nations. Most popular among those was the crime of “aggression,” which is now declared criminal, but not yet defined by the Statute.²⁴ Although frequently not hard to identify, “aggression” can at times be something in the eye of the beholder. Thus, Israel justifiably feared that its preemptive strike in the Six Day War almost certainly would have been the subject of a complaint to the Prosecutor, and quite likely resulted in a case brought against

²² Statute of Rome, Article 8.2(b)(i) and (iv).

²³ Some governments and NGOs proposed in Rome that the use of nuclear weapons be specifically prohibited. While these proposals were not accepted, the existing language in the Statute, including other language not quoted herein, can certainly give rise to arguments about the “criminal” effects of nuclear weapons to those seeking to outlaw them.

²⁴ Article 5.2 of the Statute provides that the Court “shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with” the Statute’s amendatory provisions. This extraordinary procedure apparently did not trouble the delegates at Rome.

top Israeli officials as individuals. Israel, therefore, was one of the few governments that voted with the United States against the Statute.²⁵

The list goes on and on. Ever-helpful Cuba offered the “crime” of embargoes, and others suggested terrorism, drug trafficking and so on. Some crimes against humanity do not appear to have been discussed, but might have been offered had the Conference gone on longer. What about the legality of a nation’s “one-child-per-family” policy? Was that prohibited by the characterization of religious persecution as a “crime against humanity, or does it have to be spelled out in terms? Are forced abortions considered a crime under the genocide prohibition against “imposing measures intended to prevent births within [a national] group”?

One major problem here is the uncertainty about the latitude and flexibility of the Court’s interpretative authority once it begins issuing decisions. We should certainly, therefore, be concerned by the weeping language of Article 119 of the Statute, which provides that “[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.” This provision is short and to the point, and troubling because of exactly what it says. But another, and more fundamental problem stems from the decentralized and unaccountable way in which international law, and particularly customary international law, evolves. Thus, during the Conference’s opening statements, Japan’s Permanent UN Representative said approvingly that:

“The war crimes which are considered to have become part of customary international law should also be included, while crimes which cannot be considered as having been crystallized into part of customary international law should be outside the scope of the Court.”²⁶

While this statement is sound as far as it goes, it expresses quite cogently the way in which customary international law evolves, or “crystallizes.” It is another of those international law phenomena that just happens “out there,” among academics and NGO activists. While the historical understanding of customary international law was that it evolved from the practices of nation-states over long years of development, today we have theorists who write approvingly of “spontaneous customary international law” that develops among the cognoscenti almost overnight. If this is where the Court and the Prosecutor begin to move, there is serious danger ahead.

But even beyond this risk is the larger agenda of many of the ICC supporters, of the nearly endless articulation of “international law” that continues ineluctably and inexorably to reduce the international discretion and flexibility of nation states, and the United States in particular. We should not be misled, in judging the Statute of Rome, by examining simply the substantive crimes contained in the final document. We have been put on very clear notice that this list is illustrative only, and just the start. We should have no misapprehensions that, when some urge the U.S. to sign on to the Statute, that we are talking about a defined and limited substantive jurisdiction. The NGOs and others “have only just begun.”

Some delegates to the Rome Conference fully understood the long-term agenda, and urged caution lest the Statute as adopted attempt to carry too much weight too early. The representative of the International Law Commission (“ILC”), which started work on an ICC statute six years ago, said unambiguously in his opening comments that:

“The revised Draft Statute is making a major effort to consolidate expand and develop substantive international law, relying only to a very limited extent on the *droit acquis* [the existing law].”²⁷

After making this favorable reference, the ILC representative went on to warn that:

“I only hope that the praiseworthy efforts to develop the law, and associated matters such as remedies for victims, do not turn out to stand in the way of the main objective, the very creation of a viable and effective independent Court. Let us not be deflected from that goal, and if necessary *let us think about ways in which new developments in substantive law and even new crimes can be brought within the jurisdiction of the Court as time*

²⁵ Israel also objected to a provision (Article 8.2.(viii)) which makes it a war crime to effect “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 parts of the population of the occupied territory within or outside this territory.”

The inclusion of Article 8.2.(b)(viii) is an excellent example of the politicization of what is masquerading as a purely legal and judicial process. It is the kind of effort to gain political advantage out of the manipulation of the Statute, the Court and the Prosecutor that we can expect to see no end of.

²⁶ Statement of Hisashi Owada, Head of Delegation of Japan, June 15, 1998.

²⁷ Statement of Professor James Crawford, International Law Commission, June 15, 1998.

passes and the law progresses Let us not make “the best” the enemy of “the good.” Let us not make the best—a fully developed international criminal code—the enemy of the good—a permanent international criminal court. (emphasis added)

This statement demonstrates clearly why we should take a “systems analysis” approach to the Statute of Rome and the Court and the Prosecutor it creates. We should not judge only by what we see before us today, but look forward to what might be added to it over a long time horizon. Only if we are willing to travel the entire path should we take the first step. Otherwise, we should prevent the consequences by denying the assumptions, and not endorse the work of the ICC even indirectly.

2. Problems of Sovereignty

As troubling as are the substantive and jurisdictional problems discussed above, they are, if anything, overshadowed by the problems raised by the governance structures and mechanisms that the Statute creates in the form of the Court and the Prosecutor.²⁸ Many advocates of the ICC have commented unfavorably that the United States has not been able to join many of its democratic allies in signing on to the Statute of Rome, and it is important to explain why that is so.

We are not considering here a relatively passive court such as the ICJ, which can adjudicate only with the consent of the parties, or when the Security Council or the General Assembly asks it for an advisory opinion. We are considering, in the guise of the Prosecutor, a powerful and legitimate element of executive power, the law-enforcement power. Law-enforcement is a necessary element of national governments. To my knowledge, never before has the United States been asked to seriously consider placing any law-enforcement power outside of the complete control of our national government.

Very briefly stated, the American concept of separation of powers, imperfect though it is, reflects the settled belief that liberty is best protected when, to the maximum extent possible, the various authorities legitimately exercised by government are placed in separate branches. So structuring the national government, the Framers believed, would prevent the excessive accumulation of power in a limited number of hands, thus providing the greatest protection for individual liberty.

Continental European constitutional structures do not, by and large, reflect a similar set of beliefs. They do not so thoroughly separate judicial from executive powers, just as their parliamentary systems do not so thoroughly separate executive from legislative powers. That, of course, is entirely their prerogative, and substantially explains why they appear to be comfortable with the ICC’s structure, which so closely melds prosecutorial and judicial functions, in the European fashion. They may be able to support such an approach, but the United States should not.

In addition, our Constitution provides that the exercise of executive power will be rendered accountable to the general public in two ways. First, the law-enforcement power is exercised by a President (or by the President’s agents) who must be elected. The President is constitutionally charged with the responsibility to “take Care that the Laws be faithfully executed,”²⁹ and the Supreme Court has characterized the Attorney General as “the hand of the President” in fulfilling that constitutional function. In short, the authority of the actual law enforcers stems constitutionally directly from the only elected executive official. Second, Congress, all of whose members are popularly elected, both through its statute-making authority and through the appropriations process can exercise significant influence and oversight.

In Continental European parliamentary systems, these sorts of political checks are either greatly attenuated or even entirely absent. Once again, the Europeans may feel comfortable with such system, but we do not and we should not. They obviously also feel comfortable extending it to a structure such as the Court and Prosecutor as created in Rome. The United States, however, should never consciously accept such an approach. The Statute’s Prosecutor is accountable to no one. Indeed, he or she will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The Prosecutor, and his or her as yet uncreated investigatory, arresting and detaining apparatus, is answerable only to the Court, and then only partially.

²⁸The nomenclature is important in this connection. We all make the mistake of lapsing into referring to this subject as “the Court.” Americans tend to believe that the judiciary is, as Professor Alexander Bickel once characterized it, “the least dangerous branch,” and references to “the Court” have a benign ring to them. I have tried in these prepared remarks to refer to “the Court and the Prosecutor” to emphasize linguistically what I believe is the less attractive reality created by the Statute of Rome.

²⁹U.S. Constitution, Article II, Section 3.

This structure utterly fails, by long-standing American principles, to provide sufficient accountability to warrant vesting the Prosecutor with the enormous power of law enforcement that the ICC's supporters have obtained. Political accountability is utterly different from "politicization," which we can all agree should form no part of the decisions of either the Prosecutor or the Court. At present, however, the ICC has almost no political accountability, and enormous risk of politicization. Americans should find this unacceptable.

Let me stress again that this analysis has but limited relevance to the notion that we fear isolated prosecutions of individual American military personnel around the world. It has everything to do with the fear of unchecked, unaccountable power, as Americans should clearly understand. Coincidentally, of course, the United States has, in the past two decades, had considerable experience with the concept of "independent counsels." It is an experience that strongly argues against repetition in an international treaty.

3. *The Statute of Rome Purported Protections Are Wholly Unsatisfactory*

The ICC's supporters nonetheless argue that there are protections built into the Statute of Rome that should permit the United States to accept it. I now briefly consider several of these provisions.

First, the advocates argue that the doctrine of "complementarity" embodied in the Statute helps ensure that the Court's jurisdiction and the Prosecutor's zeal will not grow arbitrary or too large, and that national justice systems are not truly threatened with displacement. "Complementarity," like so much else connected with the ICC, is simply an assertion, utterly unproven and untested. Since no one has any actual experience with the Court, of course, no one can say with complete certainty what will happen. This is hardly a sound basis on which to make a major change in American foreign policy.

In fact, "complementarity," if it has any real substance, argues against creating the ICC in the first place. If most national judicial systems are capable of addressing the substantive crimes the Statute proscribes, then that demonstrates why, at most *ad hoc* judicial tribunals are necessary. Indeed, it is precisely the judicial systems which the ICC would likely supplant (such as Bosnia, or possibly Cambodia) where the international effort should be to encourage the parties to the underlying dispute to come to grips with the judicial implications finding a comprehensive solution to their disagreements. Moreover, it is not at all clear that a Prosecutor might not consider something like South Africa's Truth and Reconciliation Commission inadequate, or a ruse, and commence investigations on his own motion. Removing key elements of the dispute, especially those emotional and contentious issues having to do with war crimes and crimes against humanity, undercuts the very kind of development that these peoples, victims and perpetrators alike, will have to resolve if they are ever to live peacefully together.

Second, although supposedly a protection for the independence of the ICC, the provisions about the automatic jurisdiction of the Court and the Prosecutor are troubling. They form a clear break from the basic doctrine of the ICJ, where "[j]urisdiction without the consent of the parties does not exist."³⁰ Moreover, because States Party to the Statute may refer situations where crimes have been committed to the Prosecutor, we can virtually guarantee that some will, from the very outset, seek to use the Court for political purposes. The inability of non-States Party to block prosecutions of their nationals, a key defeat for the United States at Rome, will prevent us from thwarting these efforts at their initial stages, and almost guarantee controversy and problems for our foreign policy for years to come.

For example, is there any doubt whatever that Israel will be the target of a referral from a State Party concerning conditions and practices by the Israeli Defense Forces in the West Bank and Gaza? The United States, with near-continuous bipartisan support for many years, has attempted to minimize the disruptive role that the United Nations has all too often played in the Middle East peace process. As if that were not difficult enough, we now face the prospect of the Prosecutor and the Court interjecting themselves into extremely delicate matters at inappropriate times. Here is an excellent example of where the trashing of the Security Council's role in the affairs of the ICC can have a tangible and highly detrimental impact on the conduct of our foreign policy.

Third, the supposed "independence" of the Prosecutor and the Court, as extensively discussed above, is more a source of concern for the United States than an element of protection. Indeed, "independent" bodies in the UN system (such as the UN Human Rights Commission) have often demonstrated themselves to be more highly politicized than some of the explicitly political organs. Political accountabil-

³⁰ Simma, *supra*, at p. 987.

ity, by contrast, which is almost totally absent from the ICC scheme for the Court and the Prosecutor, would have been a real protection. Instead, we may now face the prospect, as might be predicted by the “public choice” analysis of Gordon Tullock and James Buchanan, that the ICC will be “captured” not by governments but by NGOs and others with narrow special interests, and the time to pursue them.

VII. CONCLUSION: WE SHOULD ISOLATE AND IGNORE THE COURT AND THE PROSECUTOR

Confronted as we are with the fact of the ICC, the United States must now decide what its prospective policy toward it should be. Undoubtedly, there will be those arguing that we should accept the *fait accompli*, and begin to work with the Court and the Prosecutor. They will argue that, on a case-by-case basis, it may actually serve American interests, and that we should work for its long-term improvement. They will even argue that we should provide voluntary financial support and the secondment of investigators and prosecutors. The Administration may even make these arguments today.

Whenever they are made, they should be emphatically rejected.

Whether the ICC survives and flourishes or not depends in large measure on the attitude of the United States. We should not allow this sentimentality masquerading as policy to achieve indirectly what we have successfully blocked frontally. Specifically:

- We should not support any effort to consolidate the work of the existing tribunals for Yugoslavia and Rwanda into the ICC. If the ICC becomes operational before these tribunals have concluded their work, they should be allowed to finish under Security Council supervision.
- We should reject any effort to have UN members who are not States Party to the Statute of Rome pay for any portion of the ICC’s expenses.³¹
- We should veto any effort in the Security Council to participate in the ICC’s work. If the role originally proposed for the Council was unacceptable to the ICC’s founders, then they can work with some other UN body or regional organizations.
- We should oppose the cooperation of other organizations to which the United States belong, such as NATO, from cooperating with the ICC. This would simply be doing indirectly what we have already declined to do directly by not signing the Statute of Rome.³²

These steps may seem difficult to take, but it is critical that our attention not be diverted from the objective of ensuring that the potential problems posed by the ICC do not in the future become real problems. Keeping our distance will confine the ICC to a limited domain, and hopefully avoid some of the risks described in the foregoing testimony.

Prepared Statement of Lee A. Casey

I. INTRODUCTION

There are serious constitutional and policy objections to American participation in the International Criminal Court (“ICC”) Treaty. The fundamental constitutional objection is that, under the ICC Treaty, American nationals would be subject to prosecution and trial in an international court for offenses otherwise within the judicial power of the United States, and, at the same time, Americans brought before this court would not enjoy the basic guarantees of the Bill of Rights, including the right to trial by jury. As a matter of policy, U.S. participation would empower an international institution that is not accountable to the American electorate to investigate and judge the actions taken by our military and civilian officials. In this, such participation would represent an unprecedented cession of our right to self-government.

³¹ Indeed, the funding question provides a separate reason not to refer the ongoing Yugoslav and Rwanda matters to the ICC, for the reasons explained in footnote 12.

³² Moreover, the Senate has already spoken to the issue of participation in the ICC’s work, at least in part, in its existing reservations to the Genocide Convention, as discussed above.

II. CONSTITUTIONAL OBJECTIONS TO THE ICC

A. *The Federal Judicial Power Cannot be Subordinated to an Extra-Constitutional Institution Allowing that Institution to Prosecute American Nationals*

If the United States joined the ICC Treaty regime, this court would have the legal right to investigate and prosecute Americans for alleged crimes falling into four categories of offenses: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) aggression.¹ The ICC would have jurisdiction over these offenses whether they were committed in the United States or abroad. Each of these offenses — to the extent they exist at all as defined in the ICC Statute — is currently within the legislative and judicial authority of the United States. See U.S. Const. Art. I, § 8, cl. 9; Art. III, § 2. q. *Kadic v. Karcuizic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (civil suit alleging various violations of international humanitarian norms may be brought in court of the United States, so long as defendant is properly served within the Court's jurisdiction).

Under the Constitution, however, only the States and the Federal Government have the authority to prosecute and try individuals for offenses committed in the United States, and they may do so only in accordance with the guarantees contained in the Bill of Rights. In particular, the judicial power of the United States is vested in the Supreme Court, and in lower federal courts as may be established by Congress. U.S. Const., Art. III, § 1. This power cannot be exercised by any body or institution that is not a court of the United States. This was made clear by the Supreme Court in the landmark case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

In that case, the Court reversed a civilian's conviction in a military tribunal, which did not provide the guarantees of the Bill of Rights, holding that "[e]very trial involves the exercise of judicial power," and that the military court in question could exercise "no part of the judicial power of the country. That power was vested by the Constitution in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," pursuant to Article III of the Constitution. *Id.* at 119–121.

This reasoning is equally and emphatically applicable to the ICC. The ICC would not, and could not, exercise the judicial power of the United States — without which it could not prosecute or try Americans for criminal offenses allegedly committed in the United States — as its statute would empower it to do.

This constitutional objection to U.S. participation in the ICC Treaty can best be illustrated through the use of a hypothetical, shorn of the emotional overlay inherent in a "war crimes" court: The Bill of Rights undoubtedly impedes efficient enforcement of the drug laws. Could the Federal Government enter a treaty with Mexico, Canada, and the Bahamas, establishing an offshore "Special Drug Control Court," which would prosecute and try drug offenses committed in any of these countries, and which would provide only minimal due process, not incorporating all of the Constitution's guarantees? Fortunately, the Supreme Court has never faced this case. If such a case arose, however, the application of *In re Milligan's* rule and reasoning would require the invalidation of the treaty as a matter of United States domestic law.²

¹Under the ICC Statute as agreed in Rome, the "crime" of aggression would be included within the ICC's jurisdiction. However, the delegates in Rome could not agree on any definition of this crime. Consequently, the Court will not be able to prosecute such crimes until the States Parties to the treaty agree on a definition. ICC Statute, Art. 5(2).

²The fact that a treaty is involved does not change this analysis or conclusion. As the Supreme Court wrote more than a century ago: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments. . . . It would not be contended that it extends so far as to authorize what the Constitution forbids." *De Geofroy v. Riggs*, (1890).

In addition, the fact that international law is involved, which generally is considered also to be a part of U.S. law, also would not change this result. Specifically with respect to the "laws of war," the Supreme Court has stated that: "[w]e do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution." *In re Yamashita* (1946) (emphasis added).

Missouri v. Holland, 252 U.S. 416 (1920) is not to the contrary. In that case, the Supreme Court upheld a treaty with Britain regulating migratory birds, against a constitutional attack claiming that the treaty infringed the sovereign rights of the States under the 10th Amendment. Justice Holmes reasoned that the power to enter such a treaty, even if not specifically provided for among Congress' enumerated powers in the Constitution, could be inferred from the residual authority of the United States under the treaty-making power. He acknowledged, however, that there were some things the Federal Government could not do in a treaty, because such action might violate some other provision of the Constitution, noting that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is

Continued

Of course, this hypothetical presents precisely the case raised by the ICC Treaty. The Bill of Rights cannot be avoided by the simple expedient of allowing the prosecution of Americans in an extra-constitutional court. As Justice Black stated in *Reid v. Covert*, 354 U.S. at 5–6, “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitation imposed by the Constitution.”

B. If the United States Were to Join the ICC Treaty Regime. ICC Prosecutions of Americans for Crimes Allegedly Committed Overseas Also Would be Unconstitutional

If the United States were to accede to the ICC Treaty, ICC prosecutions of Americans for offenses committed overseas also would be unconstitutional. If the United States became a “State Party” to the ICC Treaty, its involvement with the Court would be sufficient to trigger the requirements of the Bill of Rights — guarantees that the ICC simply does not provide. This analysis and result was suggested by the Supreme Court in a case decided only last month.

In *United States v. Balsys*, 1998 U.S. LEMS 4210 (S.Ct. 1998), a case involving the investigation of an individual accused of war crimes in Lithuania during World War II, the Supreme Court ruled that the Fifth Amendment right against self-incrimination did not apply to a Justice Department interrogation of Balsys, because he would be prosecuted, if at all, in a foreign court. However, the Court offered a hypothetical in which a different result might obtain:

If the United States and its allies had enacted substantially similar criminal codes aimed at prosecuting offenses of international character, and if it could be shown that the United States was granting immunity from domestic prosecution for the purpose of obtaining evidence to be delivered to other nations as prosecutors of a crime common to both countries, then an argument could be made that the Fifth Amendment should apply based on fear of foreign prosecution *simply because that prosecution was not fairly characterized as distinctly “foreign.”* The point would be that the prosecution was as much on behalf of the United States as of the prosecuting nation.

1998 U.S. LEXIS 4210 at *57–58.

This would, of course, be exactly the case with the ICC. If the United States became a “State Party” to the ICC Treaty, it would be a full participant in establishing the Court, in selecting its judges, in financing its operation, and sitting on its Assembly of States Parties. Consequently, any prosecutions undertaken by the Court — whether involving the actions of Americans in the United States or overseas — would be “as much on behalf of the United States as of” any other State party. Since the guarantees of the Bill of Rights would not be available in the ICC, the United States could not participate in, or facilitate, any such court.

This may appear to be a paradoxical result to some. However, it always must be remembered that the United States Government is bound by a Constitution that denies it many of the powers, vis-a-vis its own nationals, that are enjoyed by other states with respect to theirs. There simply are some things that our government cannot do because the Constitution forbids it.

C. The ICC Would Not Provide Guarantees to Americans Comparable to Those Mandated by the Bill of Rights

ICC supporters often claim that this court would provide rights to the accused equivalent to the guarantees found in the Bill of Rights, and that the constitutional objection to arraigning Americans in the ICC would thereby be eliminated. This is incorrect. The ICC would not provide defendants with rights comparable to those guaranteed in the Bill of Rights — far from it.

First and foremost, the right to trial by a jury in the State and district where the crime occurred would not be preserved in the ICC. This, however, is one of the most critical rights enjoyed by Americans, and its importance in our system of government cannot be overstated. The right to trial by jury is not merely a means of determining facts in a judicial proceeding, but is a fundamental check on the use

whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.” *Id.* at 433–34. The guarantees provided to criminal defendants in the Bill of Rights are far more precise, and in mandatory language. A point made clear in Mr. Justice Black’s plurality decision in *Reid v. Covert*, 354 U.S. 1 (1957), a case where the Supreme Court ruled that an American civilian could not be subjected to trial in a military court overseas, even though an international agreement between Britain and the United States appeared to allow such a trial. On that occasion, Black wrote that “[a]t the beginning we reject the idea that when the United States acts against its citizens overseas, it can do so free of the Bill of Rights.” *Id.* at 5–6.

and abuse of power vis-a-vis the individual. As Justice Joseph Story explained: “The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.” Joseph Story, *Commentaries on the Constitution of the United States* 656–58 (1833) (Carolina Academic Press ed. 1987). It is “part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power.” *Id.*

This right was, in fact, considered to be so important by the Founding Generation that it was guaranteed not once *but twice* in the Constitution. Under Article III, the Constitution requires that “[t]he trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.” U.S. Art. III, § 2. This unequivocal guarantee was repeated in the Bill of Rights, where the Sixth Amendment requires that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. Amend. VI.

As noted above, the requirement that all criminal trials be by jury, and that all trials take place in the State and district where the crime occurred, was not added to the Constitution by accident. Rather, the Framers included this key requirement in the Constitution as a reaction to their own recent history. In the years before the Revolution, Americans faced the real possibility of transportation overseas for trial. The British Government had claimed the right to prosecute Americans in British courts overseas, and instituted a practice of arraigning Americans before “vice-admiralty” courts for criminal violations of the navigation and trade laws. These courts were not English Common Law courts. Like the ICC, they followed the Civil Law, “inquisitorial,” system, where guilt or innocence was determined by judges alone and rights of confrontation and counsel were highly restricted. *See generally* Thomas C. Barrow, *Trade and Empire: The British Customs Service in Colonial America 1660–1775* 256 (1967); Don Cook, *The Long Fuse: How England Lost the American Colonies 1760–1785* 59 (1995). In addition, Parliament also had decreed that Americans could be transported to England on treason charges — a claim that prompted immediate denials from colonial legislatures. *See United States v. Cabrales*, 118 S.Ct. 1772, 1774 & n.1 (1998).

Consequently, when the Founders of our Republic declared its independence, and they catalogued in the Declaration of Independence the outrages that they believed justified revolution and war, they noted three of particular interest. They accused King George and his Parliament of:

- “subjecting us to a jurisdiction foreign to our constitution and unacknowledged by our laws”;
- “depriving us, in many Cases, of the Benefits of Trial by Jury”; and of
- “transporting us beyond the Seas to be tried for pretended Offences.”

See Declaration of Independence (July 4, 1776).

At the time the Constitution was adopted, the Framers sought to preserve the right to trial by jury, and to eliminate the danger that Americans might be tried far from their homes, by requiring that trials be conducted in the state and district where the crime was committed. As Justice Story explained,

The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him.

Story, *Commentaries on the Constitution*, *supra* at 658.

Of course, if the United States were to join the ICC Treaty, Americans again would face transportation beyond the seas for judgment, without the benefits of trial by jury, in a court that would not guarantee the other rights we all take so much for granted — and where the judges may well “cherish animosities, or prejudices against” them.

Trial by jury is not, of course, the only right guaranteed to Americans that would not be respected in the ICC. For example, Americans brought before this court would only notionally enjoy rights to a speedy trial and to confront and cross-examine witnesses. The ICC would not guarantee these rights in any form recognizable or acceptable in the United States. For instance, our right of confrontation includes the right to know the identity of hostile witnesses, and to exclude “hearsay” evidence that does not fall within a recognized exception to the general rule. On the international level, however, this is not the case. In the International Criminal Tribunal for the Former Yugoslavia at the Hague, a court widely viewed as a model for the proposed ICC, both anonymous witnesses and extensive hearsay evidence

have been allowed at criminal trials. See Michael P. Scharf, *Balkan Justice* 7, 67, 108–09 (1997).³

By the same token, the ICC would not preserve the right to a speedy trial. In the United States, a defendant has a right to be brought to trial within 70 days. There would be no such limit in the ICC. Again, international practice here falls far short of American requirements. For example, the Yugoslav Tribunal Prosecutor actually has argued that up to five years would not be too long to wait in prison for a trial. See *Prosecutor v. Aleksovski (Prosecution Response to the Defence Motion for Provisional Release ¶3.2.5.)* (ICTY Case No. IT-95-1411-PT) (14 Jan. 1998). More disturbing still, there is caselaw in the European Court of Human Rights arguably supporting such a rule. *W. v. Switzerland*, Series A, No. 254 (1993) (4 years of pretrial detention accepted); *Neumeister v. Austria*, Series A, No. 8 (1968) (three year pretrial detention acceptable, and up to seven years not too long to try a criminal case). Such rules mock the presumption of innocence.

D. Cases Where the Supreme Court Has Allowed the Extradition of Americans for Trial Abroad Do Not Suggest that the ICC Would Be Constitutional.

ICC defenders who claim that the Constitution would not prohibit U.S. participation point to extradition cases, where the Supreme Court has ruled that the Bill of Rights does not prohibit the surrender of American citizens for trial in foreign tribunals. See, e.g., *Neely v. Henkel*, 180 U.S. 109 (1901). These cases, however, involve instances where Americans have committed crimes abroad, or where their actions in the United States are intended to achieve a criminal effect in another country.⁴ As the *Neely* Court reasoned:

When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

Id. at 123.

However, the ICC Treaty would be much more than an extraordinary extradition treaty. It would subject the territory and citizens of the United States to the jurisdiction of the ICC, would subordinate the United States' judicial authority to the ICC in cases within its jurisdiction, and would require the United States to surrender its citizens for trial and punishment. In particular, the ICC would have jurisdiction over crimes committed by Americans against other Americans in the United States, without any affects abroad. Although it may seem unlikely that crimes within the ICC's jurisdiction, "war crimes," "crimes against humanity," "genocide," could take place in the United States, as a matter of law, such crimes can take place anywhere. The ICC Treaty's constitutionality must be assessed based upon the nature and scope of the power it vests in that court, not upon the likelihood that this power will be used in any particular manner.

It should be noted, however, that the likelihood of such prosecutions will depend entirely upon the ICC's own interpretation of its jurisdiction. Like other courts, international tribunals claim the right to determine whether or not a particular matter falls within their authority — the principle of *competence de la competence*, the right of courts to rule on their own jurisdiction. See *Prosecutor v. Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ¶¶ 18–22* (ICTY Appeals Chamber) (2 Oct. 1995). This principle is, in fact, found in Article 19 of the ICC's Statute, which provides that "[t]he court shall satisfy itself that it has jurisdiction in any case brought before it."

The potential for mischief here is obvious. It should be remembered that the ICC Statute contains very broad definitions of such offenses as "crimes against humanity" and "genocide," and that these offenses could well be interpreted to cover certain uses of force by the U.S. government against its citizens, or to reach what we call "hate" crimes. If a prosecutor hostile to the United States, or merely interested in making the ICC's prosecutions appear "balanced," determined to investigate U.S. officials, the United States would be unable to prevent this investigation — and any resulting prosecutions — if it were a State Party to the ICC Treaty.

Moreover, the most likely theory under which the ICC would prosecute American officials on account of military actions overseas would be "superior authority" or "command responsibility." Under this theory of liability, no specifically intended ef-

³In the 1996 trial of Dusko Tadic before the ICTY, hearsay evidence was permitted, and several witnesses were allowed to give evidence on an anonymous basis. *Id.* at 108–09.

⁴See *United States v. Melia*, 667 F.2d 300 (2d Cir. 1981) (individual whose actions took place in the United States subject to extradition where acts were intended to produce criminal effect in another country.)

fect by the defendant beyond the territory United States might be required. It arguably is sufficient that alleged violations of the laws of war were committed by U.S. forces overseas, and that the individual was in a position of authority over those troops. *Cf In re Yamashita* 327 U.S. 1 (1946).

E. The Principle of "Complementarity" Would Not Prevent the Trial of Americans by the ICC

ICC supporters often claim that the principle of "Complementarity" would protect Americans from prosecution and trial by the ICC, and so also would resolve the constitutional impediments to U.S. accession to the ICC Treaty. This too is incorrect, and the Clinton Administration wisely did not accept this illusory guarantee in Rome.

Under Article I of the ICC's Statute, the Court's jurisdiction is stated to be "complementary to national criminal jurisdictions," meaning that only if national jurisdictions are unwilling or unable to bring an accused individual to justice will the ICC act. Under Article 17 of the Statute, the ICC is empowered to make determinations of whether a State is unwilling or unable to carry out an investigation and prosecution. In particular, "[i]n order to determine unwillingness in a particular case," the Court will consider whether the national 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." *See* ICC Statute Art. 17.

This provision is an open invitation for the Court to examine each decision by the United States not to pursue some alleged offense by its military or civilian officials. Under the American constitutional system, decisions on whether to prosecute both military and civilian personnel are a matter for the Executive Branch. *See Morrison v. Olsen*, 487 U.S. 654, 691 (1988) ("There is no real dispute that the [investigative and prosecutorial] functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."). Since the individuals, military and civilian, most likely to be accused of offenses within the ICC's authority also are Executive Branch personnel, directly accountable to the President as Chief Executive and Commander-in-Chief of the Armed Forces, it might be said that the decision not to pursue a case in the United States can never be "independent" or "impartial." Upon this pretext, the ICC would be in a position to examine each and every use of American military power to determine whether, in its view, offenses within its authority have been committed. Thus, the principle of "complementarity" would be no bar to the arraignment of Americans before the ICC, if the United States were to join the ICC Treaty regime.

III. POLICY OBJECTIONS TO U.S. PARTICIPATION IN THE ICC TREATY REGIME

In addition to the very serious constitutional impediments to U.S. participation in the ICC Treaty regime, there are important policy considerations that militate against such participation.

A. *Surrender of American Sovereignty*

The erection of an international authority with substantive power over individual Americans in general, and American military and civilian officials in particular, represents a profound surrender of American sovereignty — the right of self-government. Today, the elected officials of the United States are responsible for their actions to the laws of the United States and to the electorate. If the United States were to ratify the ICC Treaty, these individuals could then be held accountable for their actions to the ICC in a very real and immediate way — through criminal prosecution and punishment. As Alexis de Tocqueville wrote in the last century, "[h]e who punishes the criminal is . . . The real master of society." *See* 1 Alexis de Tocqueville, *Democracy in America* 282–83 (Reeve trans. 1948 ed.), *quoted in Reid v. Covert*, 354 U.S. at 10 n.13.

At the same time, the ICC would not be accountable to the people of the United States for its own actions. For example, no action taken by the American people, or their elected representatives, could alter in any way a decision of the ICC. This is extraordinary power. Even when the Supreme Court has resolved a constitutional question, the American people, through their representatives in the Congress and the States, are free to amend to Constitution in order to reverse the Court's determination. By contrast, there would be no appeal from decisions of the ICC. This lack of accountability is fundamentally at odds with the principle of popular sovereignty and self-government upon which the American Republic is founded.

B. National Security Concerns With the ICC

Ratification of the ICC Treaty also would pose a direct threat to American national security interests. As explained above, although the ICC would, in principle, be limited in its jurisdiction, the application of that jurisdiction would be *entirely* within the Court's discretion. Violations of international humanitarian norms are very often in the eye of the beholder. Saddam Hussein, for example, would agree that war crimes were committed during the 1991 Persian Gulf War. In his view, however, the United States and its coalition allies were the perpetrators of these offenses, not himself.

Moreover, the offenses over which the proposed ICC would have jurisdiction are broadly defined. For example, under the ICC Statute "War Crimes" include "[i]ntentionally 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." This standard is emphatically subjective, as it calls for a consideration of whether a particular military action was justified when balanced with the damage it may have caused. The application of this standard would put the ICC prosecutor and judges in the position of reviewing and judging any American military action which may result in civilian casualties, and determining for themselves whether it was justified. In the process, the ICC could demand the surrender of American officials for trial, to determine if — in its unreviewable opinion — this standard was met.

The danger that the ICC might be used as a political tool against the United States is neither fanciful nor alarmist. The United States has interests and responsibilities around the world and the possibility that a prosecutor and bench staffed by individuals hostile to the United States or its interests is quite real. The Cold War is over, but the United States still has enemies and competitors. Indeed, as the World's only superpower, it is viewed with suspicion by many states, and with outright hostility by more than a few. All would have an equal vote in selecting the ICC's personnel if they choose to ratify the treaty.

Moreover, any assumption that the ICC would not be subject to politics may charitably be described as naive. The proof of the pudding, they say, is in the eating. The United Nations has been a political institution since its founding. Throughout the Cold War, the United Nations General Assembly ran a cottage industry of anti-Americanism. For example, as Allan Gerson, an aide to United States Ambassador to the United Nations Jeanne Kirkpatrick, wrote: "What seemed beyond doubt in the winter and spring of 1981 was that the United Nations was at war with the United States, that the United States was not faring well, and that it was no accident that its fortunes around the world were at an equally low ebb." Allan Gerson, *The Kirkpatrick Mission: Diplomacy Without Apology, America at the United Nations 1981–1985* xii (Free Press 1991).⁵

Of course, some of this can be attributed to the Cold War and the "bloc voting" it caused at the UN. However, it shows in stark terms the potential of international institutions to become the political tools of our opponents. Moreover, the United Nations has provided additional recent proof of its general attitude towards the United States. Since October, 1997, a number of United Nations "rapporteurs" have travelled throughout the United States to investigate "human rights abuses." In particular, these individuals have investigated the use of capital punishment, religious intolerance, and women in the prison system in the United States. See "Human Rights Probes Irk U.S.," *Wash. Times*, June 29, 1998, p. 1. There would, however, be one dramatic difference between the United Nations and the ICC — the ICC would have real and direct power to judge, and to punish, American officials and citizens who may displease its prosecutors and judges. There would be no appeal from the Court's decisions to any other authority.

ICC defenders suggest that fears of an overreaching court are ill-founded. One of the ICC's strongest advocates, former Canadian Justice and current Yugoslav Tribunal Prosecutor Louise Arbour, has argued that "there is more to fear from an impotent than from an overreaching Prosecutor ... an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad

⁵The U.S. was not, of course, the only target. Its allies came in for their share of this treatment. This was particularly true of Israel. As the Israeli Foreign Ministry has explained "the UN was used for years as a battleground for political warfare against Israel. The 21 Arab states, with the aid of Islamic countries, the non-aligned camp and the former Communist bloc, constituted an 'automatic majority,' assuring the adoption of anti-Israel resolutions in the General Assembly." (Israel Ministry of Foreign Affairs, *Israel Among the Nations: United Nations*, www.israel-mfa.gov.il/facts/nations/fnation9.html).

faith from improper purposes.” See Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court (Dec. 8, 1997).

This, of course, is fundamentally at odds with the most basic tenets of American government. Indeed, if there is one particular American contribution to the art of statecraft, it is the principle — incorporated into the very fabric of our Constitution — that the security of our rights cannot be trusted to the integrity of our leaders. By its nature, power is capable of abuse and people are, by nature, flawed. As Madison wrote in the *Federalist* in support of strong separation of powers:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place *oblige it to control itself*.

The Federalist No. 51 (James Madison) 347, 349 (J.E. Cooke ed. 1961).

The ICC would not be obliged to control itself. In fact, the ICC would invite the exercise of arbitrary power by its very design. As an institution, it would act as policeman, prosecutor, judge, jury, and (potentially) jailor — all of these functions would be performed by its personnel, with only bureaucratic divisions of authority. As noted above, there would be no appeal from its judgments to any other authority. If the ICC abused its power, the individual defendant would have no legal recourse.

From first to last, the ICC would be judge in its own case. At the same time, the ICC would exercise the most fundamental power of government — the administration of criminal justice. The rights of individuals before it would depend entirely upon its will — good or bad. The Administration was correct to refuse to sign the ICC Treaty.

IV. AUTOMATIC APPLICATION OF THE ICC TREATY TO THE UNITED STATES, WITHOUT ITS CONSENT, WOULD BE ILLEGAL

The ICC Treaty, as agreed at the recently concluded Rome Conference, would allow the ICC to exercise its jurisdiction over Americans even though the United States has failed to sign and ratify the ICC Treaty. This assertion of power is unprecedented and entirely unsupported in international law.

The ICC is to be established by treaty, and one of the most basic principles of the law of treaties is that States cannot be bound to a treaty without their consent. See Vienna Convention on the Law of Treaties, Art. 34, *reprinted in* Louis Henkin, et al., *Basic Documents Supplement to International Law: Cases and Materials* 94 (3d ed. 1993) (“A treaty does not create either obligations or rights for a third State without its consent.”); Restatement (Third) of The Foreign Relations Law of the United States § 324 (1987) (same). Consequently, that court cannot exercise its jurisdiction over American nationals without the express consent of the United States. This consent has been refused.

Any claim by the ICC, or the States Parties to the ICC Treaty, that the Court is entitled to exercise its power over American nationals, whether military or civilian, would also be fundamentally inconsistent with the United Nations Charter. The United Nations Charter guarantees the sovereign equality of states. See U.N. Charter, Art. 2, Cl. 1., (“The Organization is based on the principle of the sovereign equality of all its Members.”), *reprinted in* Ian Brownlie, *Basic Documents in International Law* 1, 3 (4th ed. 1995). This sovereign equality includes, among other things, the fundamental principles that “(a) States are juridically equal; (b) Each State enjoys the rights inherent in full sovereignty; (c) Each State has the duty to respect the personality of other States.” See U.N. General Assembly’s Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *reprinted in* Brownlie, *supra*, at 36, 44.

By asserting the jurisdiction of the ICC, an institution that is entirely a creature of the ICC Treaty and has no foundation in customary international law, the ICC Treaty States Parties have violated these principles. In particular, they have attempted to act as an international legislature, imposing legal obligations and perils on the citizens of the United States without the consent of their government. This action is illegal. Consequently, any attempt by the ICC to exercise its jurisdiction over the citizens or nationals of the United States would constitute a grave violation of international law. The United States can, and should, take all necessary actions to ensure that American citizens are not seized and brought before this tribunal for alleged offenses purportedly within its jurisdiction.

V. Conclusion

United States participation in the ICC Treaty Regime would be unconstitutional. It would subject Americans to prosecution and trial in an extra-constitutional court, under the auspices of the United States as a State Party to the ICC Treaty, for criminal offenses otherwise within the judicial authority of the United States. Moreover, Americans brought before the ICC would not be accorded the guarantees of the Bill of Rights, especially the right to trial by jury in the State and district where the crime took place.

In addition, United States accession to the ICC Treaty would constitute an unprecedented surrender of American sovereignty — the right of the people of the United States to self-government. It would subject the elected and appointed officials of the United States, both civilian and military, to the review and judgment of an international institution in no way accountable for its actions to the American people.

The Administration was right to refuse to sign this flawed treaty. The United States would now be entirely within its rights under the recognized principles of international law to oppose, and to frustrate, any attempt by the ICC, or States Parties to the ICC Treaty, to reach American nationals.

Prepared Statement of Michael P. Scharf

Good morning, Mr. Chairman and distinguished Senators. I am Michael P. Scharf. I am currently Professor of Law and Director of the Center for International Law and Policy at the New England School of Law. From 1989–1993, I served as the Attorney-Adviser in the Office of the Legal Adviser of the U.S. Department of State with responsibility for the issue of a permanent international criminal court. I am the author of four books about international criminal tribunals, including the Pulitzer Prize nominated *Balkan Justice*. A fuller biography is attached.

Going into the Rome Diplomatic Conference, both the U.S. Congress and the Administration in principle recognized the need for a permanent international criminal court. Any discussion of what happened in Rome must begin by recalling the case for such an institution.

In his book, *Death by Government*, Professor Rudi Rummel, who was nominated for the Nobel Peace Prize, documented that 170 million civilians have been victims of war crimes, crimes against humanity, and genocide during the 20th Century. We have lived in a golden age of impunity, where a person stands a much better chance of being tried for taking a single life than for killing ten thousand or a million. Adolf Hitler demonstrated the price we pay for failing to bring such persons to justice. In a speech to his commanding generals on the eve of his campaign into Poland in 1939, Hitler dismissed concerns about accountability for war crimes and acts of genocide by stating, “Who after all is today speaking about the destruction of the Armenians.” He was referring to the fact that the Turkish leaders were granted amnesty in the Treaty of Lausanne for the genocidal murder of one million Armenians during the First World War. After the Second World War, the international community established the Nuremberg Tribunal to prosecute the major Nazi war criminals and said “Never Again!”—meaning that it would never again sit idly by while crimes against humanity were committed. Shortly thereafter, the U.N. began work on the project to establish a permanent Nuremberg Tribunal.

But because of the cold war, the pledge of “never again” quickly became the reality of “again and again” as the world community failed to take action to bring those responsible to justice when 2 million people were butchered in Cambodia’s killing fields, 30,000 disappeared in Argentina’s Dirty War, 200,000 were massacred in East Timor, 750,000 were exterminated in Uganda, 100,000 Kurds were gassed in Iraq, and 75,000 peasants were slaughtered by death squads in El Salvador. Just as Adolf Hitler pointed to the world’s failure to prosecute the Turkish leaders, Radovan Karadzic and Ratko Mladic were encouraged by the world’s failure to bring Pol Pot, Idi Amin, and Saddam Hussein to justice for their international crimes.

Then, in the summer of 1992, genocide returned to Europe just when the U.N. Security Council was freed of its cold war paralysis. Against great odds, a modern day Nuremberg Tribunal was established in The Hague to prosecute those responsible for atrocities in the Former Yugoslavia. Then a year later, genocide reared its ugly head again, this time in the small African country of Rwanda where members of the ruling Hutu tribe massacred 800,000 members of the Tutsi tribe. In the aftermath of the bloodshed, Rwanda’s Prime Minister-designate (a Tutsi) pressed the Security Council: “Is it because we’re Africans that a similar court has not been set up for the Rwanda genocide.” The Council responded by establishing a second international war crimes Tribunal in Arusha, Tanzania.

With the creation of the Yugoslavia and Rwanda Tribunals, there was hope that ad hoc tribunals would be set up for crimes against humanity elsewhere in the world. Genocidal leaders and their followers would have reason to think twice before committing atrocities. But then something known in government circles as “Tribunal fatigue” set in. The process of reaching agreement on the tribunal’s statute, electing judges, selecting a prosecutor and staff, negotiating headquarters agreements and judicial assistance pacts, and appropriating funds turned out to be too time consuming and politically exhausting for the members of the Security Council. A permanent international criminal court was universally hailed as the solution to the problems that afflict the ad hoc approach. As President Clinton said on the eve of the Rome Conference: “We have an obligation to carry forward the lessons of Nuremberg . . . Those accused of war crimes, crimes against humanity and genocide must be brought to justice . . . There must be peace for justice to prevail, but there must be justice when peace prevails.”

So what went wrong in Rome? Why at the last minute did the United States Delegation feel compelled to join a handful of rogue States and notorious human rights violators such as Iran, Libya, China, and Iraq in voting against the statute for a Permanent International Criminal Court, while all of our allies (except Israel) voted in favor of the Court?

Rome represented a tension between the United States, which sought a Security Council-controlled Court, and most of the other countries of the world which felt no country’s citizens who are accused of war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court. The justification for the American position was that, as the world’s greatest military and economic power, more than any other country the United States is expected to intervene to halt humanitarian catastrophes around the world. The United States’ unique position renders U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In sum, the Administration feared that an independent ICC Prosecutor would turn out to be (in the words of one U.S. official) an “international Ken Starr.”

The rest of the world was in fact somewhat sympathetic to the United States’ concerns. What emerged from Rome was a Court with a two-track system of jurisdiction. Track One would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda. The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor. This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court’s statute. Everyone recognized that the real power was in the first track. But the United States still demanded protection from the second track of the Court’s jurisdiction. Thus, the following protective mechanisms were incorporated into the Court’s Statute at the urging of the United States:

First of all, the Court’s jurisdiction under the second track would be based on a concept known as “complementarity,” which was defined as meaning the Court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute. Under this principle, for example, the Court would not have had jurisdiction over the infamous My Lai massacre since the United States convicted Lt. Calley and prosecuted his superior officer, Captain Medina.

Second, the ICC Statute specifies that the Court would have jurisdiction only over “serious” war crimes that represent a “policy.” Thus, random acts of U.S. personnel, such as the downing of the Iran Airbus by the *USS Vincennes*, would not be subject to the Court’s jurisdiction.

Third, the Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. And the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

Fourth, the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. This gives the United States and the other members of the Security Council a collective (though not individual) veto over the Court where the Council is seized of a matter.

Finally, the Diplomatic Conference adopted the U.S. proposals for the selection of judges to ensure against a politicized Court. While researching my book, *Balkan Justice*, I observed the first trial before the Yugoslavia Tribunal in The Hague. I can tell you that those judges were truly independent. They did not in any way re-

flect the predispositions of their home countries. The selection process produced a bench made up of the most distinguished international jurists in the world. And the Yugoslavia Tribunal's jurisprudence to date reflects a respect for the rights of the defendant every bit as strong as that found in U.S. courts. The experience with the Yugoslavia Tribunal can give us comfort that a permanent international criminal tribunal would be no Kangaroo court.

The United States Delegation played hard ball in Rome and got just about everything it wanted. These protections proved sufficient for other major powers including the United Kingdom, France and Russia. But without what would amount to an iron clad exemption for U.S. servicemen, the United States felt compelled to force a vote, and ultimately to vote against the Court. The final vote on the Statute was 120 in favor, 7 against, with 21 abstentions. I understand that the delegates loudly cheered for fifteen minutes when the tally was announced. I'm told that a few of the members of the U.S. Delegation had tears in their eyes.

The ICC Statute will come into force when 60 countries ratify it, which given the overwhelming vote in favor, should be within a relatively short period of time. Where does that leave us? Within five years the world will have a permanent international criminal court even without U.S. support. As a non-party, the U.S. will not be bound to cooperate with the Court. But this does not guarantee complete immunity from the Court. It is important to understand that U.S. citizens, soldiers, and officials could still be indicted by the Court and even arrested and surrendered to the Court while they are visiting a foreign country which happens to be a party to the Court's Statute.

Moreover, by failing to sign the Statute, the U.S. will be prevented from participating in the preparatory committee which will draft the Court's Rules of Procedure and further define the elements of the crimes within the Court's jurisdiction. Also, by failing to sign the Statute, the U.S. will be prevented from nominating a candidate for the Court's bench, participating in the selection of the Court's Prosecutor and judges, or voting on its funding. The most important question, which cannot be answered at this time, is whether the adverse diplomatic fallout from the United States' action in Rome will ultimately prevent it from being able to utilize the first track of the Court's jurisdiction: that is, Security Council referral of cases.

The worst thing about the U.S. decision to break consensus and vote against the permanent international criminal court is that the Rome conference will end up sending a mixed message to future war criminals and genocidal leaders. The U.S. action may be viewed as evidence that the world's greatest power does not support the international effort to bring such persons to justice. A future Adolf Hitler may point to the U.S. action in telling his followers that they need not fear being held accountable.

In the final analysis, the U.S. may have lost far more than it gained by voting against the ICC Statute. After having won so many battles in Rome, it is not clear why the U.S. Delegation did not declare victory and vote in favor of the Court (though ratification may have had to await a more favorable political climate). There's still time for a change of heart. After all, it took the United States over thirty years to ratify the 1948 Genocide Convention. But we finally did the right thing. Thank you.

Additional Statements Submitted for the Record

Statement Submitted by The Lawyers Committee for Human Rights

THE TREATY TO ESTABLISH A PERMANENT INTERNATIONAL CRIMINAL COURT

July 22, 1998

The Lawyers Committee for Human Rights submits this statement on the International Criminal Court (ICC) to the International Organizations Subcommittee of the Senate Committee on Foreign Relations. Since 1978, the Lawyers Committee for Human Rights has worked to promote international human rights. Its programs focus on analyzing and building the legal institutions and structures that will guarantee human rights in the long term. The Lawyers Committee played a leading role in keeping the ICC negotiating process on track toward crafting a statute that will preserve the integrity of the ICC. Through analyses of the legal and political issues and active consultation with key negotiators, we worked to mobilize support for a strong and credible court that will punish heinous international crimes and deter future atrocities. Although the Rome treaty falls short of what we advocated for, it does provide a framework of international justice for future generations. This court is squarely in the national interest of the United States and deserves its support.

Background

In the 50 years since the Nuremberg trials, genocide, crimes against humanity and serious war crimes have been committed in many parts of the world. The perpetrators usually escaped justice because there was no court able and willing to hold them accountable. The Court will have jurisdiction to prosecute those suspected of the most serious international crimes whenever a national government is unable or unwilling to do so.

The negotiations concluded in Rome on July 17 reflected widespread international consensus that a permanent court must be established.

Why An ICC Is Needed

Experience has demonstrated that the worst human rights criminals, especially those in positions of authority, are rarely called to account by their own governments. The U.N. Security Council established the ad hoc tribunal for the former Yugoslavia precisely because national authorities were unlikely to punish those responsible for atrocities. Even when the political will exists, as in Rwanda, fair prosecution is often impossible because conflicts have disrupted or even destroyed a country's judicial system.

The ICC will not prevent all future human rights violations. But it will provide a forum to prosecute the most heinous international crimes when national systems are unable or unwilling to do so. It will also serve to deter those who would commit genocide, crimes against humanity and war crimes, by confronting them with the threat of punishment. It would offer redress to victims where national courts cannot provide it. It would strengthen peace and end the cycle of violence, by offering justice as an alternative to revenge. And it would contribute to the process of reconciliation, by replacing the stigma of collective guilt with the catharsis of individual accountability. But unlike the ad hoc tribunals, which can raise questions of selective justice and political motivations, the legitimacy of a permanent ICC created by treaty by U.N. member nations would not be open to challenge. The Court would have the same mandate wherever the crimes under its jurisdiction are committed.

The ICC is in the national interest of the United States. A court capable of effectively stepping in when national judicial systems are unwilling or unable to prosecute those who commit genocide, crimes against humanity or serious war crimes will help deter those crimes. Increased deterrence will lessen the chances that U.S. military personnel will need to be deployed in response to future Bosnias. And an effective court will help deter the commission of war crimes against U.S. military personnel when they are deployed overseas.

Safeguards Against Inappropriate Prosecutions

Some have raised the concern that the Court might become a tool for politically motivated prosecutions of Americans, especially military personnel deployed abroad. This concern is legitimate, but the final treaty contains provisions that address this concern. Four important safeguards in the treaty are designed to protect against inappropriate investigations of U.S. citizens, and would do so without sacrificing the Court's independence.

First, the subject matter jurisdiction of the Court will be limited to the most egregious international crimes: genocide, crimes against humanity and serious war crimes. This limited jurisdiction necessarily will restrict the investigations that the Prosecutor can undertake to claims that those crimes have been committed. Nothing in the Court's limited jurisdiction would permit the prosecutor to investigate allegations of other types of wrongdoing. The United States was very involved in defining those crimes and including high thresholds to ensure that the Court deals only with the most serious offenses.

Second, and perhaps most important, the ICC will cede jurisdiction to the national courts of countries willing and able to prosecute individuals who commit these crimes. Under the principle of "complementarity," the Court will be empowered to act only when national judicial systems are not available to do so. Thus, a case will be inadmissible before the ICC whenever a State is exercising, or has exercised, its national jurisdiction over a case. By the treaty's terms, the ICC will have not have jurisdiction when a national investigation is taking place or has occurred. This means that whenever a State does carry out its obligation to investigate, even if it decides not to prosecute, the ICC cannot intercede. The only exceptions are when a State intentionally tries to avoid its international obligations by willingly shielding a criminal from responsibility, as is the case now with many of the indicted war criminals in the former Yugoslavia, or where the judicial system has collapsed, as in the case in Rwanda. Quite simply, the Court is neither designed nor intended to supplant independent and effective judicial systems such as the U.S. military and civilian courts.

Third, judicial oversight will ensure prosecutorial accountability. The treaty already provides for early judicial review of both the merits of a case and whether a national judicial system is available. The U.S. delegation succeeded in further strengthening these safeguards during the negotiations.

Finally, safeguards in the election and removal of the Prosecutor and Deputy Prosecutor provide accountability. The treaty requires that they be "persons of high moral character [and] be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases." The natural counterpart to election of the Prosecutor and Deputy Prosecutors is their removal, which the treaty allows by vote of a majority of states parties.

The United States has a national interest in an effective ICC as well as an interest in protecting against inappropriate prosecutions before such a court. These interests are not mutually exclusive. The final ICC treaty preserves both interests. The United States should not unnecessarily sacrifice the national interest in promoting international justice in the mistaken belief that an independent court might act irresponsibly. The safeguards outlined above—especially the principle of complementarity—will promote an independent and effective court while protecting against inappropriate prosecutions.

Statement Submitted by Richard Dicker of Human Rights Watch

The urgent need for this International Criminal Court (ICC) has been underscored by the spectacular failure of national court systems to hold those accused of the most serious crimes under international law accountable for their acts. The United States had strongly supported the Courts' creation up until the final negotiations. A foundational principle of this Court is that it will only operate in situations where a national jurisdiction is "unable or unwilling" to bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. Before the ICC could try a case, the Court's Prosecutor must prove that the national authorities were acting "with the intent to shield an individual from international criminal responsibility." This threshold provides a strong safeguard against unnecessary prosecutions.

Human Rights Watch, one of the world's largest non-governmental monitors of violations of human rights and the laws of war, believes this Court has tremendous potential to deter atrocities and provide justice to the victims of the world's most heinous atrocities. It is for this reason that we profoundly regret the failure of the United States to support the treaty that was overwhelmingly adopted in Rome, and take recent diplomatic statements threatening "active opposition" on the part of the United States to the treaty to be misguided and indeed, contrary to this nation's interest in world peace and justice.

The claim that the statute is "overreaching" in that it purports to bind non-States Parties through the exercise of jurisdiction over their nationals is a gross mischaracterization. To begin with, it does not "bind" non-States Parties or impose upon them any novel obligations under international law. What it does do, is permit the ICC to exercise jurisdiction over the nationals of non-States Parties where there

is a reasonable basis to believe they have committed the most serious international crimes. There is nothing novel about such a result. The core crimes in the ICC treaty are crimes of universal jurisdiction—that is, they are so universally condemned, that any nation in the world has the authority to exercise jurisdiction over suspects and perpetrators, *without the consent of that individual's state of nationality*. Thus, in the extremely unlikely event that a U.S. service person were to commit such a crime abroad, that State would be able to investigate and prosecute the individual without U.S. consent.

Nor is there anything unusual about the conferral of jurisdiction over nationals of non-State Parties through the mechanism of treaty law. The United States is party to a dozen anti-terrorism treaties that provide universal jurisdiction for these crimes, and empower States Parties to investigate and prosecute perpetrators of any nationality found within their territory. The United States has exercised jurisdiction over foreigners on the basis of such treaties, without the consent of their state of nationality. Indeed, the United States extradites and surrenders its own citizens all the time to be tried by foreign courts that are not subjects to the United States Constitution or its Bill of Rights. There is no Constitutional impediment to this, and indeed, there would be no such hurdle to the surrender of U.S. nationals to an international tribunal either. The one innovation of the ICC treaty is that it similarly allows states on whose territories these crimes were committed to allow the ICC to proceed in lieu of the state itself. Given that the ICC will follow the highest international standards of procedural fairness and protection of defendants' rights, this may often be preferable to having the accused tried in a foreign national court.

It is of more than semantic importance to underscore that non-States Parties are not "bound" by the ICC treaty. The treaty does not impose any duty on non-States Parties that they are not already bound to fulfill. All nations are already obligated to investigate and punish anyone who commits genocide, crimes against humanity, or the most serious war crimes, and this fact is reflected in the treaty's complementarity provisions that bar the ICC from acting where a State is taking up this task. Although it is possible for citizens of a non-State Party to come before the ICC, the state itself incurs no new obligations, and indeed, not even the obligation of cooperation with the Court, unless the referral comes from the Security Council itself.

The United States in particular objected to the inclusion of the consent or ratification of the state on whose territory the crime was committed as satisfying the preconditions to jurisdiction, and proposed that only the state of nationality of the suspect be able to satisfy the precondition through its consent or ratification of the treaty. Such a narrow door to the ICC's exercise of its powers would exclude virtually any world-class criminal. No one imagines Saddam Hussein consenting to his own prosecution for war crimes committed in Kuwait.

In fact, such a narrow basis for the exercise of jurisdiction would have operated as a powerful disincentive for states to ratify the treaty—a sort of "poison pill" to ensure the ICC never became operational. If refraining from ratifying the Court's statute were the on sure-fire way of guaranteeing that no citizen was ever the subject of an ICC prosecution, many states would think long and hard about ratifying at all. It would not make sense, therefore, for the United States to stake its position vis-a-vis the Court on this issue if it otherwise favored joining the treaty.

In contrast, the current formulation that allows either the state where the crime was committed or the state of the suspect's nationality to act as the "door" to jurisdiction provides an additional incentive to ratification. Governments that want to insure redress should they ever be invaded and subjected to these atrocities can ratify this treaty, secure in the knowledge that this "insurance" will only operate should their nation be rendered incapable of enforcing justice in its own courts.

The United States has also objected to the power of the prosecutor to act independently to initiate the investigation of matters on the basis of information from sources such as victims, United Nations personnel, or non-governmental groups, arguing that this would overwhelm the prosecutor and transform the office into a human rights ombudsperson. Yet it advanced no solution to this problem, though many have been suggested, including panels of experts to screen out frivolous or marginal cases. And indeed, the United States succeeded in imposing a powerful check on the prosecutor's power to commence investigation of a matter by subjecting it to a rigorous process of challenge by an affected State and review by successive levels of the ICC—all without prejudice to the State's ability to also challenge the investigation of any individual suspect's case.

In fact, the United States won myriad concessions at the negotiations that are reflected throughout the body of the treaty, in terms of the threshold definitions of crimes, and the opt-out provision for war crimes generally, that constrict the reach of the Court to a considerable degree and make the chances of prosecution of a

United States citizen extremely remote indeed. It is notable that other world powers widely deployed abroad, such as France, the United Kingdom and Russia, did not see this treaty as exposing their nationals to frivolous or malicious prosecutions; and it is our hope that the United States will ultimately come to this point of view.

Related Documents

Rome Statute of the International Criminal Court

A/CONF.183/9
17 July 1998

UNITED NATIONS

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

Rome, Italy

15 June–17 July 1998

[Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.]

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 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 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 a 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) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully 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) Willfully 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 law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hos-

pitals 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 paragraphs 2 (c) and (d) 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 author-

ize 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 notice, 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, paragraph 2. 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 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 in respect of the proceedings of which deferral 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 before 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 articles 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 at-

tempt 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:

1. 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:

(a) 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

(b) 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.

2. With respect to superior and subordinate relationships not described in paragraph 1, 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:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) 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.

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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 inclusive, 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 in 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; and
 - (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;
 - (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 the 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 of this Statute, 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;
 - (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 for 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 (j), 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 8 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 2, 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 conjunction 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.

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 the 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 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 under 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 of the Statute affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

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 73 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 in 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 Part 9, 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 Part 9 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. 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.

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 articles 18 and 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 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 con-

ditions, 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 of 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*:

(1) 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

(2) The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) (1):

(1) 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;

(2) 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 the 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

Without prejudice to article 53, paragraph 2, where there is an admissibility challenge under consideration by the Court pursuant to articles 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 articles 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 custodial 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 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 articles 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 defence or 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;

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; and

(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,

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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 the 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. 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 the 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.

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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 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 next Assembly of States Parties 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 article 5 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 the Statute with immediate effect, notwithstanding paragraph 1 of article 127, but subject to paragraph 2 of article 127, 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 the 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 paragraph 1, 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 the 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.

**Statement of the United States Delegation to the Preparatory Committee
on the Establishment of an International Criminal Court**

March 23, 1998.

The United States is deeply concerned that at this late stage of the proceedings of the Preparatory Committee, certain fundamental tenets of International Humanitarian Law applicable to non-international armed conflict are still being questioned. It would be regrettable if, before Rome, the Preparatory Committee could not reach an understanding on the deletion of a number of brackets.

- To facilitate our progress in Rome, the United States strongly believes that the bracketed text “in armed conflict” should be deleted from the definition of crimes against humanity (paragraph 1, on page 32 of the Zutphen draft). Contemporary international law makes it clear that no war nexus for crimes against humanity is required. (The United States distributed a paper examining this issue on March 25, 1996.) The United States believes that crimes against humanity must be deterred in times of peace as well as in times of war and that the ICC Statute should reflect this principle.
- Section C of the definition of war crimes (on page 28 of the Zutphen draft), which incorporates common Article 3 of the Geneva Conventions, is currently bracketed. In our view, it is essential that those brackets be removed. The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC’s subject matter jurisdiction with regard to non-international armed conflicts.
- Finally, the United States urges that there should be a section, in addition to Section C, covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non international armed conflicts a part of the ICC’s jurisdiction.

The United States is eager to work with other delegations to build strong consensus on these matters

Statement of the United States Delegation on Elements of Offenses

UNITED STATES DELEGATION,
April 3, 1998.

On Friday, March 27th, the U.S. delegation submitted a paper to the Preparatory Committee as an illustration of how a set of criminal elements, annexed to the Statute, might appear. We solicited, and have received comments on this paper, and have since submitted the paper as a conference document which is forthcoming as DP 11. (It may not be translated by the end of the Preparatory Committee meeting)

The overwhelming majority of comments have been positive with respect to the need to define crimes with the clarity, precision and specificity many jurisdictions require for criminal law. This is consistent with adherence to the principle of *nullum crimen sine lege* and the desires for specificity in the definition of crimes expressed in reports from earlier Preparatory Committee meetings. We have also received some critical comments, however, or perhaps more appropriately—expressions of cautious reservation, due to the necessarily late submission of our proposed annex and what some see as a potential to delay negotiation of the treaty in Rome.

I would like to take a moment to address these concerns directly.

We hope for a successful conclusion of a diplomatic conference in Rome. We view our proposal regarding a criminal elements annex as being entirely consistent with and, in fact, advancing the constructive approach our delegations have taken to achieve that aim.

The United States continues to believe that the inclusion of an annex which lays out criminal elements is a fundamental requirement for a successful criminal statute. We understand that different criminal justice systems function with different levels of specificity, but if the International Criminal Court is to enjoy the widespread acceptance, recognition and respect that it must have to function appropriately, it must not have standards of criminal justice that are less rigorous than those of its member states. Considering the seriousness of the crimes and penalties in these cases, specificity becomes an issue of fundamental fairness.

Addressing the issue of timing, let me explain why we have just now introduced DP 11 as opposed to at an earlier time. The answer is closely related to the fact that we could only submit a template or model and not a specific proposal. The task of listing elements of offenses is logically accomplished subsequent to reaching consensus on the list of crimes. However, at this juncture, such consensus has not been achieved. Therefore, the United States has prepared this document to serve as a potential template or model for a parallel effort in Rome or follow-on negotiations of a more technical nature.

More than two years ago, there was widespread agreement that the statute would need to define crimes with the clarity and precision of a criminal statute. While there may be different perceptions of what the terms "clarity" and "precision" really mean, there can be no disagreement that the current formulations of crimes do not contain the requisite specificity. Our current list of crimes in the draft statute uses language frequently drawn directly from Hague or Geneva Conventions. While accommodating some concerns of the international lawyer, these conventional formulations are not crafted so as to address the needs of the criminal practitioner.

Moving beyond the timing of our proposal, I would like to address the issue of the potential for delay. No one has suggested a less ambitious goal than completion in Rome, but likewise we should accept nothing less than a thorough comprehensive treaty. We should not allow ourselves to conclude that any necessary effort is simply "too hard to complete in Rome. Nevertheless, we have attempted to accommodate the concerns of other delegations by maintaining an attitude of flexibility on the specific procedures or mechanism by which the annex could be adopted. We have made several references to the criminal elements in the draft text, coupling them with the terms, "rules of evidence and procedure." The specific mechanism for adopting an elements annex must still be clarified.

While timing may be a point for discussion, we believe that the status of the elements as a constituent part of the statute should be presumed. The essence of this entire effort is the preeminence of the rule of law. This law binds alleged perpetrators as well as the prosecutors and judges that make them accountable. The elements must be a part of the statute; they carry with them the rigor that gives a criminal tribunal its authority as an institution under the law.

Some argue that those bred in civil law have found the common law character of the elements paper difficult. We sympathize with their concerns and are happy to consult with them. Consultations thus far lead us to believe that it would be possible to make this paper broadly acceptable to a wide range of delegations. It may be that the best way of proceeding in Rome would be to charge a group of experts drawn from different legal systems to finalize the elements text for adoption, as an annex to the Statute, at the end of the Rome conference.

Some delegations may believe that the task of reaching consensus on elements is a daunting one, given the short time available. They may believe that discussions about the elements will be as complex as the discussions we had about principles of criminal law and the list of crimes. But the elements are meant to be simple and practical. In fact, the removal of any perceived ambiguity in the current crime list could facilitate agreement on that list. They are something readily familiar to criminal practitioners, a necessary guide to prosecutors of what must be proved, and to defense counsel of what must be defended against.

Conversely, some have argued that there is no controversy regarding what the elements are, and thus, negotiating them is an unnecessary task. If this is the case, then we should reach quick agreement at Rome, without any controversial discussion. However, if there are some points of disagreement in the elements, then discussion and agreement on them become even more important. How can we ask the global community to accept the jurisdiction of a court, when we cannot even agree on the precise nature of the criminal activity that would be subject to it?

The U.S. delegation strongly urges other delegations to take a close look at the criminal elements paper that we have proposed. We must ensure that our endeavors are oriented toward establishment of a responsible permanent international criminal justice system. We cannot abandon the task in the face of difficulties, and leave it for the court. We will elect judges to judge, not to legislate.

In conclusion, we do not believe the court should become operational before the elements are adopted. And this, of course, is also true about the need to adopt rules of evidence and procedure before the court becomes operational. Our proposal is designed to create a truly viable and effective permanent court that deserves the authority and responsibility we give it.

**Proposal Submitted by the United States of America on Elements of
Offences for the International Criminal Court**

A/AC.249/1998/DP.11

2 April 1998

Original: English

Preparatory Committee on the Establishment of an International Criminal Court
16 March–3 April 1998

PROPOSAL SUBMITTED BY THE UNITED STATES OF AMERICA

Elements of Offenses for the International Criminal Court

1. The attached reference paper is submitted to the Preparatory Committee as an illustration of how a set of criminal elements, annexed to the Statute, might appear.

2. The March–April and August 1996 Proceedings of the Preparatory Committee reported that “[t]here was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*).” Significant attention was given to the concept that articles dealing with crimes should identify “the essential elements of the offenses and the minimum qualitative and quantitative requirements.” The Committee reported, “[t]he definition of war crimes should clearly indicate in what circumstances, by which perpetrators and against which victims certain acts would constitute such crimes.”¹

3. The United States believes that elements of the crimes should be set forth in an annex to the Statute to provide the clarity and precision required to adequately instruct the Prosecutor and Court, to ensure respect for the rights of the accused. Current formulations of crimes in the Zutphen Draft Statute (A/AC.249/1998/L.13) tie norms to treaty formulations but fail to provide a useful tool to the practitioner. We believe criminal elements can give teeth to the concept of *nullum crimen sine lege*.

4. The task of listing elements of offenses is logically accomplished subsequent to reaching consensus on the list of crimes. However, at this juncture, such consensus may not be achieved prior to the Diplomatic Conference. Therefore, the United States has prepared this present document to serve as a potential template for a parallel effort in establishing elements for the eventual list of crimes under the Court’s jurisdiction. This effort could facilitate agreement on a list of crimes by removing fear that ambiguous terminology will be unfavorably interpreted by a judge. The existence of elements could provide a level of assurance that will allow consensus to develop for certain crimes and bolster the credibility of the Court.

5. These elements were drafted for a list of some 52 offenses found in the Zutphen draft that we believe are fairly widely accepted. They are consolidated here in a list of 32 substantive offenses. Reference to the statute’s formulation can be found in the “definition” section of each listing in this document. However, this is not meant to be a statement of support for or against any crime. Likewise, we are not necessarily bound to the substance of the provisions herein. Our goal is to facilitate discussion to reach what we believe is an achievable goal, and one that may allow many more countries eventually to join the statute.

Annex

ELEMENTS OF OFFENSES FOR THE INTERNATIONAL CRIMINAL COURT

A. Genocide

a. *Definition*: Any of several acts committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group, as such.

b. *Elements*:

(i) That the accused committed one or more of the following acts against a person in a national, ethnic, racial, or religious group, because of that person’s membership in that group:

a. Killing;

b. Causing serious bodily or mental harm;

c. Deliberately inflicting conditions of life calculated to bring about physical destruction of the group in whole or in part;

¹Official Records of the General Assembly, Fifty-first Session, Supplement No. 22 (A/51/22) par. 52–53.)

- d. Imposing measures intended to prevent births within the group;
- or
- e. Forcibly transferring children of the group to another group.
- (ii) That when the accused committed such act, the accused had the intent to take part in a plan to destroy such group in whole or in part.

B. Crimes Against Humanity

1. General comments

The following comments apply to all of Part B:

(a) A crime against humanity means any of the following acts when committed as part of a widespread or systematic attack against a civilian population: extermination, murder, torture, arbitrary imprisonment, arbitrary deportation, enslavement, rape and other forms of sexual abuse, including enforced prostitution, and enforced disappearance of persons.

(b) In contrast to war crimes, crimes against humanity need not take place during an armed conflict.

(c) All crimes against humanity require deliberate and purposeful action. Additionally, they share the element of being crimes constituent within a widespread or systematic attack. The accused need not be personally responsible for the widespread or systematic nature of the entire attack.

(d) "Widespread" means the attack is massive in nature and directed against a large number of individuals.

(e) "Systematic" means the attack constitutes or is part of, consistent with or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.

2. Murder

(a) *Definition from Statute.* Murder.

(b) *Elements:*

- (i) That the accused intended to kill or cause death to one or more non-combatant persons;
- (ii) That the accused killed or caused the death of one or more persons;
- (iii) That the killing was arbitrary and without lawful justification; and
- (iv) That the killing was carried out as part of a widespread or systematic attack.

(c) *Comment.* Since this offense requires deliberate and purposeful action, the thought of taking life must be consciously conceived and the act or omission by which it was taken must be intended.

3. Extermination

(a) *Definition:* Extermination.

(b) *Elements:*

- (i) That the accused intended to kill or cause to be killed a group of people, a population, or a large portion of a population;
- (ii) That the accused killed or caused to be killed one or more people;
- (iii) That the killing was deliberate and premeditated; and
- (iv) That the killing was carried out as part of a widespread or systematic attack.

(c) *Comments:*

(i) An accused may be found guilty of this offense if he imposed unlawful living conditions that were intended to be seriously injurious to health and safety and that were calculated to bring about death of a large portion of a population. An intentional failure to provide essential food, shelter, and medical care may be sufficient for a conviction. A siege or embargo conducted according to the laws of armed conflict is not extermination under this Statute.

(ii) Extermination is distinguished from genocide in that it does not require targeting the population to be based solely on nationality, race, ethnicity, or religion.

4. Enslavement

(a) *Definition:* Enslavement.

(b) *Elements:*

- (i) That the accused intended to own or cause to be owned one or more persons and the fruits of their labour;

(ii) That one or more persons was forced to do labor without any compensation;

(iii) That the accused exerted ownership rights over one or more persons so as to deprive them of all individual rights; and

(iv) That the enslavement was carried out as part of a widespread or systematic attack.

(c) *Comment.* The detention or internment of protected persons, defined in accordance with the Geneva Conventions of 1949, does not constitute enslavement under this Statute.

5. *Unlawful Imprisonment*

(a) *Definition:* Imprisonment in flagrant violation of international law or fundamental legal norms.

(b) *Elements:*

(i) That the accused intended to imprison or cause to be imprisoned a group of people, a population, or part of a population, with the knowledge that such imprisonment was unlawful;

(ii) That the accused unlawfully imprisoned or caused to be imprisoned one or more persons;

(iii) That in carrying out the imprisonment, the accused systematically conducted or caused to be carried out arrests, detentions, or use of sham legal process that departed substantially from established indispensable governing norms; and

(iv) That the imprisonment was carried out as part of a widespread or systematic attack.

(c) *Comments:*

(i) Upon a prima facie showing by the defense, the prosecutor has the burden of proving that imprisonment was not carried out for some lawful purpose. The following cases do not constitute arbitrary imprisonment: the lawful detention of persons after conviction by a competent court; the lawful arrest or detention of persons for non-compliance with the lawful order of a court or in order to secure fulfillment of any obligation prescribed by law; and the lawful detention of persons for the prevention of the spreading of infectious diseases or to otherwise safeguard health and safety.

(ii) Since this offense requires deliberate and purposeful action, a good faith belief that the imprisonment was lawful would undermine the intent element of the offense.

6. *Torture*

(a) *Definition:* Torture.

(b) *Elements:*

(i) That the accused intended to cause death, serious injury or severe pain to one or more persons;

(ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;

(iii) That the accused, at the time of such acts, had the intent to inflict severe physical or mental pain or suffering;

(iv) That the acts did not arise from or were not inherent in or incidental to lawful sanctions; and

(v) That the acts were carried out as part of a widespread or systematic attack.

7. *Deportation*

(a) *Definition:* Deportation or forcible transfer of population.

(b) *Elements:*

(i) That the accused intended to wrongfully deport or transfer a population or group of people from their lawful place of residence;

(ii) That the accused knew of population or group's lawful residence in the place from which the accused expelled them;

(iii) That the accused caused a population or group to be forcibly moved from their lawful place of residence without justification based on security considerations or other imperative reason of public welfare; and

(iv) That the forcible movement was carried out as part of a widespread or systematic attack.

(c) *Comment.* The “wrongfulness” of the intent element and the lack of justification for the movement preclude prosecution for justified movements such as:

- (i) Any movement of a population according to Article 49, of the First Geneva Convention, 1949;
- (ii) Any movement in case of an emergency or calamity threatening the life or well-being of the population;
- (iii) Any service of punishment lawfully imposed;
- (iv) Any movement required as a necessary adjunct of a lawful internment.

8. *Rape, Sexual Abuse, or Enforced Prostitution.*

(a) *Definition:* Rape or other sexual abuse of comparable gravity, or enforced prostitution.

(b) *Elements:*

- (i) That the accused intended to attack a person or persons through acts of a sexual nature;
- (ii) That the accused committed or caused to be committed one of the following acts by force:
 - a. Rape;
 - b. Sexual abuse; or
 - c. Enforced prostitution; and
- (iii) That the acts were committed as part of a widespread or systematic attack.

(c) *Comments:*

- (i) “Rape” is the forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object.
- (ii) “Sexual abuse” is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offenses of sexual mutilation, enforced pregnancy, and enforced sterilization.
- (iii) “Sexual mutilation” is forcibly causing serious physical injury to the victim’s sexual organs.
- (iv) “Enforced prostitution” is intentional sexual enslavement wherein the “forcible” element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature related to rape or sexual abuse.
- (v) “Committed by force” means the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress, or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

9. *Persecution*

(a) *Definition:* Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural or religious grounds and in connection with other crimes within the jurisdiction of the Court.

(b) *Elements:*

- (i) That the accused intended to deprive an identifiable group of persons of life, liberty or security of person;
- (ii) That the accused unlawfully and directly deprived one or more members of that group of life, liberty or security of person;
- (iii) That the deprivation caused death, serious physical or mental injury or a complete loss of human dignity;
- (iv) That the deprivation was motivated by the target group’s political, racial, national, ethnic, cultural or religious affiliation;
- (v) That the deprivation was carried out in conjunction with one or more of the other crimes against humanity described in this statute and as part of a widespread or systematic attack.

(c) *Comments:*

(i) The “directly” requirement in the second element of this offense necessitates that the accused’s actions be the proximate cause of any deprivation. Crimes of omission such as allowing starvation to take place would not be crimes against humanity under this section.

(ii) The intent element of this offense requires both an intent to deprive and a motivation that is based on a group’s political, racial, national, ethnic, cultural or religious affiliation.

C. War Crimes

1. General Comments

The following comments apply to all of Part C:

(a) *Military necessity*. The principle of military necessity authorizes that use of force, not otherwise specifically prohibited by the law of armed conflict, required for mission accomplishment or submission of the enemy.

(b) *Collateral damage*. Collateral Damage includes that incidental injury or additional damage that was not intended by an attack or course of action. It is not unlawful to cause incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective. The principle of *proportionality*, however, may prohibit some attacks on legitimate military objectives that would cause excessive collateral damage or injury.

(c) *Proportionality*. The principle of proportionality prohibits attacks which are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be clearly excessive in relation to the overall military advantage anticipated.

(d) *Evaluation of intent element in war crimes*. In several cases, there is a particular mens rea requirement for war crimes which involves a level of knowledge of the commander or other accused. Decisions by military commanders and others responsible for planning, deciding upon or executing attacks can only be judged on the basis of their assessment of the information reasonably available to them under the circumstances at the relevant time.

2. Willful Killing

(a) *Definition*: Willful killing; killing or wounding a combatant who, having laid down his arms or having no longer a means of defense, has surrendered at discretion; Violence to life and person, in particular murder of all kinds.

(b) Elements:

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That a certain person, protected under one or more of the Geneva Conventions of 1949 is dead;

(iii) That at the time of the act or omission, the accused knew or should have known that the victim was protected under one or more of the Geneva Conventions of 1949;

(iv) That the death resulted from the act or omission of the accused; and

(v) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the victim or another similarly protected person.

(c) Comments:

(i) This offense requires deliberate and purposeful action. The act or omission must have been accompanied by an intent to kill or cause great bodily harm, accompanied by knowledge of the intended victim’s status.

(ii) Willful killing encompasses faults of omission. The omission must have been intended to cause death or great bodily harm. Again, if death is the foreseeable consequence of such omission, intent can be inferred. Examples include giving instructions for food rations of prisoners of war to be reduced to such a point that malnutrition causes death and allowing wounded persons to die for want of reasonably available medical care.

3. Torture

(a) *Definition*: Torture; violence to life and person, in particular cruel treatment and torture; Willfully causing great suffering, or serious injury to body or health.

(b) Elements:

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused committed acts resulting in the infliction of severe physical or mental pain or suffering upon one or more persons;

(iii) That the accused, at the time of such acts, had the intent to inflict severe physical or mental pain or suffering;

(iv) That the acts did not arise from or was not inherent in or incidental to lawful sanctions.

4. *Inhuman treatment*

(a) *Definition:* Willfully causing great suffering or serious injury to body or health; violence to life and person, in particular mutilation; inhuman treatment, including biological experimentation; subjecting persons who are in the power of an adverse Party to physical mutilation or to medical or scientific experiments of any kind that are neither justified by the medical, dental, or hospital treatment of the person concerned nor carried out in his interest, and that causes death to or seriously endangers the health of such person or persons; committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused committed an act against a certain person or subjected that person to a particular medical or biological procedure or treatment;

(iii) (*for inhuman treatment*) That the act was intended to, and did in fact, subject the victim to mutilation, severe indignities, pain, or extreme suffering grossly out of proportion to the treatment expected of one human being from another; or

(iii) (*for biological experimentation*) That the intent of the procedure or treatment was non-therapeutic and was neither justified by medical reason nor carried out in the victim's interest; and

(iv) (*for both inhuman treatment and biological experimentation*) That the act or treatment caused death or serious injury to the mental or physical health of the victim.

5. *Extensive destruction or wrongful appropriation*

(a) *Definition:* Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict; Pillaging a town or place, even when taken by assault.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused willfully or recklessly destroyed, damaged, or appropriated certain real or personal property; and

(iii) That the amount of destruction, damage, or wrongful appropriation was clearly excessive, not justified by military necessity, and carried out wantonly.

(c) *Comments:*

(i) The wantonness requirement takes this offense beyond a mere intentional destruction or appropriation in excess of that required by military necessity and necessitates proof of a significantly heightened malice or arbitrary disregard for the rights of the victims.

(ii) Causing collateral damage cannot constitute this offense. Likewise, destruction or appropriation justified by military necessity is not unlawful.

(iii) Wrongful Appropriation means taking property from its lawful owner, or any other person with a greater possessory interest than the accused, with the intent to permanently deprive.

6. *Compelling hostile acts*

(a) *Definition:* Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; 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.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused coerced a certain person, by act or threat, to engage in hostile acts against that person's own country; and

(iii) That the person coerced was a prisoner of war or a civilian protected by one or more of the Geneva Conventions of 1949.

(c) *Comment:* Implicit in the second element is the fact that the acts compelled do not constitute lawful prisoner of war or civilian labor as defined by articles 49–57 of (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, 1949 and articles 51 and 52 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949.

7. Denying judicial guarantees

(a) *Definition:* Willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial; declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused allowed judicial proceedings to be concluded which resulted in some punishment of a certain prisoner of war or civilian within the accused's control;

(iii) That the accused intended to deprive the person of a fair and regular trial; and

(iv) (*for international armed conflicts*) That such act was performed without according the person a fair and regular trial as defined by the Third and Fourth Geneva Conventions of 1949; or

(iv) (*for non-international armed conflicts*) That such act was performed without judgment by a regularly constituted court or without the most manifestly indispensable judicial guarantees.

(c) *Comment:* For international armed conflicts, the substance of this offense is the violation of one or more of the penal provisions of articles 82–88; 99–108 of (Geneva) Convention (III) Relative to the Treatment of Prisoners of War, 1949, and articles 64–78 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949. For non-international armed conflict, the elements of the offense are only met when the combined violations of penal provisions rise to the level of indispensable judicial guarantees requisite for the most fundamental judicial norms, as provided in Common Article 3(d) of the Geneva Conventions of 1949.

8. Deportation

(a) *Definition:* Unlawful deportation, transfer, or unlawful confinement; Ordering the displacement of a civilian population other than that represented by the forces of the accused.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused held, confined, or otherwise restrained the liberty of a person or expelled a person from the territory in which that person resides for purposes other than lawful internment;

(iii) That the person was a civilian protected under one or more of the Geneva Conventions of 1949;

(iv) That the accused knew of the person's status as a lawful resident of the territory of the State; and

(v) (*for cases of deportation or transfer*) That the deportation or transfer was not conducted for security purposes or any other lawful reason; or

(vi) (*for cases of unlawful confinement*) that the restraint was not undertaken for security purposes and was effected without affording the procedural and substantive protections prescribed in the Fourth Geneva Convention of 1949.

(c) *Comment:* Occupying powers are authorized, for reasons of security, to intern civilians in some situations in accordance with Articles 78–104 of (Geneva) Convention (IV) Relative to the Protection of Civilian Persons in Time of War

of 1949. It is the prosecutor's burden to prove that internment of civilians was not undertaken for security purposes once a prima facie case is made for that defense.

9. Taking hostages

(a) *Definition:* Taking of hostages.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused seized, detained or otherwise held hostage a certain noncombatant person;

(iii) That the accused threatened to injure, kill, or continue to detain such person; and,

(iv) That the act was performed with the intent to compel a state, an international intergovernmental organization, a natural or juridical person, or a group of persons to do or refrain from doing any act as an explicit or implicit condition for the safe release of the person.

(c) *Comment:* This offense is distinguished from unlawful confinement by the additional element that the accused threatened to prolong the hostage's detention or to put him or her to death in exchange for some act by a third party. It is not constrained by the need for the victim to be a protected person or for the offense to take place during international armed conflict.

10. Attacking civilians

(a) *Definition:* Intentionally directing attacks against the civilian population as such, as well as individual civilians not taking direct part in hostilities.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused intentionally directed an attack against one or more civilians;

(iii) That the accused intended the object of the attack to be one or more civilians;

(iv) That the civilian or civilians against whom the attack was directed were not taking part in hostilities or located in proximity to, or within, a lawful military objective at the time the attack was initiated; and

(v) That the attack resulted in death or harm to one or more civilians.

(c) *Comments:*

(i) Since this offense requires deliberate and purposeful action, causing incidental injury or collateral damage does not constitute attacking civilians.

(ii) *Military objective.* Military objectives are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

11. Causing disproportionate damage

(a) *Definition:* 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 that would be excessive in relation to the concrete and direct overall military advantage anticipated.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused launched an attack

(iii) That the attack resulted in collateral damage or incidental injury;

(iv) That the collateral damage or incidental injury was manifestly excessive in relation to the overall military advantage anticipated;

(v) That the accused knew that such collateral injury or damage would be disproportionate to the military advantage gained.

(c) *Comments:*

(i) The knowledge element is key to proportionality analysis for this offense. Since the evaluation is necessarily subjective, the proportionality

knowledge threshold must be high and analysis must be based on the perspective of the accused prior to the attack.

(ii) Military advantage includes all benefits ranging from tactical goals to overall campaign objectives.

12. *Attacking an undefended locality*

(a) *Definition:* Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings that are undefended.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused launched an attack against a certain undefended locality;

(iii) That the attack was not justified by military necessity; and

(iv) That at the time of the offense, the accused knew that the object of the attack was an undefended locality.

(c) *Comments:*

An “undefended locality” is any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party and has been declared undefended by appropriate authorities of a party to the conflict. This declaration shall be addressed to the adverse party and such a locality shall fulfill the following conditions:

(a) All combatants, as well as mobile weapons and mobile military equipment must have been evacuated;

(b) No hostile use shall be made of fixed military installations or establishments;

(c) No acts of hostility shall be committed by the authorities or by the population; and

(d) No activities in support of military operations shall be undertaken.

13. *Improper use of a flag, symbol or uniform*

(a) *Definition:* 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; Killing or wounding treacherously individuals belonging to the hostile nation or army.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused wrongfully used a flag of truce, the flag of the enemy or of the United Nations, or the distinctive emblems of the Geneva Conventions; or wrongfully used the military insignia and uniform of the enemy or of the United Nations while engaging in attacks.

(iii) That the wrongful use of one or more of these items was intended to cause death, serious personal injury, or capture; and

(iv) That death, serious personal injury, or capture occurred as a direct result of the accused’s actions or wrongful misrepresentations.

14. *Attacking protected objects*

(a) *Definition:* Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes;

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused directed an attack against one or more of the following: a building dedicated to religion, art, science or charitable purposes, an historic monument, or a hospital or place where the sick and wounded are collected;

(iii) That the accused specifically intended such attack and its natural consequences with respect to the object of the attack;

(iv) That the object of attack was not being used for military purposes at the time of the attack; and

(v) That the accused knew the object of attack was not being used for military purposes at the time of the attack.

15. *Perfidy*

(a) *Definition:* Killing or wounding treacherously individuals belonging to the hostile nation or army; killing or wounding treacherously a combatant adversary.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused intended to kill or wound a combatant adversary;

(iii) That the accused committed an act resulting in the death or wounding of a combatant adversary;

(iv) That the accused intended the death or wounding to be accomplished by securing the confidence of a military adversary to believe himself to be entitled to, or obliged to accord, protection under the law of war, with intent to betray that confidence; and

(v) That the death or wounding occurred as a direct result of the accused's wrongful misrepresentations.

16. *Denying quarter*

(a) *Definition:* Declaring that no quarter will be given.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused was a person in command or had authority over certain forces;

(iii) That the accused declared to those subordinate forces that no quarter be given the enemy;

(iv) That in so declaring, the accused intended that his or her subordinates refuse quarter to the enemy; and

(v) That the refusal to accept surrender was not justified by military necessity.

(c) *Comment:*

(i) Denial of quarter is the refusal to accept an enemy's surrender when it is reasonable to do so.

(ii) Bringing a preponderance of force to bear against enemy military objectives or enemy personnel does not constitute denial of quarter. Neither is a commander obligated to offer an opportunity to surrender before carrying out an attack, since surprise or speed may be critical to the success of the attack.

17. *Sexual Offenses*

(a) *Definition:* Committing rape, sexual slavery, enforced prostitution, enforced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused intended to commit a certain sexual act upon a certain person or forced that person to engage in a certain sexual act;

(iii) That the accused committed or caused to be committed one of the following acts by force:

a. rape;

b. sexual abuse; or

c. enforced prostitution; and

(iv) That the acts were committed as part of a widespread or systematic attack.

(c) *Comments:*

(i) "Rape" is the forcible penetration, however slight, of any part of the body of another by the accused's sexual organ, or forcible penetration, however slight, of the anal or genital opening of another by any object.

(ii) "Sexual abuse" is any contact of a sexual nature by force or threat of force of comparable gravity to rape. It specifically includes the offenses of sexual mutilation, enforced pregnancy, and enforced sterilization.

(iii) "Sexual mutilation" is forcibly causing serious physical injury to the victim's sexual organs.

(iv) "Enforced prostitution" is intentional sexual enslavement wherein the "forcible" element need not be present for each individual sex act, but is generally present regarding a mandated occupation that involves acts of a sexual nature related to rape or sexual abuse.

(v) "Committed by force" means the sexual act was accomplished by force or threat of force against the victim or a third person. The threat of force can be either express or implied, and must place the victim in reasonable fear that he or she or a third person will be subjected to violence, detention, duress, or psychological oppression if the victim does not comply. Evidence of consent may negate the necessary force element. However, consent may not be inferred if resistance would have been futile, if the victim was forcibly detained, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties.

18. *Immunizing an area with protected persons*

(a) *Definition:* Utilizing the presence of a civilian or other protected persons to render certain points, areas or military forces immune from military operations.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That at the time of the offense, the accused was defending a military objective from likely attack;

(iii) That the accused either caused the military objective, civilian personnel or other persons protected under one of the Geneva Conventions of 1949 to be moved so that the military objective and the civilian personnel, or other protected persons would be either located together or otherwise positioned so that an attack against the military objective would seriously endanger the civilian personnel or other protected persons; and

(iv) That the accused's actions were intended to shield military objectives from attack, to shield, favor or impede military operations, or to otherwise undermine the adversary's will to attack or continue an attack.

19. *Attacking objects displaying a protective emblem*

(a) *Definition:* Intentionally directing attacks against buildings, material, medical units and transport, and personnel using, in conformity with international law, the distinctive emblems of the Geneva Conventions;

(b) *Elements:*

(i) That the alleged offense took place during the course of an armed conflict;

(ii) That the accused directed an attack against a building, material, a medical unit or transport, or person that was properly displaying a distinctive protective emblem of the Geneva Conventions;

(iii) That the accused knew the object of attack was properly displaying a distinctive protective emblem of the Geneva Conventions;

(iv) That the object of attack was not being used for a military purpose at the time of the attack; and

(v) That the accused did not believe that the object of attack was being used for a military purpose at the time of the attack.

20. *Starvation*

(a) *Definition:* Intentionally using starvation of civilians as method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused engaged in an act or omission calculated to attack, destroy, remove, or render useless objects indispensable to the nourishment and survival of the civilian population;

(iii) That the accused's act or omission was intended for the specific purpose of denying nourishment necessary for the survival of the civilian population of the adverse party; and

(iv) That as a result of the accused's acts, one or more persons died from starvation.

21. *Using illegal weapons*

(a) *Definition:* Employing the following weapons, projectiles and material and methods of warfare which are calculated to cause superfluous injury or unnecessary suffering: (i) poison or poisoned weapons, (ii) asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, (iii) 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, (iv) bacteriological (biological) agents or toxins for hostile purposes or in armed conflict, (v) chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction.

(b) *Elements:*

(i) That the alleged offense took place during the course of an international armed conflict;

(ii) That the accused knowingly used one of the following weapons against an adversary in that armed conflict:

- a. Poison or poisoned weapons;
- b. Asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- c. Bullets which expand or flatten easily in the human body;
- d. Bacteriological agents or toxins;
- e. Chemical weapons; and

(iii) That at the time of the offense, the accused knew the weapon was banned under international law.

(c) *Comments:*

(i) "Chemical weapons" means chemical weapons as defined in and prohibited by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction. It does not include Riot Control Agents as they are defined in that Convention.

(ii) Bacteriological agents or toxins means any microbial or other biological agent or toxin, whatever their origin or method of production.

Reference Paper Submitted by the United States of America on Rules of Evidence of the International Criminal Court

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Preparatory Committee on the Establishment of an International Criminal Court
16 March–3 April 1998.

REFERENCE PAPER SUBMITTED BY THE UNITED STATES

Rules of Evidence of the International Criminal Court

The attached reference paper is submitted to the Preparatory Committee as an illustration of how rules of evidence, contained within the Court's rules promulgated under Article 43 of the Statute, might appear.

Article 62 of the draft Statute addresses the law of evidence to be applied by the Court. Following extended debate on Article 62 during the past week, it now appears that many of the criteria for determining the relevance and admissibility of evidence will not be set forth in the Statute, but instead will be deferred to the rules. This Paper is intended to suggest potential structure and content of the rules of evidence.

A number of the draft provisions are derived, with appropriate modifications, from the Rules of Procedure and Evidence of the Tribunal for the Former Yugoslavia ("ICTY rules"), and the Draft Set of Rules of Procedure and Evidence for the International Criminal Court prepared by the delegations of Australia and the Netherlands (A/AC.249/L.2) ("A/NL rules"), and these sources are noted. In addition, we

have included explanatory notes where we thought it appropriate to highlight significant issues that will need to be considered in preparing the rules.

RULES OF EVIDENCE

(see Statute Article 62)

Rule 1: General Provisions

(derived from ICTY rule 89; A/NL rule 105)

(1) The rules of evidence set forth in this Section, together with Article 62 of the Statute, shall govern the proceedings before a Chamber.

(2) The rules of evidence set forth in this Section shall be interpreted to ensure fairness to the parties and to the end that the truth may be ascertained and cases justly decided.

(3) Where not otherwise provided for in this Section, a Chamber shall apply rules of evidence that will best favor a fair determination of the matter before it.

(4) A Chamber may admit any relevant evidence that it deems to be reliable and have probative value. Irrelevant evidence shall not be admitted.

(5) Relevant evidence may nonetheless be excluded for good cause, including that it would constitute a needless presentation of cumulative evidence, or result in undue delay.

(6) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(7) A Chamber may request verification of the authenticity of evidence.

Rule 2: Testimony of Witnesses

(derived from ICTY rule 90; A/NL rule 106)

(1) Before testifying, every witness shall make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

[N.B.: This rule governs a solemn declaration made by a witness, other than the accused. A number of delegations expressed support for a provision ensuring that an accused may make an unsworn statement at trial. The above rule does not seek to address this issue, which would have to be treated in the Statute or separately in the Rules.]

(2) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which he has knowledge and that he understands the duty to tell the truth. A judgement cannot be based on such testimony alone.

(3) If scientific, technical, or other specialized knowledge will assist the Chamber to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(4) Other than an expert or an investigator responsible for a party's investigation, a witness who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(5) A witness may decline to make any statement that might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than [contempt or] perjury, and the Chamber may order such protective measures as may be necessary to effect this result.

Rule 3: Live Testimony By Means of Video or Audio Link

(1) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber permits otherwise under this Rule of Rule 4.

(2) In the interests of justice and to facilitate the orderly and efficient progression of the proceedings, a Chamber may permit an out-of-court witness to testify, notwithstanding his physical absence, by live audio link, video link, or other technology.

(3) The examination of the out-of-court witness shall be conducted in accordance with the provisions of the rules governing examination of witnesses at trial. If the

State in which the out-of-court witness is located restricts the procedures under which the testimony is given, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Statute and Rules.

Rule 4: Recorded Testimony

(derived from ICTY rule 71)

(1) In exceptional circumstances and in the interests of justice, a Chamber may order that testimony be taken and recorded, by audiotape, videotape, transcript, or other similar means in advance of trial. The recorded testimony may be admitted at trial if, for good reason, the witness cannot be present at the time of trial.

(2) The party seeking to take and preserve testimony shall apply to the Chamber in writing and shall state the name and whereabouts of the person whose recorded testimony is sought, the date and place at which the recorded testimony is to be taken, the matters on which the person is to be examined, and the exceptional circumstances involved.

(3) If the Chamber grants the application, the party at whose request the recorded testimony is to be taken shall give reasonable notice to the other party, who shall have the opportunity to cross-examine the person to be examined. The parties shall attend the examination, or participate by means of audio link, video link, or other similar technology.

(4) The Chamber may appoint a judge to preside over the examination, which shall be conducted pursuant to the Rules governing testimony of a witness at trial. If the State in which the witness is located restricts the procedures under which the examination proceeds, the testimony shall be admitted only if the procedures used do not prejudice the rights of the parties and are otherwise in substantial conformity with the Rules.

(5) When recorded testimony is taken at the request of the Prosecutor or an indigent accused, the Chamber may order that the Court will bear the expense involved.

Rule 5: Written and Oral Statements

(1) Where a witness is unavailable or where the interests of justice otherwise so require, the Chamber may admit prior written or oral witness statements in lieu of testimony. Such statements shall be given such weight as deemed appropriate by the Chamber. A judgement cannot be based on such testimony alone.

(2) When a written or recorded statement or part thereof is introduced by a party, the Chamber may consider any other part or any other written or recorded statement of the witness which in fairness also ought to be considered.

Rule 6: Documentary and Other Evidence

(1) The Chamber may admit documents, including records reflecting official acts or regularly conducted activity, so long as the records have substantial guarantees of trustworthiness.

(2) The Chamber may admit summaries, charts, or other demonstrative evidence if such evidence will assist in clarifying the issues under consideration.

Rule 7: Confessions

(derived from ICTY rule 92; A/NL rule 108)

(1) A confession or admission by the accused given during questioning by the Prosecutor and recorded pursuant to Rule —, ¹ shall be presumed to have been given voluntarily unless the contrary is proved.

(2) A confession or admission by the accused that has not been recorded pursuant to Rule — shall not be excluded if the circumstances establish that it was voluntarily given.

Rule 8: Evidence of Consistent Pattern of Conduct

(derived from ICTY rule 93; A/NL rule 108)

Evidence of a consistent pattern of conduct by the accused may be admitted in the interests of justice.

[N.B. Other provisions in the Statute or Rules will provide for disclosure of such evidence prior to trial.]

¹The Rules of Procedure could require the Prosecutor to record statements of the accused, in the same manner as ICTY rule 43. If such a rule is promulgated, a presumption in favor of voluntariness could be provided for as above.

Rule 9: Evidence in Cases of Sexual Assault
(derived from ICTY rule 96; A/NL rule 113)

In cases of sexual assault:

- (1) No corroboration of the victim's testimony shall be required.
- (2) Past sexual conduct of the victim shall not be admitted in evidence, except where exclusion would violate the fundamental rights of the accused. Before admitting evidence of a victim's past sexual conduct, the Chamber shall satisfy itself through an offer of proof made *in camera* that the evidence meets the requirements of this paragraph.
- (3) Sexual conduct of the accused may be admitted [if relevant to show motive, opportunity, intent, identity, plan or absence of mistake].

[N.B.: ICTY Rule 96 (ii) permits consent as a defense in certain limited circumstances. Consideration of consent as a defense may more properly be treated in relation to defining crimes of sexual violence or general principles of criminal law.]

Rule 10: Lawyer-Client Privilege
(derived from ICTY rule 97; A/NL rule 115)

All communications between lawyer and client shall be regarded as privileged and consequently not subject to disclosure, unless:

- (a) the client consents to such disclosure; or
- (b) the client disclosed the content of the communication to a third party.

Rule 11: Agreements as to Admission
(derived from A/NL rule 111)

- (1) The defence and the prosecution may agree that a fact, the contents of a document, or the expected testimony of a witness should be considered as evidence by the Chamber.
- (2) In the interest of justice, the Chamber may decline to accept an agreement under paragraph (1).
- (3) After an agreement has been accepted, a party may withdraw from it only if permitted to do so by the Chamber.
- (4) An agreement between the defence and prosecution that a witness, if called to testify, would give certain testimony or that a document, if offered in evidence, has certain contents does not constitute an admission of the truth of the testimony or the contents of the document.

Statement of the United States Delegation on "Article 11 bis—Preliminary Rulings Regarding Admissibility"

April 3, 1998

STATEMENT OF THE UNITED STATES DELEGATION

ON

"Article 11 *bis*—Preliminary Rulings Regarding Admissibility"

(A/AC.249/19981WG.3/DP.2)

The United States has long believed that a core purpose of an international criminal court must be to advance a simple norm: countries should bring to justice those who commit genocide, crimes against humanity, and war crimes, or turn suspects over to someone who will, such as an impartial and effective international court. The permanent court must ensure that national legal systems with the will and ability to prosecute persons who commit these crimes are permitted to do so, while guaranteeing that perpetrators of these crimes acting in countries without competent, functioning legal systems nonetheless will be held accountable. Where national legal systems can assume their responsibilities, then the permanent court should not be the court of first resort.

In that spirit, on March 25, 1998, the U.S. delegation submitted a proposal to strengthen the principle of complementarity in the draft statute of the proposed international criminal court. Although, we join other delegations in strongly supporting the provisions of Articles 11 and 12 of the Zutphen draft, and indeed ac-

tively participated in the drafting of them last year, it has never been clear how the principles of Article 11 would be effected when matters are first referred to the court. It has become evident in recent months that many delegations support a procedure whereby overall matters are referred to the court following which the prosecutor would investigate and seek indictments against individual suspects. If that becomes the adopted procedure, then we believe that the principle of complementarity should be recognized at the outset of any referral of a matter to the court in addition to the investigation of individual cases by the prosecutor.

The U.S. proposal states that when a matter has been referred to the court, the Prosecutor would make such referral known by public announcement and by notification to all States Parties. Public acknowledgment of a referral of large-scale “matters”, as opposed to the filing of a complaint against an individual suspect, should not be objectionable. Investigations by the Prosecutor of individual suspects can, of course, remain confidential and need not be publicized. When the referral is made known, a State may step forward and inform the Prosecutor that it is undertaking the responsibility to investigate its own citizens or others within its jurisdiction who may have committed crimes in the referred matter.

At this stage the Prosecutor has two choices. The Prosecutor can defer to the national investigation because of his or her belief that the State has the ability and will to undertake its responsibility. We believe that when the Prosecutor has made a decision to defer, there should be some reasonable period—we have suggested six months or a year—before the decision is revisited.

Alternatively, the Prosecutor can determine at the outset that the State is unwilling or unable genuinely to carry out the investigation and prosecutions; in other words, the criteria for admissibility appear to apply. In that event, the Prosecutor would seek confirmation from the Pre-Trial Chamber and, if the judges concur, the Prosecutor would launch the investigation.

We have provided that the Pre-Trial Chamber’s preliminary ruling could be appealed to the Appeals Chamber, where a super-majority of the judges of the Appeals Chamber would need to approve the Prosecutor’s commencement of investigation.

The Prosecutor will need the cooperation of States in order to investigate alleged crimes. We believe that our proposal reflects reality, namely, that a State that is willing and capable to investigate such crimes should not be burdened with, and indeed may resist, cooperation with an ICC investigation not merited under the principles of complementarity. On the other hand, States that have no intention of investigating the crimes or cooperating with the Prosecutor will proceed with their own agenda regardless of the court’s orders for access to witnesses and evidence.

The U.S. delegation has begun to receive comment on our proposal. We appreciate these comments and look forward to further consultations with delegations and the non-governmental community. For example, we are considering several delegations’ suggestion that there should be an exception to the period of deferral when the circumstances which led the Prosecutor to defer have changed significantly. Also, we understand the concerns raised that no procedure should be adopted that would encourage the destruction of evidence or permit a State to thwart the pursuit of justice. Further, we accept the obvious right of appeal from the Pre-Trial Chamber by either party. We would emphasize that our proposal does not contravene the principle that a person or State may challenge admissibility only once. Article 12(3) concerns challenging admissibility of an individual case regarding an individual suspect, and we strongly support it. Our proposal relates to the overall matter that has been referred to the court at a much earlier stage, when no particular suspects have been identified and one is dealing with a State’s right to launch full-scale investigations.

This proposal is extremely important to the United States Government. In our view, it takes account of our interest in protecting against unwarranted investigation and prosecution of persons who are being investigated by their own national authorities, while ensuring the prosecution of those who should be brought before an international court. Our proposal also seeks to honor a fundamental tenet of the principle of complementarity, namely, that at the outset of a referral of an overall matter, a State can assert its responsibility to enforce the law itself provided it is capable and willing to do so.

**Proposal Submitted by the United States of America on Article 11 bis.—
Preliminary Rulings Regarding Admissibility**

A/AC.249/1998/WG.3/DP.2

25 March 1998

Original: English

Preparatory Committee on the Establishment of an International Criminal Court
16 March–3 April 1998

Working Group on Complementarity and Trigger Mechanism

PROPOSAL SUBMITTED BY THE UNITED STATES OF AMERICA

Article 11 *bis*. Preliminary rulings regarding admissibility

1. When a matter has been referred to the Court pursuant to article 6 and the Prosecutor has determined that there would be a sufficient basis to commence an investigation of the matter, the Prosecutor shall make such referral known by public announcement and by notification to all States Parties.

2. Within [] days of the public announcement of such referral, a State may inform the Court that it is investigating its nationals or others within its jurisdiction with respect to criminal acts that allegedly were committed in the context of the matter referred to the Court and that may constitute offences described in article 5. At the request of that State, the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions. Before the Prosecutor may commence investigation of such persons, the Prosecutor must obtain a preliminary ruling from a Pre-Trial Chamber confirming the Prosecutor's determination. The Prosecutor's deferral to the State's investigation shall be open for review by the Prosecutor [six months] [one year] after the date of deferral.

3. A preliminary ruling of the Pre-Trial Chamber confirming the Prosecutor's determination may be appealed to the Appeals Chamber by the State concerned. If the preliminary ruling is appealed by the State, [two thirds] [all] of the judges of the Appeals Chamber must confirm that ruling before the Prosecutor may commence the investigation and seek indictments.

4. When the Prosecutor has deferred an investigation pursuant to section 2, the Prosecutor may request that the State concerned report periodically on the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

5. That a State has challenged a preliminary ruling under the present article shall not prejudice its right to challenge admissibility of a case under article 12¹ [or to withhold its consent to the exercise of jurisdiction under article 7].

**Statement of the United States Delegation Expressing Concerns Regarding
the Proposal for a Proprio Motu Prosecutor**

THE CONCERNS OF THE UNITED STATES REGARDING THE PROPOSAL FOR A *Proprio
Motu* PROSECUTOR

June 22, 1998

The United States strongly supports an effective ICC Prosecutor who will be able to exercise independent judgment and who will be perceived as impartial and fair. The Prosecutor must have independent discretion to decide, free of any outside influence and based on the evidence collected, what charges to file against which people.

The United States is strongly of the view that the principles of prosecutorial independence and effectiveness are not only fully consistent with, but ultimately 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. It is our firm view that the proposal for a *proprio motu* prosecutor—one tasked with responding to any and all indications that a crime within the potential jurisdiction of the Court may have been committed—not only offers little

¹Article 12(4) should be revised to require a vote by two thirds of the judges of the Appeals Chamber to decide that a case is admissible.

by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor's central task of thoroughly and fairly investigating the most egregious of crimes.

As an initial matter, we reiterate the longstanding position of the United States that no one, not the Security Council, not States, not 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. That is why the United States has and will continue to press for the formula that referrals from States and the Security Council must be referrals of overall situations. It must lie with the Prosecutor to determine whether a crime has been committed and by whom; the referral mechanism cannot purport to limit the Prosecutor's decisions on such matters.

Moreover, our thinking about the appropriate role of the Prosecutor and our concern about the *proprio motu* proposal are very much guided by the overriding principle set forth in the preamble that the mandate of the ICC is "to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole."

Maintaining that threshold is essential to the credibility, wide acceptance and efficiency of the Court. Certainly, part of the broad consensus in moving towards jurisdiction limited to "core crimes" is the desire that the Court and its Prosecutor focus on crimes that can fairly be said to be "crimes of concern to the international community as a whole." Yet the definitions of those crimes do not necessarily exclude conduct which will not rise to the standard articulated in the preamble. This is particularly the case with war crimes, a category covering a wide range of criminal conduct which may occur during conflict, and crimes against humanity, which are broadly defined.

Thus, it is essential that there be some screen to distinguish between crimes which do rise to the level of concern to the international community and those which do not. The only rational and workable proposal to date—even if it may fall short of the perfect—is to look to States, and in appropriate cases the Security Council, to speak for what is "of concern to the international community as a whole." For the United States, it is inappropriate and ultimately unworkable to suggest that this role is better vested in a single individual, the ICC Prosecutor.

The United States has listened carefully to the arguments made by proponents of the *proprio motu* prosecutor, but we are unpersuaded.

First, we reject 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 Court, not one State will respond. Indeed, quite the opposite has been demonstrated by the United States and other States which have worked hard to establish and support the work of the *ad hoc* tribunals, and which are in Rome to facilitate future prosecutions through the establishment of a permanent court. Moreover, it is wrong to argue that States' unwillingness to invoke the ICC's jurisdiction is presumptively foreshadowed by the past reluctance of States—absent an ICC—to take on national prosecutions of atrocities committed thousands of miles away. To the contrary, the ICC will provide an alternative to overcome the variety of legal, political, practical and resource difficulties which have made States reluctant, if not unable, to take on these prosecutions themselves. Experience with the International Court of Justice also does not provide useful guide, since the International Court of Justice cannot conduct criminal prosecutions at all.

Second, we find overly simplistic the argument that the State and Security Council referral approach offers only an improperly politicized Prosecutor, while the *proprio motu* approach assures a pristinely impartial Prosecutor whose work will be without any political dimension.

In much of the discussion regarding the *proprio motu* Prosecutor, the term "political" has been used in an entirely pejorative sense to mean actions that are partisan or self-interested. Even with that particular gloss, however, there is no basis in experience to say that States act only on the basis of partisanism and self interest, while individuals and organizations—those authorized to bring allegations to the *proprio motu* Prosecutor—are *per se* beyond such motives or bias. Surely both categories can, in the pejorative sense, act "politically," and we would be naive to ignore the considerable political pressure that organizations will bring to bear on the Prosecutor in advocating that he or she take on the causes which they champion. Thus, we cannot exclude that organizations as well as States can, in the pejorative sense, seek to act politically and apply political pressure on the Prosecutor. However, a significant difference is the accountability of States—as opposed to individuals and organizations—when they do so in the international context.

In the United States' view, the discussion regarding the *proprio motu* Prosecutor has also ignored the extent to which State and Security Council referral in fact has

a “political” component which is beneficial, if not essential, to the work of the Prosecutor. In making referrals, States are expressing political will and political support for the Prosecutor and his work; they are signaling to other States the level of their concern about the situation at issue and their commitment to stand behind and assist the Prosecutor both directly, and in his or her dealings with other States, including those likely to be hostile to the Prosecutor’s investigation.

This involvement of States is critical. Under the *proprio motu* model, we fear it will become too easy for 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 only States can provide. The Prosecutor then can become isolated, and abandoned to deal in a difficult international arena without the clear, continuing involvement of States Parties in affirming his or her work.

In addition, we do not find persuasive the argument that a *proprio motu* Prosecutor will be able to decide whether to pursue investigations based solely on legal criteria and thereby avoid questions going to his or her impartiality or independence. If the Prosecutor has authority—and indeed the responsibility—to pursue all facially credible allegations coming from individuals or organizations, there will surely be many more complaints than the Prosecutor can possibly handle. Without the screen of a State and Security Council referral mechanism, the volume of complaints will expand significantly, including those that will prove to be inappropriate bases for prosecution. These will include some directed against particular individuals for personal reasons and some motivated by improper political considerations; some will relate to situations that are not sufficiently serious to come within the Court’s proper jurisdiction; and some will involve matters already being dealt with by national authorities, but with results disappointing to particular individuals or organizations.

Many of those complaints may, at least facially, meet the legal criteria to initiate an investigation suggested in the draft Statute—“a reasonable basis” or “any other substantiated information”—so that the Prosecutor will not be able to use a simple legal checklist to choose which of several complaints to pursue. Thus, the Prosecutor will be required to make decisions of policy in addition to those of law.

Admittedly, some such exercise of prosecutorial discretion will be necessary and appropriate even in the context of a State referral regime. However, in the *proprio motu* setting, the exercise of prosecutorial discretion—something not universally accepted and all the more suspect in politically charged settings—will become a frequent and essential step in preserving the proper functioning and focus of the Court.

Thus, we fear that by considerably expanding the number of instances in which the Prosecutor must choose to decline complaints that appear unlikely to result in meritorious prosecutions, we inevitably will undermine perceptions of his or her impartiality and subject the Prosecutor to incessant criticism by groups and individuals who disagree with his choices. We are also concerned that this volume of complaints will tend to embroil the Court in debate about the outer limits of its jurisdiction—creating controversy that will in fact weaken, not strengthen, the essential foundation of consensus for the Court.

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. In our view, these initial public policy decisions are best made by political bodies, freeing the Prosecutor to deal for the most part with the law and the facts.

Nor does it assuage our concerns to require judges to approve the Prosecutor’s *proprio motu* decisions. Judges are equipped to review legal matters. Their competence involves legal questions of admissibility and jurisdiction under the Statute, and we expect it would be rare that the Prosecutor’s decisions would be unlawful under the Statute. To the extent judges would be questioning the Prosecutor’s judgment in choosing to investigate on other than legal grounds, the judges’ review would simply substitute their own personal or policy preferences for that of the Prosecutor. Moreover, in that event they, like the Prosecutor, would find perceptions of their impartiality and fairness undermined.

Finally, the United States is deeply concerned by the tremendous resource implications of the *proprio motu* proposal and the extent to which it will transform the nature of the Prosecutor’s office. One need only look at the volume of complaints lodged with human rights organizations to understand how debilitating it will be to make the Prosecutor responsive to all possible allegations of conduct coming within the framework of the Statute. In 1997, nearly 30,000 communications were submitted under the U.N. Human Rights Commission’s “Resolution 1503” procedures and another 1,200 under the first option protocol of the ICCPR. The experience of

other international bodies is similar. In its first two sessions in the Spring of this year, the European Commission of Human Rights was called upon to deal with 1500 applications.

Thus, even if the Prosecutor receives only a fraction of these numbers of communications, his office will need to be enormously expanded, and at tremendous additional cost. We have an idea of the costs entailed in investigating and prosecuting “core” crimes. The budgets the two *ad hoc* tribunals were \$98 million for 1997 and \$127 million for 1998.

If States impose a structure which will flood the Prosecutor’s office with thousands of allegations, they must then be prepared to give the Prosecutor the resources to discharge his *proprio motu* authority responsibly, even if that means—as we believe it ultimately will—that the Prosecutor’s preliminary inquiries will show the vast majority of complaints unworthy of further investigation. Moreover, States must recognize that in most instances, the Prosecutor will be turning to States for information to determine the credibility of allegations and whether they are being handled at the national level. Thus the costs and frustrations that will come with the *proprio motu* scenario will in the long run fall on States as well. Accordingly, it is the United States’ view that the incremental benefits, if any, of a Prosecutor with unfettered investigative authority are significantly outweighed by the costs involved and diminution of the Prosecutor’s focus and efficiency.

The United States has carefully considered the arguments in favor of a *proprio motu* Prosecutor and is well aware of their appeal. However, we believe that after careful scrutiny, other factors emerge which give rise to serious practical and policy concerns. The United States has offered this paper with the hope that other delegations might give further thought to the respective merits of the *proprio motu* proposal and what we believe is on balance the better approach—albeit not perfect—of making referrals from States, and in appropriate cases the Security Council, the starting point for the Prosecutor’s work.

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